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131 Cal.App.2d 687

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George E. BENTLEY, Defendant and Appellant.

Cr. 5240.

District Court of Appeal, Second District, Division 3, California.

March 21, 1955.

Rehearing Denied April 4, 1955.

Hearing Denied April 20, 1955.

Defendant was convicted in the Superior Court, Los Angeles County, Benjamin J. Scheinman, J., of a violation of section 288 of the Penal Code and from the judgment and the order denying a motion for new trial the defendant appeals. The District Court of Appeal, Vallée, J., held that statements of police officer and mother of a girl whom defendant allegedly annoyed, together with failure of the court to rule on a motion to strike the answer of the mother were prejudicial error and required a reversal.

Reversed.

1. Criminal Law ⇐369(1), 1169(5)

In prosecution for sex offense committed upon a child, statement of a police officer deliberately made about defendant being a suspect in another case in 1942 was prejudicial error notwithstanding the court's direction that the testimony should be disregarded. Pen.Code, § 288.

2. Criminal Law ⇐696(1), 1168(4)

In prosecution for sex offense committed on a child, where mother of girl whom defendant allegedly annoyed was asked on cross-examination whether she had discussed defendant's reputation with other people and she answered about a man trying to date all the married women in the neighborhood, and instead of ruling on defendant's motion to strike the answer the court interrogated the witness and brought out that she had never discussed defendant's character or reputation with anybody else, there was prejudicial error. Pen. Code, § 288.

3. Witnesses ⇐274(2)

It was proper for the district attorney to ask character witnesses for the defendant whether they heard reports about alleged immorality of the defendant.

4. Criminal Law ⇐633(1)

Mere accusation of a sex offense upon an eight year old girl arouses a feeling of revulsion, and it is especially necessary in a prosecution therefor that the rights of the defendant be scrupulously respected. Pen.Code, § 288.

5. Criminal Law ⇐768(1)

Although character witnesses of the accused may be cross-examined concerning charges or reports of other offenses or misconduct inconsistent with the possession of a good reputation, juror should be informed that purpose of the inquiry is merely to test the truth of the opinions the witnesses have expressed as to the reputation of the accused.

6. Criminal Law ⇐768(1)

In prosecution for sex offense committed upon a child, where defendant had denied accusations with relation to other children, a cautionary instruction should have been given that purpose of inquiry to character witnesses concerning charges of other misconduct was merely to test the truth of the opinions the witnesses had expressed as to the reputation of the accused.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of a violation of section 288 of the Penal Code. He appeals from the judgment and the order denying his motion for a new trial. The complaining witness, a girl 8 years of age, testified that defendant committed acts denounced by the statute.

The complaining witness testified she did not tell her mother what had happened on the day the alleged offense took place but she told her later; she did not tell her all at once but she did tell her in parts. The mother testified that the girl made a complaint on the day after it occurred, that she did not tell very much that day but told enough, that she told a little more the next day, and a little more the day after that.

A police officer testified he had a conversation with defendant one week after the offense was alleged to have occurred in which defendant denied any fondling or touching of the child. In concluding the statement of the conversation, the officer said, "And I went on to question him about activities he had been involved in in 1942 when he had been a suspect in another case, and he denied this." On motion of defendant the quoted statement was stricken and the jury admonished to disregard it. Defendant then moved for a mistrial, which was denied.

Five character witnesses testified that defendant's reputation for morality was, variously, good, very good, and excellent. On cross-examination of four of the character witnesses, the district attorney asked each of them whether he had ever heard a report that defendant had been arrested on a prior occasion for the same charge for which he was on trial and whether he had ever heard a report to the effect that defendant was charged by a girl named Tomlinson "for the same type of offense" as that for which he was on trial. In addition, two of the character witnesses were asked if they had ever heard a report that defendant had molested a minor child by the name of Johnson in the neighborhood. Each witness testified he had heard no such report.

Thereafter defendant, testifying in his own behalf, was asked by his counsel if he had ever been arrested before for any charge involving mistreatment of a minor child. He answered that he had not. He was also asked by his counsel if he had ever molested or annoyed a child by the name of Tomlinson. He answered that he had not; that he had "never heard of it until yesterday." He was also asked if he had ever molested or annoyed a child by the name of Johnson. He answered that he had not; that he did not "have the faintest idea what Johnson is being referred to." In rebuttal the People called Mary Sue Tomlinson, 18 years of age, who, over objection of defendant, testified that defendant had committed acts on her, denounced by section 288 of the Penal Code, some 10 or 11 years ago. On surrebuttal defendant denied the accusation.

Mazie Tomlinson, mother of Mary Sue, called by the People in rebuttal, on direct examination testified that defendant's reputation in the community for morality was bad. On cross-examination she was asked if she had discussed defendant's reputation with other people. She answered, "Well, I think if a man tries to date up all the married women in the neighborhood, I wouldn't call that—I don't know if that is morality or not. It isn't considered that—." Defendant moved to strike the answer and asked the court to admonish the jury to disregard it. Instead of ruling on the motion, the court interrogated the witness and brought out that she had never discussed defendant's character or reputation with "anybody else."

[1, 2] Defendant urges that the statement of the police officer, together with the failure of the court to rule on the motion to strike the answer of Mazie Tomlinson, were prejudicial and on the facts compel a reversal. We agree. While the testimony of the prosecuting witness was sufficient to support the verdict, it leaves one in some doubt. There is a strong indication of coaching in her testimony. She testified that defendant touched her "va-

gina"; that she touched his "penis." Her mother taught her these words. The susceptibility of a child her age to suggestion is a well-known fact. The police officer who had the conversation with defendant a week after the offense was claimed to have been committed testified he "heard a verbal statement from her mother"; that what had happened was not clear to him; "As I talked to her mother, she informed me the little girl hadn't told her just where Mr. Bentley had touched her or what had happened." In the conversation with the officer defendant denied any improper fondling or touching of the child.

It is obvious from the record that the police officer deliberately made the statement about defendant being a suspect in another case in 1942 with the idea in mind of prejudicing defendant. There can be no doubt that the statement was highly prejudicial. The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement. Every prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand. The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial. The court struck out the objectionable statement of the officer but the damage had been done and could not have been cured by the court's admonition. The mere direction that the testimony should be disregarded was no antidote for the poison that had been injected into the minds of the jurors. The defendant stood as one who had been accused of some other sex offense. His counsel no doubt realized the gravity of the situation. Should he ignore it or should he allow the defendant to deny that he had been accused of some other offense? He chose the latter course. Defendant denied the former accusation. He did not volunteer that denial; he was driven to it and driven to it wrongfully. When the statement was made the court should have declared a mistrial and discharged the jury.

[3] It is true that under the decisions it was proper for the district attorney to ask the character witnesses whether they had heard the reports he mentioned. But anyone who theorizes that such questions do not have a pernicious effect on the minds of lay jurors with respect to other offenses is indeed naive. The defendant must either remain silent in the face of the devastating questions of the prosecutor or undertake to defend himself against one or more accusations for which he is not on trial.

[4] The mere accusation of an offense upon an 8-year-old girl arouses a feeling of revulsion that is not easily removed. It is especially necessary that in such a case the rights of the defendant be scrupulously respected. People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607. By the time the evidence was in defendant was defending himself not only against the crime charged in the information, but against the charges of misconduct toward the Tomlinson girl and the Johnson girl. What the law does not permit to be done directly was done indirectly.

[5] Although the character witnesses of the accused may be cross-examined concerning charges or reports of other offenses or of misconduct inconsistent with the possession of a good reputation, it is highly important that the jurors understand that the purpose of the inquiry is merely to test the worth of the opinions the witnesses have expressed as to the reputation of the accused. Such questioning by the prosecutor carries an implication that such rumors have been in existence and would naturally cause the accused to be suspect of grievous wrongdoing or perhaps of other crimes. It is necessary that the jurors should put out of their minds all question as to the truth of the rumors or charges, and yet they cannot know the limited purpose of the cross-examination unless it is explained to them.

[6] The defendant did not request such an instruction and none was given. One should have been given of the court's own motion. It was especially necessary because of the course of the trial after defendant

had denied the accusations with relation to other children but we think a cautionary instruction should be given in every case in which such cross-examination is permitted.

Defendant did not have a fair trial. Upon the record the errors complained of require a reversal. Manifestly we cannot say that they did not result in a miscarriage of justice.

The judgment and the order denying a new trial are reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

131 Cal.App.2d 663

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph R. LAZZARA, Defendant and Appellant.

Cr. 3003.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Rehearing Denied April 5, 1955.

Hearing Denied April 20, 1955.

Defendant was convicted on two counts of selling heroin and was convicted of conspiracy to sell heroin. The Superior Court, City and County of San Francisco, Twain Michelsen, J., entered judgment, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that where defendant had several previous convictions for dealing in narcotics, and a previous conviction for manslaughter, imposition of consecutive sentences totaling 18 years was not an abuse of discretion.

Affirmed.

1. Criminal Law ⇐1170(2)

In prosecution for sale of heroin and for conspiracy, wherein defendant, as a witness, voluntarily disclosed that he knew "special employee" of federal officers and his name, alleged error in sustaining prosecution's objections to questions concerning the name, whereabouts, and character of the "special employee," was not prejudicial error.

2. Conspiracy ⇐47

Evidence was sufficient to sustain conviction for conspiracy relating to sale of heroin. Health and Safety Code, § 11500.

3. Criminal Law ⇐984

Where defendant had previously been convicted several times of dealing in narcotics and of manslaughter, and subsequently he was found guilty under three counts of selling heroin and of conspiracy, imposition of consecutive sentences totaling 18 years was not an abuse of discretion. Health and Safety Code, § 11500.

On Petition for Rehearing

4. Criminal Law ⇐1165(1)

Where defendant, in prosecution for selling heroin and conspiracy to sell heroin, did not object to failure of prosecution to disclose the name, whereabouts, and character of "special employee" employed by federal officers to buy heroin from defendant, on ground that defendant was not fully aware of such facts, and it did not appear that defendant was without knowledge of such facts, or that he desired to call "special employee" as a witness, or that defendant was unable to locate "special employee," alleged error in failing to disclose such facts was not prejudicial error.

P. W. Fisher, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant and appellant was tried to a jury on four counts charging a violation of section 11500 of the Health & Safety Code—the sale of heroin. On a separate indictment he was tried on a charge of conspiracy to violate the same code section. He was found guilty under counts one, three and four; not guilty under count two, and guilty of the conspiracy charge. He was given concurrent sentences under counts one and three; a consecutive sentence under count four, and a consecutive sentence on the conspiracy charge. He appeals from the judgment and from the order denying a new trial. On the appeal he is now represented by counsel assigned by this court on defendant's request. The appeal is ably presented, but counsel's task is a hopeless one.

A brief statement of the facts is sufficient as there is no material conflict in the evidence. Three federal officers engaged one Jim Black—referred to throughout by the prosecution as the "special employee", but identified by defendant as "Jim Black," a former peddler or user of narcotics. The officers gave Black $500 in marked currency, then trailed him until he met defendant. Thereafter they found a quantity of heroin in Black's possession; some of the marked currency in defendant's possession, some in the possession of his coconspirator, Cherrito, who pleaded guilty.

[1] The first ground urged by appellant is that it was error to sustain the prosecution's objections to the questions concerning the name, whereabouts, and character of the mysterious "special employee". Even if the ruling were error it could not have been prejudicial under the special circumstances of this case since the appellant, as a witness, voluntarily disclosed that he knew this "special employee" and that his name was Jim Black.

[2] The evidence of conspiracy was sufficient. Before the sale was consummated appellant drove the special agent twice around the block in the vicinity of Cherrito's home, then let the agent out of the car and drove around the block, stopping in front of Cherrito's home. A man identified as looking like Cherrito was seen standing in his doorway. After the heroin was turned over to the special agent and the marked money given to the appellant they separated. Shortly thereafter, during the arrest of Cherrito, four twenty dollar bills were found on Cherrito, all identified as part of the marked currency originally given by the federal officials to Jim Black and by him given to appellant. There is no good purpose in laboring the question further.

[3] There is not much to say about appellant's final ground—that the consecutive sentences imposed were a breach of discretion. Appellant points out that the four sentences total a period of confinement of eighteen years. When we take into consideration the several previous convictions for dealing in narcotics, together with a previous conviction of manslaughter, we cannot say that these sentences show a breach of discretion.

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

On Petition for Rehearing

PER CURIAM.

[4] Appellant's main criticism goes to the failure of the prosecution to disclose these facts relating to the special employee. However in none of the objections noted by him does it appear that he was without this knowledge that he planned to call Jim Black as a witness or that he was unable to locate him. The failure to disclose any of these facts was not objected to on the ground that defendant was not fully aware of all the circumstances and it does not appear that such disclosure would have been of any benefit to him in any manner whatsoever.

We hold therefore that if any error was committed it was not prejudicial. The petition for a rehearing is denied.

131 Cal.App.2d 530

Arthur KOFSKY, doing business under the fictitious name of Standard Cigar Co., Plaintiff and Respondent,

v.

SMART & FINAL IRIS CO., a corporation, Defendant and Appellant.

Civ. 20616.

District Court of Appeal, Second District, Division 2, California.

March 15, 1955.

Suit for injunction restraining defendant from violating Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and destroy competition. The Superior Court, Los Angeles County, Arnold Praeger, J., granted preliminary injunction and defendant appealed. The District Court of Appeal, McComb, J., held that where defendant had violated provisions of Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and destroy competition, plaintiff was entitled to preliminary injunction restraining such acts pending trial of action, notwithstanding that plaintiff had also violated such Act in selling cigarettes below cost with like intent.

Order affirmed.

1. Equity ⇐25

Equity will not aid one party or another to transaction which is illegal or contrary to public policy where parties are equally

at fault, but will leave them just where it finds them.

2. Equity ⇐65(2)
Trade-Marks and Trade-Names and Unfair Competition ⇐95(1)

Where defendant had violated provisions of Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and destroy competition, plaintiff was entitled to preliminary injunction restraining such acts pending trial of action, and since the acts which defendant was restrained from doing were against public policy the fact that plaintiff had also violated such Act in selling cigarettes below cost with like intent did not make applicable the clean hands doctrine. West's Ann.Bus. & Prof.Code, §§ 17000 et seq., 17001, 17002, 17043, 17078.

3. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.2)

The purpose of Unfair Practices Act is to prevent acts which the Legislature declared to be against the public interest. West's Ann.Bus. & Prof.Code, § 17000 et seq.

4. Trade-Marks and Trade-Names and Unfair Competition ⇐95(1)

Provision in Unfair Practices Act that if a defendant has violated any of provisions of Act, court shall preliminarily enjoin defendant from doing all acts which are prohibited, was mandatory direction to trial judge finding that defendant violated Act by selling cigarettes below cost with intent to injure competition and to destroy competition. West's Ann.Bus. & Prof. Code, § 17078.

5. Equity ⇐65(1)

Equitable rule that he who comes into equity must come with clean hands, has no application where failure to restrain act because parties are in pari delicto would result in permitting act declared by statute to be void or against public policy.

6. Appeal and Error ⇐878(6)

Where plaintiff did not appeal from preliminary injunction, injunction would not be broadened as suggested by plaintiff to include other acts of defendant who had violated Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and destroy competition. West's Ann.Bus. & Prof.Code, §§ 17043, 17078.

Loeb & Loeb, Los Angeles, Henry P. Erlich, Laurence M. Weinberg, Los Angeles, of counsel, for respondent.

Hoge & Perry, Los Angeles, for appellant.

McCOMB, Justice.

This appeal is from an order granting a preliminary injunction restraining defendant from violating the Unfair Practices Act by selling cigarettes below cost with intent to injure competitors and to destroy competition.

We assume, for the purposes of this appeal only, that the record discloses the following facts:

Plaintiff and defendant were competitors in the wholesale tobacco business and in the sale of other products. Defendant sold cigarettes at less than cost in violation of the Unfair Practices Act in order to injure competitors and destroy competition. Plaintiff also had sold cigarettes and other merchandise below cost with a like intent thereby being guilty of violating the Unfair Practices Act.

[1, 2] *Questions:* First: *Since plaintiff had violated the Unfair Practices Act of the State of California, would the unclean hands doctrine, to wit, that equity will not aid one party or another to a transaction which is illegal or contrary to public policy where the parties are equally at fault, but will leave them just where it finds them, apply so as to prevent the granting of the preliminary injunction in favor of defendant?*

No. In the instant case the following provisions of the Business and Professions Code are applicable:

Section 17043 reads: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the

purpose of injuring competitors or destroying competition."

Section 17078 reads: "If it appears to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary injunction should not be issued, or upon the hearing of any motion for a preliminary injunction, or if the court shall find, in any such action, that any defendant therein is violating, or has violated, this chapter, then the court shall enjoin the defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by the defendant."

Section 17001 reads: "The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented."

Section 17002 reads: "This chapter shall be liberally construed that its beneficial purposes may be subserved."

Defendant, having violated the provisions of section 17043 of the Business and Professions Code, plaintiff was entitled to a preliminary injunction restraining such acts pending the trial of the action.

[3] From a reading of section 17001 of the Business and Professions Code, supra, it is clear that the purpose of the Unfair Practices Act is to prevent acts which the Legislature declared to be against the public interest, and that the provisions of such code should be liberally construed for this purpose is expressly stated in section 17002 of the Code.

In construing the Unfair Practices Act, in Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 11 Cal.2d 634, at page 646, 82 P.2d 3, at page 10, 118 A.L.R. 486, the court says, "That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority."

Again, 11 Cal.2d at page 663, 82 P.2d at page 19: "The statute embodies the concept that sales made at a loss to the seller, when made for the purpose of injuring or destroying competition, are predatory and anti-social in character." (See also People v. Centr-O-Mart, 34 Cal.2d 702, 704, 214 P.2d 378.)

[4] Section 17078, supra, provides that upon the trial court's finding that a defendant has violated any of the provisions of the Unfair Practices Act, "the court shall enjoin the defendant from doing all acts which are prohibited by the section". It is therefore evident that it was mandatory in view of the findings in this case for the trial judge to grant the preliminary injunction.

[5] It is settled that the equitable rule that " 'he who comes into equity must come with clean hands,' " has no application where the failure to restrain an act because the parties are in *pari delicto* would result in permitting an act declared by statute to be void or against public policy. (Simmons v. Simmons, 57 App.D.C. 216, 19 F.2d 690, 691; People v. Gordon, 105 Cal.App.2d 711, 721, 234 P.2d 287; see also Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316, 318, 32 A.L.R. 1088.)

Therefore, since in the instant case the acts which defendant was restrained from doing were against public policy, the rule just stated is applicable and it is immaterial so far as the present proceedings are concerned whether plaintiff had unclean hands or not.

[6] Second: *Should the injunction as issued by the trial court be broadened to include other acts of the defendant, as suggested by plaintiff?*

No. Plaintiff has not appealed from the preliminary injunction issued by the trial court. Therefore we must assume that plaintiff is satisfied with the extent of it. Should this not be true, the matter may be properly considered upon another application to the trial court.

The order is affirmed.

MOORE, P. J., and FOX, J., concur.

131 Cal.App.2d 571

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert B. NELSON, P. L. Lewis, and Earliest Eddie Fells, Defendants and Appellants.

Cr. 1024.

District Court of Appeal. Fourth District. California.

March 17, 1955.

Defendants were convicted in the Superior Court, San Diego County, John A. Hewicker, J., of assault with intent to commit rape, and from the judgment, and an order denying a new trial, they appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Rape ⇐53(2)

Evidence sustained conviction of three defendants, as principals, for assault with intent to commit rape.

2. Criminal Law ⇐829(1)

Where all phases of law are fully covered by other instructions it is not error to refuse another instruction covering same matter in different language.

Claude B. Brown, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., Victor A. Gables, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from a conviction on a charge of assault with intent to commit rape.

The defendants Nelson, Lewis and Fells were charged in Count I with forcible rape upon one Guadalupe Velesquez, and in Count II with assault with intent to commit rape upon Maria Velesquez. Nelson was also charged with two prior convictions. He admitted the priors, and all three defendants pleaded not guilty to both counts. A jury found Nelson and Lewis guilty and Fells not guilty on the first count, and found all three guilty on the second count.

Motions for a new trial were denied as to each defendant. Nelson was sentenced on each count to run consecutively; Lewis was sentenced on each count to run concurrently; and Fells was given three years' probation, the first nine months to be in the custody of the sheriff. Nelson and Lewis appealed from the judgment, and from an order denying their motion for a new trial. Fells appealed from the order denying his motion for a new trial. Nelson and Lewis later abandoned their appeal with respect to the first count, and this appeal is presented with respect to the second count only.

About 4:00 A.M. on June 6, 1954, the two women involved, who were sisters, were waiting for a bus on Highway 101 near the Mexican border. The appellants, coming from Tijuana, in a 4-door sedan stopped and offered them a ride, which they refused. Lewis got out of the car, grabbed Maria and threw her on the lap of Fells, who was seated in the rear seat. Another man, asleep in a drunken condition, occupied all of the rear seat except the part occupied by Fells. Lewis then forced Guadalupe into the front seat between himself and the driver, Nelson. The car was driven two or three miles and stopped near the road in a dark place. During the ride Guadalupe was choked by Lewis to keep her from screaming. Maria screamed when she was thrown in the back seat, during the ride, and after they stopped. Fells held Maria on his lap by keeping both arms around her waist. She succeeded in opening the rear door while the car was in motion and Fells closed it. During the ride, and after the car stopped, Fells fondled Maria's breasts and succeeded in unbuttoning the button above the zipper on her slacks, but was unsuccessful in a number of attempts to unzip her slacks because she pulled his hands away and bit him. She tried to get out when the car stopped but was prevented from doing so.

When the car stopped Lewis got out and guarded the rear door to keep Maria from getting out. Nelson knocked Guadalupe down, overcame her struggles, and suc-

ceeded in taking off her slacks and panties, tearing them in the process. He then accomplished an act of intercourse with her while she was still struggling. Lewis, who already had his pants unbuttoned, then started to do the same thing. At that time a highway patrolman arrived on the scene. He observed Guadalupe leaning on the car door, crying for help and she was naked from the waist down. The officer radioed for help and kept the appellants in line, with a pistol in his hand, until another officer arrived a few minutes later. He then observed Guadalupe holding her stomach and retching, while Maria was crying and holding up her sister.

The defendants admitted picking up these women, claimed they had gotten into the car voluntarily in response to an offer of a ride, and denied that they had molested the women in any way. Nelson testified that he stopped the car after he discovered that the women were unable to speak English, and that he was trying to get them out of the car when the officer arrived. Lewis and Fells both testified that they went to sleep immediately after the women got in the car. Lewis testified that he awakened when the car stopped, and Nelson was trying to get the women out of the car. Fells testified that when he woke up the officers were there.

The appellants contend that the evidence was not sufficient to sustain the verdict as to the second count in that it did not demonstrate that Fells had an intent to rape Maria. It is argued that the fact that Maria was placed on the lap of Fells was without significance since there was no other place for her to sit in the back seat; that while Fells fondled Maria he did not place his hands on her body under her clothes; that Maria was not prevented from screaming and was not struck or choked; that she was not threatened by Fells but was prevented from getting out of the car by Lewis; that Fells prevented her from leaving the car, when she opened the door, because she would have been injured if she had left the car while it was moving; that Maria was still sitting on Fells' lap when the officer arrived; that the intent of Fells must be determined from his act and conduct; and that there is no evidence that he intended to use force in carrying out his purpose. It is argued that the insufficiency of the evidence as to the second count clearly appears from the rules established in the cases of People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11; People v. Manchego, 80 Cal. 306, 22 P. 223, and People v. Fleming, 94 Cal. 308, 29 P. 647. Relying on People v. Mullen [45 Cal.App.2d 297, 114 P.2d 13], it is argued that: "Unless the defendant indicated a resolution to use all his force to commit rape, then there is no satisfactory proof of such intent. * * * 'The assault must have been made with intent to commit a rape, notwithstanding all possible resistance that could be made.'"

The old rule referred to in People v. Mullen, has been considerably modified in many modern cases. Moreover, the facts in that case were quite different from those involved here. In that case, the incident occurred in daylight in a business building and with other people within call; there was no duress; there was no violence or threat of violence; and the efforts of the party charged were voluntarily abandoned without any fear of interruption. The incident here in question occurred in a dark spot at night, there was ample evidence of duress and violence, and the efforts of the appellants were not voluntarily abandoned.

[1] The acts and conduct of the appellants sufficiently disclosed the required intent. One rape had already taken place, another was about to begin, and the evidence justifies the inference that there was an intent to rape Maria, which was frustrated by the opportune arrival of the officer. The evidence discloses that all three appellants were acting in unison with a common purpose; and indicates that the assault upon Maria was with the intent of committing rape upon her, and that all three were guilty as principals. People v. Griffin, 106 Cal.App.2d 531, 235 P.2d 424; People v. Le Grant, 76 Cal.App.2d 148, 172 P.2d 554; People v. Mummert, 57 Cal.App.2d 849, 135 P.2d 665. Appellants' unity of purpose was manifest from their obvious approval and cooperation throughtout the en-

tire incident. While one rape was completed, and another was being started, Maria was held in duress, still screaming and resisting the advances of Fells, and none of the appellants showed the slightest concern for her protests. The evidence is sufficient to support the verdicts as to the second count. People v. Burdette, 78 Cal.App.2d 591, 178 P.2d 8.

[2] It is further contended that the court erred in refusing to give two instructions requested by the appellants, which were refused as covered. The first of these instructions reads:

> "Whatever the extent and however rough the fondling of a woman, if her pursuer without fear of interruption voluntarily abandons his endeavor to ravish her sexual organs, then the force he employed was not an assault with intent to commit rape."

The second one reads:

> "In order to establish the crime of assault with intent to commit rape, it must be proved that the defendant had the intent to commit rape at all events regardless of all the prosecutrix could do to prevent it."

It is argued that while the instructions which were given relating to the second count, correctly stated the law in general, they failed to inform the jury that the fondling of a woman does not, in itself, constitute an assault with an intent to commit rape, and that it must be proved that a defendant had the intent to commit rape at all events regardless of all the prosecutrix could do to prevent it. Where all phases of the law are fully covered by other instructions it is not error to refuse another instuction covering the same matter in different language. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1. A further consideration with respect to the first of these instructions is that there was no evidence, and no contention had been made, that these parties voluntarily abandoned their attempt without fear of interruption. The evidence shows that they were interrupted in the midst of it, and the appellants made no claim of abandonment but testified to the effect that they had not begun any attempt and had not molested the women in any way. The second instruction incorrectly stated the law and would have told the jury that to establish a crime it must be proved that there was an intent to commit rape at all events, regardless of all the victim could do to prevent it. The instruction in that form should not have been given. People v. Stewart, 109 Cal.App.2d 334, 240 P.2d 704.

The judgment, and the order denying a new trial as to all appellants are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

131 Cal.App.2d 599

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Winona BROWN, Defendant and Appellant.

Cr. 5271.

District Court of Appeal, Second District, Division 2, California.

March 18, 1955.

Prosecution for grand theft from the person. The defendant was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., and she appealed. The District Court of Appeal, Moore, P. J., held that where the victim had testified about $100 had been taken and he had recovered about $10 or $30, and he was asked on cross examination if he had told officers he had lost $40, the court's interruption whereby the court sustained objection and commented that the amount was not material, if error, was not prejudicial.

Affirmed.

1. Criminal Law ⇐1186(4)

In prosecution for grand theft from person, wherein victim testified about $100

had been taken and he had recovered about $10 or $30, and he was asked on cross-examination if he had told officers he had lost $40, court's interruption whereby court sustained objection and commented that amount was not material, if error, was not prejudicial, and was not objectionable as intimating victim was telling truth. Pen. Code, § 487, subd. 2; West's Ann.Const. art. 6, § 4½.

2. Witnesses ⇐319

Witness cannot be impeached upon immaterial matter.

Martha Malone Jefferson, Bernard S. Jefferson and A. P. Coviello, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of grand theft from the person, defendant seeks a reversal on grounds of asserted errors of the trial judge. She makes no claim of innocency or of the insufficiency of the evidence to support the verdict.

The victim of the stealth and strong arm of this prowling woman was one Louis Barton. He had attended a meeting at the Hollywood Athletic Club on Sunset Boulevard near the intersection with Hudson Street in Los Angeles. About midnight, he left the club and approached his automobile on Hudson. As he inserted his key into the lock of the door, a cream-colored conveyance swerved in front of the Barton car and a woman alighted, cried out: "Hey, just a minute." She seized the genitals of her theftee with one hand and with the other withdrew about $100 from his left front pants' pocket. He pushed her to the ground, but she arose with alacrity and, nothing daunted, with a nail file in her right hand, she advanced to mow Mr. Barton down. But she was doomed to disappointment. After a five minute struggle, he wrenched the file from her left hand, as she held his money in her right. Thereupon, she fled to her car. Momentarily dazed by such violent encounter, Mr. Barton duly pursued the female figure and as she was taking her departure, through her open window he retrieved her money bag, threw it to the street and recovered a portion of the stolen lucre. He hastily entered his own vehicle and followed Mrs. Brown until she slowed down at an intersection when he wrote her license number. He continued pursuit without avail. The police did the necessary.

The defense was an alibi. Appellant and her witnesses testified substantially that during the evening and to the instant of the crime, appellant attended a card party in the 11400 block on Towne Avenue, Los Angeles, some 15 miles from the Athletic Club. The implication of such testimony was that the thief could not have stolen the money from such distance. But the jury declined to draw the intended inference. They convicted the woman, and probation was denied. She now languishes in a state prison.

[1, 2] Assignment is made of the court's ruling and remarks as prejudicial under the following circumstances: On his direct examination, Mr. Barton testified that he had about $100 in his pocket before the theft and had recovered about $10 or $30. When on cross examination, Barton was asked whether he had ever told any person or officer in the case that he had lost $40, the court intervened as follows:

> "The Court: Just a minute. Objection sustained to the question. I don't think it is material if the witness lost $1.00 or if he lost $40.00. It is not necessary. And furthermore, Mr. Coviello, it is not necessary in drafting a legal document charging grand theft of the person to charge the amount of a certain sum. Any sum would be sufficient. It could be $1.00 or $40.00. It would be grand theft."

Nothing of a prejudicial quality is to be found in the court's remarks. The comment was purely legalistic; it was a clarification of subdivision 2 of section 487 of the Penal Code. It signified no more than saying that when one takes property of any value from the person of another, he is guilty of grand theft, the same as if he

had stolen a million from a castle. His entire statement was a commentary on the law of grand theft from the person, not the expression of approval or disapproval of any fact in issue. The judge did not approach the question of guilt of the accused or of the credibility of a witness.

In People v. Yokum, 118 Cal. 437, 50 P. 686, after two medical witnesses had testified for the People, with a variance, exception was taken to the court's limitation of two witnesses in rebuttal and to the judge's remarks that the evidence was immaterial. The limitation was held to be reasonable and the remark was cured by other language of the judge showing that it was material. In People v. Savage, 66 Cal.App. 2d 237, 152 P.2d 240, the language of the trial judge was criticised because he went to the rescue of the prosecutrix. Appellant argued that the judge showed he was sympathetic with the witness. It was held to have been a harmless remark of the judge in trying to be courteous. The court is justified in giving his reason for a ruling.

The authorities cited by appellant in support of her first assignment (People v. Jones, 160 Cal. 358, 117 P. 176; People v. Vollmann, 73 Cal.App.2d 769, 167 P.2d 545; People v. Vatek, 71 Cal.App. 453, 236 P. 163) are classic illustrations of the need for cross examination when it is necessary to make sure that no inconsistent statements of the witness upon a material issue remain unexplained or to lay a predicate for impeachment. But a witness cannot be impeached upon an immaterial matter. These authorities declare fundamental law about which there could be no dispute when properly applied. The refusal of the judge below to permit counsel to waste time splitting hairs on inconsequential matters such as inquiring whether the witness had testified that he had recovered $10 or $30 is a practice to be commended. The issue was: Did the accused way-lay Barton, hold his body and steal property of *any* value from his person. Counting the dollars lost in the sand was calculated to divert the jury's attention from the issue.

The second assignment is of prejudicial misconduct in that the judge's statement, above quoted, indicated to the jury that Mr. Barton was telling the truth. The judge merely indicated the immateriality of the amount in theft from the person. No miscarriage of justice resulted which could be the only cause for a reversal. Constitution, Art. VI, sec. 4½; People v. Watts, 198 Cal. 776, 792, 247 P. 884. The inquiry was not pertinent to the charge, but related solely to the veracity of the victim. Nothing said by the court could be reasonably construed as a certification of Barton's veracity. That subject had been explored to such extent as to acquaint the jury fully with Mr. Barton, and to enable them fairly to appraise his testimony.

The authority cited by appellant, People v. Byrd, 88 Cal.App.2d 188, 198 P.2d 561 in support of her contention is not pertinent. It is readily distinguishable. The question there propounded to the defendant clearly indicated the judge's hostility to the accused and the "case was extremely close," requiring a display of the utmost fairness and impartiality.

The evidence against appellant was clear and positive and was believed by the jury. She was identified by her victim and the number of her automobile license was completely established. Under such circumstances, a reversal would restore the antiquated practice prior to the adoption of section 4½ of Article VI of the Constitution which forbids a reversal of a judgment, unless after an examination of the record including the evidence, the court shall be of the opinion that the asserted error resulted in a miscarriage of justice.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

131 Cal.App.2d 622

Donald DAY, Plaintiff and Appellant,

v.

Claude E. ROBISON et al., Defendants and Respondents.

Civ. 16181.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Hearing Denied May 18, 1955.

Vendor brought action against purchasers of lot for injunction and damages for trespass, and purchasers cross-complained and asserted an easement over lane and sought damages for failure of consideration. The Superior Court of the County of Marin, Thomas F. Keating, J., entered judgment awarding purchasers an easement, and vendor appealed. The District Court of Appeal, Nourse, P. J., held that where real estate broker prior to sale to purchasers of lot located in large tract of land owned by vendor, showed purchasers a map, which had been furnished by vendor, and which showed a lane along one side of lot, and assured purchasers that they would have the use of the lane, and lane had been in existence for more than 29 years and was being used by two other adjoining property owners, purchasers had an easement over lane for ingress and egress.

Judgment affirmed.

Easements ⇐17(4)

Where real estate broker, prior to sale to purchasers of lot located in large tract of land owned by vendor, showed purchasers a map, which had been furnished by vendor, and which showed a lane along one side of lot, and assured purchasers that they would have the use of the lane, and lane had been in existence for more than 29 years and was being used by two other adjoining property owners, purchasers had an easement over lane for ingress and egress.

Simeon E. Sheffey, Ray E. Montrose, San Francisco, for appellant.

Nelson & Boyd, Leo V. McInnis, San Rafael, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for an injunction and damages for trespass; defendants cross-complained asserting an easement and seeking damages for failure of consideration. Judgment was entered awarding defendants an easement for ingress and egress and denying all further complaints.

Plaintiff as owner of a large tract of land in the city of Kentfield placed in the hands of a real estate broker the lot purchased by the defendants and delivered to him a map showing a road on the northerly and easterly sides of the lot and a twenty-foot lane on the westerly side. The broker turned the lot over to another broker who showed the lot to the defendants along with plaintiff's map showing the lane and, after assuring them that they would have the use of the lane, made the sale which was accepted by plaintiff. The lane was in existence for more than twenty-nine years and was being used, at the time of the sale herein mentioned, by two other adjoining property owners.

These facts were all found to be true, and the findings are supported by competent evidence.

The controlling question of law is found in Prescott v. Edwards, 117 Cal. 298, at page 304, 49 P. 178, at page 179, where the Supreme Court said: " 'The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the land, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an ample covenant that subsequent purchasers should be entitled to the same rights.' "

The Prescott case is cited in Smith v. Smith, 21 Cal.App. 378, 131 P. 890, where

the facts were similar to those here. In the Smith case the court said, 21 Cal.App. at page 380, 131 P. at page 891: "The production of a map by Safford to the purchasers of the various lots showing the alley, and his representations to said purchasers that said strip was an alleyway, and which representations were acted upon, were sufficient as to such parties to establish said strip as an alleyway."

In a summary of the Prescott case and of Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024, the district court in Bradley v. Frazier Park Playgrounds, 110 Cal.App.2d 436, at page 443, 242 P.2d 958, at page 962, said:

"It was said in Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024, that where a lot conveyed by deed is described by reference to a map, such map is made a part of the deed; that if streets are marked on the ground in the absence of a map, and lots are sold on the representation that such streets exist, the appurtenant right to use the streets, not expressed in the deed, rests upon an equitable estoppel; that the right of the owner may be enforced in equity with respect to all the streets which the particular lot owner has occasion to use; and any street or alley in close vicinity to a lot owner, which either is or may become of substantial benefit to him, will be protected against closure by injunction. Prescott v. Edwards, 117 Cal. 298, 49 P. 178 [59 Am.St.Rep. 186], as well as many other authorities, are cited therein. See, also, Davidow v. Griswold, 23 Cal.App. 188, 192, 137 P. 619; Secs. 801 et seq., 1104, Civ.Code."

The Danielson case, and others following the same rule, is followed in the recent case of Fristoe v. Drapeau, 35 Cal.2d 5, at page 8, 215 P.2d 729, at page 732, where the court said:

"The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. Although the prior use made of the property is one of the circumstances to be considered, easements of access have been implied in this state in situations in which there was no prior use. For example, where land was conveyed by reference to a map or plat showing proposed streets, it has been held that the grantee had an implied easement therein for use as a private way. See Danielson v. Sykes, 157 Cal. 686, 689, 109 P. 87, 28 L.R.A.,N.S., 1024; Douglas v. Lewin, 131 Cal.App. 159, 162, 20 P.2d 959; Syers v. Dodd, 120 Cal.App. 444, 446, 8 P.2d 157."

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

131 Cal.App.2d 682

Anna Zilver BLONDE, Plaintiff and Respondent,

v.

The ESTATE of Will A. JENKINS, Deceased,

and

Bernard P. Droog, as Executor, Defendants and Respondents,

Dorothy Bergere Wade, Appellant.

Dorothy Bergere WADE, Plaintiff and Appellant,

v.

Bernard Paul DROOG, Bernard Paul Droog, Executor of the Estate of Will A. Jenkins, Deceased, Anna Zilver Blonde, One Doe, Two Doe and Three Doe, Defendants and Respondents.

Civ. 20621.

District Court of Appeal, Second District, Division 2, California.

March 21, 1955.

Rehearing Denied April 6, 1955.

Two consolidated actions to quiet title to corporation stock certificates alleged by each plaintiff to have been given her by plaintiffs' employer, since deceased. From a judgment of the Superior Court, Los Angeles County, Frand G. Swain, J., quieting title to the certificates in one of plaintiffs, the other plaintiff appealed. The

District Court of Appeal, Moore, P. J., held that the trial court's findings that decedent gave the certificates to plaintiff-respondent and not to appealing plaintiff were substantially supported by evidence and hence could not be disturbed on appeal.

Judgment affirmed.

1. Gifts ⇐49(1)

A claim of gift to one never asserting claim until after alleged donor's death can be sustained only by clear, satisfactory, explicit and convincing evidence of every element requisite to constitute a valid gift inter vivos.

2. Gifts ⇐36

Gifts first asserted after alleged donor's death are regarded with suspicion.

3. Gifts ⇐15, 18(1)

To make valid gift, donor must not only deliver to donee and part with control of object given, but must have intention, at same time, to complete a presently effective gift and a delivery amounting to present transfer of title to object, and such intention must be executed by complete and unconditional delivery of object to donee.

4. Gifts ⇐47

An alleged donee has burden of proving gift.

5. Gifts ⇐18(2)

To constitute valid gift inter vivos, gift must be completed by actual delivery of property given without power of revocation.

6. Gifts ⇐18(2)

A gift of property, over which donor retains dominion and control until his death, becomes merely an unexecuted and unenforceable promise to make future gift; reservation of such dominion and control being fatal to asserted gift.

7. Gifts ⇐18(2)

To accomplish a gift inter vivos, donor must completely divest himself of power to revoke gift.

8. Appeal and Error ⇐1010(1)
Gifts ⇐49(6)

In actions by decedent's former housekeeper and secretary, respectively, to quiet title to corporation stock certificates alleged by each plaintiff to have been given her by decedent in his lifetime, trial court's findings that decedent gave certificates to housekeeper and not to secretary were substantially supported by evidence and hence could not be disturbed on appeal.

Elmer J. Walther, Los Angeles, for appellant Dorothy Bergere Wade.

G. Harold Janeway, Los Angeles, for respondent Anna Zilver Blonde.

James P. Brice, Los Angeles, for B. P. Droog, individually and as executor of the estate of Will A. Jenkins.

MOORE, Presiding Justice.

This is a controversy between two claimants to personal property, each asserting ownership by virtue of an alleged gift by William A. Jenkins, now deceased. Each lady filed suit against the other and against the executor of the Jenkins Estate to quiet title to certificates for 250 shares of the capital stock of the Portland General Electric Company. Each alleged ownership of the shares. Respondent Blonde alleged the gift to her on December 23, 1952; appellant Wade alleged the gift to her on the first day of the same month. The two actions were consolidated. The court found all the pertinent allegations of Mrs. Blonde true and all the pertinent allegations of Miss Wade untrue and by its judgment quieted title in respondent to the certificates for 250 shares and adjudged that neither appellant Wade nor the executor of the Jenkins Estate owns any interest or right in or title to such certificates or to any of the 250 shares. A reversal is demanded on the ground that the findings are contrary to all the evidence.

Will A. Jenkins had been in the employ of an insurance company at Los Angeles for over 40 years. Appellant had been his secretary for five years. He had been generous to some associates and had occasionally paid appellant's hospital bills. About December 1, 1952, she visited him at his home. She testified that while there he made her a present of the shares; that

he took from a closet some papers and handed them to her saying, "Dorothy, I am giving you some securities * * * 250 shares of Portland General Electric. * * * I will endorse them over to you now. * * * I am giving them to you"; that he entered her full name and the number of shares on the reverse side of each certificate, signed it and handed it to her; that he then remarked: "It will be necessary for me to have my signature guaranteed; the next time I am down at the bank I will have it done"; that she thereupon replied: "I know you will take care of everything and will keep them for me for safekeeping"; that his reply was he would attend to it and take care of everything. The court found against such testimony of appellant.

The substance of the testimony of Mrs. Blonde was that she was the housekeeper of decedent for 23 years and until his decease; that she first learned of the gift to her from Mr. Droog about 9:00 a. m. on the 22nd day of December, 1952; that two hours later Mr. Jenkins called her into his den and said: "Mrs. Blonde, I have a gift of stock for you; I can't hand it to you, but I am having Mr. Droog take it down to the bank and have it transferred to your name * * * you have been very faithful to me over these years"; that he went to the hospital the same day and she never saw him again; that on the following day she first saw the bank's receipt in her name for the stock, given her by Mr. Droog; that she gave the receipt to her son on December 24th; that on January 26, 1953, Mr. Droog received the securities; that she had never received physical custody of the shares; that after they had been transferred to her name the certificates were returned to Mr. Droog.

It will be borne in mind that the court made findings that on December 24, 1952, defendant Droog, at the express request of Will A. Jenkins, delivered the three certificates for 250 shares of the capital stock of Portland General Electric Company duly endorsed by Will A. Jenkins for transfer to respondent; that he directed the bank to forward such certificates to the transfer agent of the corporation; that he received a receipt from the bank for the "shares issued to and in the name of Anna Zilver Blonde, which receipt he delivered to her on December 24, 1952, prior to the death of said Jenkins. * * * Bank did forward said certificates, so endorsed by said Jenkins, to the transfer agent * * * for transfer thereof to said Anna Zilver Blonde, and said shares were thereafter so transferred and returned to said Bank for delivery to said Anna Zilver Blonde * * * said transfer agent returned the original three certificates to said Bank and said Bank thereupon in the month of January 1953 delivered said original certificates to said Droog, as Executor * * * without the knowledge or consent of said Anna Zilver Blonde." In view of such finding, the sole question for decision now is whether Mr. Jenkins about December 1, 1952, made a complete gift of such shares to appellant.

[1, 2] The record is destitute of any evidence that appellant ever asserted any claim to the shares until after the death of Jenkins. Under such circumstance, the claim of a gift can be sustained only "by clear and satisfactory evidence of every element which is requisite to constitute a gift." Denigan v. Hibernia Savings & Loan Society, 127 Cal. 137, 141, 59 P. 389, 390; Humble v. Gay, 168 Cal. 516, 520, 143 P. 778. Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts. Ibid. Because of the facility with which, after a donor is dead, a fraudulent claim of ownership may be founded on a pretended gift, assertedly made while the donor was living, it is but a salutory precaution which requires explicit and convincing evidence of every element that constitutes a valid gift *inter vivos*. Sullivan v. Shea, 32 Cal.App. 369, 371, 162 P. 925.

[3, 4] In order to make a valid gift, a donor must not only make delivery and part with control of the object claimed, but the donor must at the same time have the intention to complete a presently effective gift and a delivery amounting to a present transfer of title. Bishop's School Upon the Scripps Foundation v. Wells, 19

Cal.App.2d 141, 146, 65 P.2d 105; Knight v. Tripp, 121 Cal. 674, 678, 54 P. 267; In re Estate of McEuen, 18 Cal.App.2d 180, 181, 63 P.2d 332. And that intention must be executed by a complete and unconditional delivery. In re Estate of McEuen, supra; Sullivan v. Shea, supra. The donee has the burden to prove the gift.

[5–7] Appellant contends that after the certificates were delivered to her, she returned them to Mr. Jenkins for safekeeping. In other words, she re-vested in him all that he had delivered to her. The certificates were restored to the same pigeon hole, drawer or strong box that had hitherto retained them. They never left the custody of the owner on December 1, 1952. All that passed between Mr. Jenkins and appellant was words. He had, after the conversation, all he had ever had. If he talked about giving the stock, he still retained possession and dominion over it after she had gone. To constitute a valid gift *inter vivos,* the gift must be complete by actual delivery without power of revocation. Edwards v. Guaranty Trust & Savings Bank, 47 Cal.App. 86, 89, 190 P. 57; Lefrooth v. Prentice, 202 Cal. 215, 225, 259 P. 947; Morehead v. Turner, 41 Cal.App.2d 414, 422, 106 P.2d 969. If dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. Morehead v. Turner, supra; Beebe v. Coffin, 153 Cal. 174, 177, 94 P. 766. Reserving dominion and control over property is fatal to the asserted gift thereof. To accomplish a gift *inter vivos,* the donor must divest himself completely of the power of revocation. Edwards v. Guaranty Trust & Savings Bank, supra.

[8] In the light of the cited authorities, of the testimony of appellant and in view of the permanent absence of Mr. Jenkins, it would be most ungracious to hold that he made a gift to be presently effective. Clearly, the nonagenarian had in mind that he could not make a disposition of the stock without his signature being first guaranteed on the certificates by a bank official. He told appellant: "It will be necessary for me to have my signature guaranteed. * * * I will have it done." For what reason did he think the guaranty necessary? Surely, he was not then so vain as to desire to see a guaranty of his autograph. He was in a serious mood and was thinking only of a valid transfer. It is not unlikely that at that moment he had visions of Mrs. Blonde and her long friendship and faithful service. His heart was full of gratitude and it sought expression. He may at first have had thoughts of enriching Mrs. Wade; but as the drama moved on he drifted to new intentions, to a different donee. Thereupon, he gently dismissed appellant with the suggestion of having the bank certify his signature. Mrs. Wade never thereafter saw the certificates. He made no promise as to when the certificates would be transferred to her. He did nothing to make a presently effective gift. If he thought a guaranty of his signature was essential to a completed gift, his choice of a donee was indicated by such act after he had inserted respondent's name in the assignment. He kept the certificates in his possession until December 24th, the while he had them he made the valid assignments to respondent. He sent them to the bank for transfer. His messenger, Mr. Droog, took the bank's receipt for the certificates and delivered it to respondent prior to Mr. Jenkins' death.

There is nothing in the record to indicate that Judge Swain was in the least arbitrary. He zealously heard the narrative recited by appellant and weighed it against the testimony of respondent and of Mr. Droog and the executed assignments by Mr. Jenkins. The testimony of Mr. Droog was especially potent in that the findings against appellant by reason thereof have substantial support. Therefore, the finding cannot be disturbed on appeal. Savelli v. Simon, 25 Cal.App.2d 365, 368, 77 P.2d 486; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

131 Cal.App.2d 748

Pedro VARGAS and Enedina Maria Vargas, by Jennie Villa, their Guardian ad litem, Plaintiffs and Appellants,

v.

Pete VARGAS, Defendant and Respondent.

Civ. 20647.

District Court of Appeal, Second District, Division 1, California.

March 23, 1955.

Action to have defendant declared to be father of plaintiffs and to enforce his obligation to give them support and education suitable to his circumstances. The Superior Court, Los Angeles County, A. Curtis Smith, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding that defendant had not had sexual intercourse with plaintiffs' mother at time either plaintiff was conceived and that defendant was not father of either of the plaintiffs.

Affirmed.

1. Bastards ⇐65

In action to have defendant declared to be father of plaintiffs and to enforce his obligation to give them support and education suitable to his circumstances, evidence sustained finding that defendant had not had sexual intercourse with plaintiffs' mother at time either plaintiff was conceived and that defendant was not the father of either of the plaintiffs.

2. Bastards ⇐92

Reversal of judgment declining to declare defendant to be father of infant plaintiffs could not be predicated upon alleged error of court in striking plaintiffs' testimony to effect that defendant was their father where testimony stricken could have added nothing to trial court's conviction that children believed the defendant to be their father.

J. Widoff, Los Angeles, for appellant.

Y. B. Arsen, Los Angeles, for respondent.

WHITE, Presiding Justice.

Enedina and Pedro, children born unto Jennie Villa on January 21, 1942 and May 25, 1945, appeal from a judgment for defendant in their action by their guardian ad litem to have defendant declared to be their father and to enforce his obligation to give them support and education suitable to his circumstances. Section 196a, Civil Code.

The court found that defendant did not have sexual intercourse with plaintiffs' mother at the time either was conceived; and that defendant is not the father of either of the plaintiffs. Plaintiffs, in their briefs, urge that those findings are not supported by the evidence.

The record on appeal is lengthy, and the only evidence not in conflict is that the children were born; that their birth and baptismal certificates show defendant as their father; that the information upon which the certificates were based was given by their mother; that the mother of plaintiffs was married on August 3, 1932 to one Joe Anaya, and that she and her said husband were not divorced until some time after May 25, 1945.

Jennie Villa testified that she had not seen her said husband at any time after 1938 and that defendant was the father of the plaintiffs. She testified that at the time of conception she was living with defendant as his wife and that from 1938 to 1945 she did not have intercourse with any man other than defendant. Numerous friends and relatives, including a sister and a sister-in-law of the defendant and the minor plaintiffs, corroborated some of her testimony.

Defendant testified that he never at any time had had sexual intercourse with Jennie. He denied that he had ever at any time lived with her, and testified that he did not see her at any time in March, April or May of 1941, and that he did not see her at any time during the months of July, August or September, 1944.

Concerning the husband of Jennie Villa, in addition to her own testimony that she had not seen him since 1938, the record includes the testimony on cross-examination of Carmen Gujardo, called by plaintiffs, to

the effect that she had seen him on the street once in 1951 or 1952 and Jennie had told her who he was; and the testimony of Joe Vargas, a brother of defendant, that on August 10, 1941, he heard Jennie Villa tell defendant that she had an argument with her husband, that he had hit her, and that she was planning to separate. The following is quoted from the defendant's testimony:

"Q. Did Jennie Villa ever mention her husband to you? A. Yes, she did.

"Q. When did she mention him? A. It was in August 10th, 1941.

"Q. How did the discussion come about? How did it come up? A. She came to work in the morning—* * * and she had a piece of cloth on her face, so then I looked at her, and she had some bruises on her face, and I asked her what had happened, and she said, 'I got into an argument with my husband because he won't work and he is drinking all the time and I am thinking about leaving him.'

"Q. Now, after that conversation, did you employ her, did you or did you not employ her at that time? A. I let her remain. I did.

"Q. That was the entry in this book for August 10th? A. That is right."

[1] The foregoing evidence, in connection with the entire record on the appeal now engaging our attention, is sufficient to support the findings and judgment.

[2] Plaintiffs further contend that the judgment should be reversed because the court "erred in refusing to admit the testimony of the plaintiffs to the effect that the defendant was their father". In re Estate of Ganes, 114 Cal.App. 17, 299 P. 550, 551, is cited and relied upon. In that case it was held not to be reversible error to permit a party to testify " 'that she knew of her own knowledge that she was the natural child of decedent' " and, 114 Cal.App. at page 19, 299 P. at page 551, the court said: "That such evidence was competent is attested by the decision in the case of Comstock v. State, 14 Neb. 205, 15 N.W. 355, where it is held that 'a child may be a competent witness to testify to the fact of his parentage.' (Citing cases.)"

The record on the instant appeal discloses the following testimony of the plaintiff Enedina:

"Q. By Mrs. Mack: I am asking you about this gentleman down here (indicating). A. What is wrong?

"Q. Who is he? A. He is my father.

"Mr. Tierman: That is exactly the basis of the objection. I will ask that it be stricken.

"The Court: Now, that answer will be stricken."

And the following is quoted from the testimony of the plaintiff Pedro:

"Q. Who is your father? A. Pete Vargas.

"Q. Peter Vargas, do you know this gentleman at the table here, the one way down there (indicating)? Will you stand up, please, Mr. Vargas.

"(Defendant standing.)

"Q. Do you know him? A. Yes.

"Q. Who is he? A. My daddy.

"Mr. Tierman: I ask that the answer be stricken as a conclusion.

"The Court: The answer may be stricken."

It would not have been reversible error had the trial court denied respondent's motions to strike in the instances above quoted. In the instant action, however, at the end of the trial the court said: "* * * if I hold that he not the parent, that, of course, too, would be a mental shock to them (the minor plaintiffs) because obviously they have been brought up in the belief that he is. *I don't think there is any doubt that they do have that belief.* Whether it is true or not is another matter, and for me to decide." (Emphasis added.)

Admission in evidence of the answers stricken could have added nothing to the court's conviction that the children believed the defendant to be their father. It cannot be doubted therefore that the decision would have been the same if the errors complained of had not been made.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

131 Cal.App.2d 576

CONSOLIDATED LIQUIDATING CORPORATION, a corporation, formerly known as Consolidated Western Steel Corporation,

Consolidated Liquidating Corp., a corporation, as successor in interest to Western Pipe & Steel Company, Petitioner-Respondent,

v.

John Anson FORD, Herbert C. Legg, Kenneth Hahn, Burton W. Chace, Roger W. Jessup, acting as the Board of Supervisors of the County of Los Angeles, Defendants-Appellants.

Civ. 20306, 20307.

District Court of Appeal, Second District, Division 2, California.

March 18, 1955.

Consolidated actions involving claims for tax refund. The Superior Court, Los Angeles County, Frank G. Swain, J., made determinations adverse to defendants, and they appealed. The District Court of Appeal, Moore, P. J., held that notwithstanding Government Code sections permitting tax refund claimant to treat inaction by Board as rejection of claim and permitting him to sue county on claim at any time within six months after Board's rejection of claim, claimant would be granted peremptory writ of mandate requiring Board to either approve or reject claim for refund.

Affirmed.

1. Taxation ⇐543(3)

Government Code section, providing that if Board fails to act on tax refund claim for 90 days, claimant "may" treat such refusal or neglect as rejection, and section, providing that claimant dissatisfied with rejection of his claim "may" sue county on claim at any time within six months after final action of Board, are permissive only and do not require filing of action within six months immediately following 90-day period. Government Code, §§ 29714, 29715.

2. Taxation ⇐543(3)

The remedy provided by Revenue and Taxation Code section permitting tax refund claimant to commence action within six months from time of rejection of his claim affords independent relief in all cases coming within its provisions. West's Ann. Code Civ.Proc. § 338; Revenue and Taxation Code, §§ 5096, 5097, 5103.

3. Mandamus ⇐3(8)

Notwithstanding Government Code sections permitting tax refund claimant to treat inaction by Board as rejection of claim and permitting him to sue county on claim at any time within six months after Board's rejection of claim, claimant would be granted peremptory writ of mandate requiring Board to either approve or reject claim for refund. Government Code, §§ 29714, 29715.

Harold W. Kennedy, County Counsel, by Gordon Boller, Deputy County Counsel, Los Angeles, for appellants.

Laughlin E. Waters, U. S. Atty., and Musick, Peeler & Garrett, Joseph D. Peeler, John P. Pollock, Los Angeles, for respondent.

MOORE, Presiding Justice.

Two identical actions have been consolidated for this appeal. A discussion of one (20306) will serve to show why the same order is made in both. The facts are not uncommon.

Respondent, Consolidated Liquidating Corporation, paid under protest to the Tax Collector of Los Angeles County $106,898.54, the amount of "escape possessory interest tax assessments" for the years 1942 to 1947, inclusive. The assessments were made with respect to properties which were owned by the government of the United States of America and had been used or occupied by Consolidated Western Steel Corporation for the purpose of producing certain commodities for the government or its agencies under "cost-plus-a-fixed-fee" contracts which obligated the government or its agencies to reimburse respondent with respect to certain costs, including taxes of the type so assessed to which it might be subjected in the performance of such contracts.

On November 20, 1951, respondent filed with the office of the Board of Supervisors, a claim for refund of such payment of taxes and penalties. Although the Supervisors were by their counsel advised on February 19, 1952, to reject such claim, seven days later, the same counsel joined the Department of Justice in successfully requesting a postponement of action on the claim until March 4, 1952. Similar requests for postponement of action by the Board were subsequently made for the purpose of providing federal agencies an opportunity for considering the acceptability of the settlement proposed by the County Counsel. After the County Counsel had been advised, June 15, 1953, that his proposal of March 18, 1949, had been rejected by the Attorney General, respondent filed with the Board of Supervisors on July 22, 1953, a "Request for Immediate Action on Claim for Refund" whereby respondent requested approval or denial of its claim in order to provide statutory basis for court action for recovery of the taxes. On July 29, 1953, the clerk of the Board of Supervisors notified counsel for respondent that its petition for action on the claim for refund had been denied by formal order on July 28, 1953. This action followed whereby respondent prayed that a writ of mandate issue to defendants as a Board of Supervisors commanding them to act upon and either approve or reject the claim for refund. A general demurrer having been overruled, judgment was duly entered that a peremptory writ of mandate issue to defendants, requiring them to consider, act upon and either approve or reject that certain claim for refund of taxes filed with the Board of Supervisors by respondent on November 20, 1951.

On this appeal, it is contended (1) that petitioner's right was barred by limitations long before its request for immediate action on the claim for refund; (2) that a suitor cannot postpone doing an act he is legally required to do and thereby indefinitely suspend the running of limitation against his right; (3) that the board's rejection of the claim for refund, even under compulsion, would constitute merely an ineffectual rejection and would not revive the outlawed claim. Pursuant to such theses, appellant asserts that the erroneous payment of taxes occurred December 6, 1948, and contends (a) that the action is barred by subdivision 1 of section 338 of the Code of Civil Procedure[1]; (b) that the right of action to enforce a refund expired December 6, 1951; (c) that failure to sue prior to the latter date was fatal to respondent's claim; (d) that the mere filing of a claim with the board did not suffice to toll the statute; (e) that, under section 5103 of Revenue and Taxation Code, if a claim for refund is rejected by the Board, suit thereon must be filed within six months from such rejection; (f) that under section 29714 of the Government Code, if the board refuses or neglects to act on a claim within 90 days, such inaction must be construed as a rejection of the claim and the claimant must commence his action within the six months immediately following the 90-day period; (g) that 90 days from November 20, 1951, the date of filing of the claim, the claim was constructively denied; (h) that in such event, respondent had to file suit by August 20, 1952. By reason of such statutes and respondent's noncompliance therewith, appellants contend that their demurrer should have been sustained with finality.

[1] The vice of appellants' argument lies in the fact that the Government Code, sections 29714 and 29715 do not require action to be filed at the end of the 90-day period. Both sections[2] contain permissive clauses, allowing a claimant to treat

1. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
"Within three years:
"1. An action upon a liability created by statute, other than a penalty or forfeiture."

2. Government Code, § 29714. "If the board refuses or neglects to allow or reject a claim for 90 days after it is filed with the clerk, the claimant may treat the refusal or neglect as final action and rejection on the ninetieth day."
Section 29715. "A claimant dissatisfied

the neglect to act as a rejection of the claim, but they are permissive only and gain neither force nor pertinency from the history of section 4078 of the Political Code, the progenitor of 29714.

[2, 3] Section 338, Code of Civil Procedure, is not applicable to the provisions of the Revenue and Taxation Code, sections 5096 and 5097. The latter sections deal specifically with the refund of taxes "erroneously or illegally collected." It forbids any refund except on a verified claim, "filed within three years after making of the payment." Section 5103 of the same Code comes into play and permits the claimant to commence an action within six months from the time of rejection. That makes a minimum of three and a half years assuming prompt action by the board in rejecting the claim. The remedy provided by the last above-cited section affords independent relief in all cases coming within its provisions and is not excluded by the terms of former statutes. Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 665, 76 P. 481. "Independent" as used in the last above sentence means not subject to control by others, not subordinate. (Webster's International Dictionary.)

In Otis v. City and County of San Francisco, 170 Cal. 98, 148 P. 933, after it had been ascertained that certain taxes had been illegally collected, a verified claim for refund was duly presented to the supervisors. Formally, they neither allowed nor rejected the demand. The City and County insisted that the plaintiff should have taken affirmative action by way of mandate. But the court held: "Where a right is thus created by statute and the method of securing that right pointed out, in all essentials the legislative directions must be followed." Id., 170 Cal. at page 100, 148 P. at page 933. Nonaction of the board tolled the statute. Those taxes had already been declared illegal. In the case at bar, the question of the illegality of the taxes was in dispute; hence allowance or rejection of the claim had to be made by the board before action to recover could be maintained.

The other contentions of appellants have been answered by this court in Hochfelder v. County of Los Angeles, 126 Cal. App.2d 370, 272 P.2d 844, decided after this appeal had been lodged. The appellants there contended that their interpretation of section 29714 made 90-days inaction of the board constructive rejection and required action by the respondent within six months. We there scorned the suggestion that unless the claim is deemed rejected on the ninetieth day after filing by operation of law, a claimant would be in a position to delay indefinitely the running of the statute of limitations. All that is required to start the running of the statute *is for the board to pass* upon the claim, as it was intended by the legislature that it should do. We there pointed out, 126 Cal.App.2d at page 374, 272 P.2d 844, (1) that the purpose of section 29714 was to obviate a situation in which the board, by its nonaction, could defer indefinitely a claimant's right to sue; (2) that the import of the section is that a claimant *may* deem the nonaction of the board as tantamount to a final rejection of the claim on the ninetieth day; (3) that it accords to the claimant only the privilege of regarding the claim as denied and (4) that while he may, he is not required to exercise such privilege. In the words of Mr. Justice Fox, 126 Cal.App.2d at page 375, 272 P.2d at page 847: "He may elect to wait until the board discharges its responsibility by acting upon his claim in due course. Government Code, § 29713. * * * By the clear terms of section 29715 of the Government Code and section 342 of the Code of Civil Procedure, plaintiffs had six months from that date in which to file the present action."

In the light of the Hochfelder decision, a discussion of the other points discussed in the briefs would be fruitless.

Both judgments are affirmed.

McCOMB and FOX, JJ., concur.

with the rejection of his claim or with the amount allowed him may sue the county on the claim at any time within six months after the final action of the board."

131 Cal.App.2d 638

PAN AMERICAN WORLD AIRWAYS, Inc., a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, George R. Reilly, James H. Quinn, William G. Bonelli, Paul R. Leake, and Robert C. Kirkwood, as members of said Board; and Charles G. Johnson, as Treasurer of the State of California, Defendants and Appellants.

Civ. 16221.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Rehearing Denied April 20, 1955.

Hearing Denied May 18, 1955.

Airline's action to recover money collected as "use" tax on certain equipment in airplanes. Plaintiff had judgment in Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., and an appeal was taken. The District Court of Appeal, Nourse, P. J., held that aircraft equipment which was installed in the planes before the planes entered California and which was required as to each plane before certificate of airworthiness could be issued by the Civil Aeronautics Authority, was an integral part of the aircraft on arrival of planes in California and was exempt from use tax under statutory aircraft exemption.

Affirmed.

Licenses ⇐19(3)

Aircraft equipment, including galley equipment, radio navigation equipment including indicating instruments, first-aid kits, overwater emergency equipment including six 15-man life rafts, eighty-five life jackets, emergency kit, emergency rations, emergency radio set and passenger oxygen, which was installed in planes before planes entered California and which was required as to each plane before certificate of airworthiness could be issued by Civil Aeronautics Authority, was integral part of aircraft and was exempt from use tax under statutory aircraft exemption. Revenue and Taxation Code, § 6366.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Sho Sato, Deputy Attys. Gen., San Francisco, for appellants.

Athearn, Chandler & Hoffman, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover the amount collected by defendants as a "use" tax on certain equipment on airplanes of plaintiff located in this State. It was the theory of the plaintiff that the personal property taxed herein was exempt from taxation under section 6366 of the Revenue and Taxation Code. Plaintiff had judgment.

The code section reads: "§ 6366. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption of aircraft sold to persons using such aircraft as certificated or licensed carriers of persons or property in interstate or foreign commerce under authority of the laws of the United States or any foreign government, or sold to any foreign government for use by such government outside of this State, or sold to persons who are not residents of this State and who will not use such aircraft in this State otherwise than in the removal of such aircraft from this State."

Preliminarily it should be said that respondent does not contend for the exemption of such passenger service equipment as blankets, pillows, sheets, etc., or such buffet equipment as dishes, silverware, glasses, etc. It limits its claims to such articles as are required by the Civil Aeronautics Authority to be installed prior to a certificate of airworthiness. Such a certificate was issued by the Authority on all of respondent's planes certifying the installation of all the items here involved, such as galley equipment, radio navigation equipment, first-aid kits, overwater emergency equipment, life rafts, life jackets, radio sets and passenger oxygen.

The question arising is whether these articles, all of which had been installed prior to the delivery of the planes into

this state, become an integral part of the aircraft before delivery within this state.

The facts are that respondent contracted with the Boeing Aircraft Company of Seattle, Washington, for the delivery of twenty passenger planes fully equipped in accordance with the specifications of the federal regulations. Respondent purchased the equipment here involved from a manufacturer who delivered them to Boeing in Seattle, who installed them in the aircraft as stated. Delivery to respondent was made outside the State of California. Hence, when they were brought into this state the planes were fully equipped.

These facts having been found true by the superior court (and there is no conflict in the evidence) the learned trial judge filed a written opinion which we herein quote with our full approval.

"Plaintiff Pan American World Airways, Inc. sues herein seeking a refund of *use tax* paid to defendant. The tax was levied by defendant Board upon plaintiff for storage and use in California of certain items of tangible personal property hereinafter set forth. Plaintiff's petition for refund is timely herein and upon denial of petition plaintiff instituted this action.

"The facts are not in dispute. Plaintiff, Pan American World Airways, Inc., a certificated licensed carrier of persons and property in interstate and foreign commerce under authority of the laws of the United States, contracted with Boeing Aircraft Company of Seattle, Washington, to purchase twenty aircraft at a purchase price of $1,304,390 per plane. Of these twenty planes, eleven were needed and brought by plaintiff to its base at San Francisco Municipal Airport. Deliveries were all made according to the purchase contract at Portland, Oregon, or Seattle, Washington. These eleven planes all arrived in California on the same day they were delivered to plaintiff in Seattle or Portland. Upon delivery by Boeing at either of these two cities the planes were taken over by crews of plaintiff and flown to San Francisco Municipal Airport in California. The contract provided that the manufacturer, Boeing, would obtain for each 'aircraft', prior to delivery thereof, an appropriate Airworthiness Certificate, in the Transport category, from the Civil Aeronautics Administration.

"The specifications for construction of the planes provided for certain customer-furnished equipment to be installed by Boeing prior to delivery. Plaintiff purchased this equipment directly from manufacturer-suppliers at their several plants or offices in the United States and this equipment was shipped by the manufacturer thereof directly to Boeing at Seattle, who installed this equipment in accordance with the contract of purchase prior to delivery of the planes to plaintiff. This equipment consists of articles required by the Civil Aeronautics Authority to be installed upon the planes prior to the issuance of the Certificate of Airworthiness necessary to the use of the planes. All of these planes were of a type designed for use by plaintiff in its interstate and foreign business. Following is a list of the customer-furnished equipment for each plane involved, and which was installed by Boeing; Galley equipment, radio navigation equipment, including indicating instruments; first-aid kits; overwater emergency equipment, including six 15-man liferafts, eighty-five life jackets, emergency kit, emergency rations, emergency radio set, and passenger oxygen.

"The issues herein may be very simply stated:

"(1) Are the items of customer-furnished equipment on the planes at the time of their arrival in California an integral part of an 'aircraft' and thus exempt from the tax herein levied in accordance with Sec. 6366 of the Revenue and Taxation Code of California; and

"(2) Are these items part of a vehicle of interstate commerce when brought into the State and thus not subject, constitutionally, to tax by the State, as a violation of the 'commerce clause' of the United States Constitution.

"The first issue to be determined herein is whether the disputed customer-furnished equipment purchased by plaintiff in various parts of the United States and delivered to Boeing in Seattle and there installed by Boeing in the planes, became an integral

part of an 'aircraft' so as to lose its separate individual identity and become merged into the completed 'aircraft' prior to its arrival in California. Certainly the State of California, under the facts herein, had no taxing authority under the Sales and Use Tax Act until the articles in question arrived in California so as to acquire a tax situs within the State. This moment could not arrive until the planes themselves arrived in California. All of the articles in dispute herein at that time were an integral part of the 'aircraft'. Without any of them a Certificate of Airworthiness could not have been obtained from the C.A.A. for the plane. The legislature, in Sec. 6366, has specifically exempted 'aircraft' from the tax levied by defendant Board herein. These items at the time the planes arrived at San Francisco Municipal Airport had become an integral part of an 'aircraft', which under C.A.A. regulations would have been incomplete without them. They were not replacement parts, repair parts nor additional items to be installed at some future date. These items were not to be unloaded and stored pending use, but were integral part of an 'aircraft', and, according to C.A.A. regulations, essential thereto. That these safety and airworthiness regulations of the C.A.A. are reasonable in all respects cannot be questioned. That body, under proper authority given it by law, has determined this fact; thus the items of concern herein are no longer just single items of inventory or equipment, but are integral parts of an 'aircraft' and not subject to tax. Who originally ordered, purchased or took delivery of these articles is of no consequence; we must look to their first arrival in California when they came within the tax situs of the State of California under the Act in question to determine the taxable character of the goods. At that time they were integral parts of an 'aircraft' just as much as the engines and frame of the plane."

The gist of the case is that, upon the arrival of the planes in this state, all the controversial equipment had become an integral part of the 'aircraft' and hence was exempted from the storage and use taxes under the provisions of the Revenue and Taxation Code.

There are no California authorities in point, and none from other jurisdictions covering the question because our statutes are peculiar and individual in scope. The common sense construction of our statutes is that, in exempting the 'aircraft' from the use tax, the statutes exempted all the essential equipment required by the federal regulations as an integral part of the aircraft.

Since we have concluded that the items referred to are not subject to the tax under the provisions of Section 6366 of the Revenue Code, it would serve no purpose to discuss the other point raised by respondent—the application of the "commerce clause" of the federal Constitution.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

131 Cal.App.2d 739

Maybelle Burke CAREY, Petitioner and Appellant,

v.

RETIREMENT BOARD OF SAN FRANCISCO et al., Defendants and Respondents.

Civ. 16224.

District Court of Appeal, First District, Division 2, California.

March 23, 1955.

Rehearing Denied April 22, 1955.

Hearing Denied May 18, 1955.

Widow of deceased fireman brought mandamus proceeding against Retirement Board of the City and County of San Francisco to compel payment of widow's pension under section 169 of city charter. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment adverse to widow, and she appealed. The District Court of Appeal, Kaufman,

J., held that amendatory section 168.3 of city charter providing that, on death of member of fire or police department, either before or after retirement, as result of injury received in, or illness caused by performance of duty, "in lieu of" and allowance payable under any other section of the charter, shall be paid, impliedly repealed charter section 169 dealing with pension of widow or children of member of fire department, who dies in performance of his duty or from sickness clearly, unmistakably, and directly caused by and resulting from discharge of such duty, and that amendatory section provides sole method of compensation for widows of firemen who die from injuries received in line of duty.

Judgment affirmed.

1. Municipal Corporations ⇐79

A municipality cannot through its charter abrogate the Workmen's Compensation Law.

2. Municipal Corporations ⇐49

Repeal of provision of charter of municipality by implication is not favored.

3. Municipal Corporations ⇐8

If two sections of a city charter purport to cover the very same persons and situations, they will be so construed as to maintain the integrity of both sections, if it is possible that they may subsist together.

4. Municipal Corporations ⇐49, 200(6)

Amendatory section of city charter providing that, on death of member of fire or police department, either before or after retirement, as result of injury received in, or illness caused by performance of duty, "in lieu of" any allowance payable under any other section of the charter, shall be paid, impliedly repealed charter section dealing with pension of widow or children of member of fire department, who dies in performance of his duty or from sickness clearly, unmistakably, and directly caused by and resulting from discharge of such duty, and amendatory section provides sole method of compensation for widows of firemen who die from injuries received in line of duty.

See publication Words and Phrases, for other judicial constructions and definitions of "In Lieu Of".

5. Pensions ⇐3

Though there is a continuing right to a pension, a pensioner does not have a right to a specific sum, and hence amount may be reasonably increased or decreased.

6. Pensions ⇐2

Any time before contingency happens, on which a right to a pension vests, the law granting such right is subject to alteration or repeal.

7. Limitation of Actions ⇐58(1)

Where fireman died on March 18, 1948, and, when his widow made applications for pension, she was informed that her only right to a pension was under section 168.3 of city charter and that section 169 had been superseded by section 168.3, and mandamus proceeding by widow to compel retirement board of city to pay widow's pension under section 169 was not filed until October 1952, it was barred by three year limitation statute, though amount paid widow under 168.3 was sufficient to cover amounts which she would have received under section 169, until August 1952. West's Ann.Code Civ.Proc. § 338.

Taheny & Taheny, San Francisco, for appellant.

Dion R. Holm, City Atty., City and County of San Francisco, Bernard J. Ward, Deputy City Atty., San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the County of San Francisco denying a petition for a peremptory writ of mandate in a proceeding brought to compel the Retirement Board of the City and County of San Francisco to pay a widow's pension under Section 169 of the city charter. Petitioner has been receiving benefits from respondent since the death of her husband under the provisions of section 168.3 of said charter, but contends that she has the right to receive

a pension under section 169, which in her case would be a larger sum than that which she is now receiving. Respondent contends that section 168.3 of the charter, which became effective in 1947, superseded the provisions of section 169 applicable to employees of the fire department in the class to which her husband belonged, and that she has no right to a pension under section 169.

Petitioner's husband, Leo J. Carey joined the fire department in 1927, and was at all times thereafter a member until his death on March 18, 1948, which resulted from an injury sustained in line of duty on March 16, 1948. He became a member of the retirement system on January 8, 1932 under the provisions of section 169 of the charter. If Carey had lived, he would have attained the age of 55 years on September 8, 1948, at which time he would have been eligible for a pension.

At the time of his death Carey held the rank of lieutenant which paid a salary of $345 monthly. In July 1948, the salary for that rank was raised to $370 per month, in July 1951, to $395, and since July 1952 has been $436 per month.

On March 25, 1948, the respondent Board presented appellant with a form of application for pension entitled "Application for allowance—Death In Line of Duty". This application form referred generally to the "Charter and ordinance provisions governing the Retirement System", but made no reference to any specific sections thereof. However, appellant's verified petition alleges that "At the time said application was filed and at all times thereafter until the 8th day of September, 1952, petitioner was informed by said Retirement Board, and by the officers, agents and employees thereof, that she had no right to a pension under any provisions of the Charter other than under section 168.3, and was further informed that section 169 had been superseded by said section 168.3." This allegation is not denied in the Answer.

Following the filing of appellant's application, the respondent made payments to her at the rate of $345 monthly, the salary the deceased was receiving at the time of his death, until September 7, 1948, the date on which he would have been eligible for retirement, and after that date, $162.64 monthly, an amount equal to the retirement allowance the deceased would have received if he had retired on that date, as provided in section 168.3.

In her opening brief appellant asserts that she was not informed and did not know that she had a right to a pension under either section 168.3 or 169 and she so testified at the hearing. However, her allegation in the verified petition shows that she was informed that she had no right to a pension under section 169 or any other section of the charter except section 168.3.

The trial court denied the writ on two grounds: First, that section 168.3 supersedes the payment provisions contained in section 169 under which petitioner now claims, and Second, that the action is barred under section 338 of the Code of Civil Procedure, having been instituted more than four years and six months after the alleged wrong was committed.

The principal question in the case is whether the adoption of the amendment to the charter, section 168.3, in 1947, supersedes the provision in section 169 of the Charter which pertains to pensions for widows of firemen who die from injury or sickness resulting from performance of duty with the department. Section 169 relates to Pensions and Retirement of members of the Fire Department. Section 169(b) provides in part as follows:

"(b) The family of any member of the fire department who shall die as a result of any injury received during the performance of his duty, or from sickness clearly, unmistakably and directly caused by and resulting from the discharge of such duty, or while eligible to a pension on account of years of service in the department, or who has served twenty consecutive years in the department and attained the age of fifty-five years, shall receive the following benefits:

"First, should the decedent leave a widow to whom he was married prior to the date of the injury resulting in death, his widow shall, as long as she may live and remain unmarried, be paid a monthly pension equal

to one-half of the salary attached to the rank held by the decedent at the time of his said injury, provided, however, that should said widow die, leaving a child or children under the age of sixteen years, said pension shall continue to such child or children collectively until the youngest child arrives at the age of sixteen years."

Section 168.3, entitled Pension Provisions —Dependents of Members of Fire and Police Departments Killed in Line of Duty, provides as follows:

"Section 168.3. If a member of the fire or police departments, as defined in the charter for the purposes of the retirement system, or a member of the salvage corps in the fire department, or any person employed by the city and county to perform duties now performed under the titles of pilot of fireboats, marine engineer of fireboats, or marine fireman of fireboats, all of whom are hereafter designated as members, shall die before or after retirement as a result of an injury received in, or illness caused by the performance of his duty, a monthly allowance, *in lieu of any allowance payable under any other section of the charter or by ordinance, shall be paid,* beginning on the date next following the date of death, to his surviving wife throughout her life or until her remarriage. If the member, at the time of death, was qualified for service retirement, but had not retired, the allowance payable shall be equal to the retirement allowance which the member would have received if he had been retired for service on the day of death, but such allowances shall not be less than one-half of the average monthly compensation earnable by said member during the three years immediately preceding death, and if he had retired prior to death, the allowance payable shall be equal to the retirement allowance of the member. If death occurs prior to qualification for service retirement, the allowance payable shall be equal to the compensation of said member at the date of death, until the date upon which said member would have qualified for service retirement, had he lived and rendered service without interruption in the rank held by him at death, and after said date the allowance payable shall be equal to the retirement allowance said member would have received if retired for service on said date, based on the average monthly compensation he would have received during the three years immediately prior to said date, had he lived and rendered service as assumed, but such allowance shall not be less than one-half of such average monthly compensation. * * *

"Benefits provided under this section *shall be in lieu of all benefits payable under other sections of the charter upon death of such member resulting from an injury received in, or illness caused by the performance of duty,* except the five hundred dollar benefit payable upon death after retirement." (Emphasis added.)

Appellant contends that section 168.3 is intended to give the widow of a fireman who dies from injury in line of duty the right to apply for a pension thereunder, but that it did not repeal her right to apply for a pension under section 169, and since it was not intended that she should receive both pensions, it appropriately provides that the widow's pension under section 168.3 shall be "in lieu of any allowance payable under any other section of the charter." It is argued that it would be idle to provide that an allowance shall be in lieu of any other allowance payable under another section if the very section that makes such reference has destroyed and repealed all other provisions for such allowance. It is senseless, appellant says, to refer to an "allowance payable" under another provision if the section referring thereto has repealed the other provision.

The purpose of section 168.3 was to enlarge the rights of widows of firemen killed in line of duty, as is shown by the argument supplied to the voters at the time section 168.3 was adopted. It stated that the amendment would correct the inadequacy of the pension system which was brought to light in a recent fire during which four members of the department lost their lives. But the interpretation of this amendment as a repeal of section 169(b), rather than as a supplementary provision, would in the cases of firemen close to the retirement age, result in a lesser pension for their widows

when they are killed in line of duty, than would be received if they lived to the retirement age and died from a cause not connected with their service.

[1] Appellant maintains that the expression "in lieu of all benefits payable under other sections of the charter" and "in lieu of any allowance payable under any other section of the charter or by ordinance" cannot be construed as a repeal of that part of section 169 pertaining to firemen whose deaths result from injury in line of duty. She notes that section 171.1.6 of the Charter enacted in 1949, provides that that portion of any allowance payable because of death or retirement of any member which is provided by contributions of the City and County, shall be reduced by the amount of any benefits, other than medical, payable under the Workmen's Compensation Insurance and Safety Law of the State of California because of the injury or illness resulting in death or retirement. "Such portion which is paid because of death or retirement which resulted from injury received in or illness caused by performance of duty, shall be considered as *in lieu of all benefits* other than medical benefits, *payable to* or on account of such person under said law of the state of California and shall be in satisfaction and discharge of the obligation of the City and County to pay such benefits." Here, appellant says, it is clear that both benefits shall not be collected, but it would be ridiculous to say that the "Workmen's Compensation Law is impliedly repealed in respect to firemen who meet death in line of duty." However, the Workmen's Compensation Law is one imposed by the state, and it is well settled, as appellant admits, that a municipality cannot through its charter abrogate the state law in this regard. It is pointed out in Larson v. Board of Police, etc., Com'rs, 71 Cal.App.2d 60, 63, 162 P.2d 33, that the payment of workmen's compensation and the allowance of pension benefits are supported upon entirely different principles. Under the above quoted provision of the charter it is clear that the portion paid because of death or retirement on account of injury is paid *in lieu of,* or in place of, all other benefits and is in satisfaction of the city's obligation under the state law.

However, the obligation to pay a pension arises out of the municipal charter itself. The question is, then, whether the amendment which deals with exactly the same subject as that covered by section 169(b), but adds certain other classes thereto, such as police officers, fireboat pilots and salvage corps personnel, leaves the earlier section intact, creating alternative methods of compensation for the widows of these firemen. The language is very clear that only one pension is *payable* by the City and County. Appellant interprets this language to mean that only one pension is *collectible,* but that either one or the other may be paid. There is no doubt as to the meaning of the phrase "in lieu of". It means "instead of", "in place of", "in substitution for." Webster's International Dictionary, Second Ed.; Rutherford v. Oroville-Wyandotte Irr. Dist., 218 Cal. 242, 22 P.2d 505. Therefore, section 168.3 clearly states that in the case of death of firemen, policemen, and certain other classes of employees, dying from injury received in line of duty, this pension *shall* be paid to the widows by the city *instead* of any other allowance or pension provided for by any *other* charter provision or ordinance. It is clearly obligatory on the City to pay this particular pension. Such language makes the language of the earlier section 169(b) in conflict therewith, and it must be held to be irreconcilable and therefore impliedly repealed.

[2-4] It is true, as appellant says, that repeal by implication is not favored. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896. If two sections purport to cover the very same persons and situations, they will, of course, be so construed to maintain the integrity of both if it is possible that they may subsist together. Hammond v. McDonald, 32 Cal.App.2d 187, 89 P.2d 407. But in the present case, the later provision covers the entire class of persons to whom the earlier provision applied, comprehends exactly the same situations, and provides in detail for the calculation of different allowances. It therefore must be held that they are in conflict with each other, rather than that they create an option on the part of the recipient of a pension.

Respondent calls attention to the fact that where an option or election is granted under the charter, the language clearly so provides. In section 158.1 dealing with retirement it is provided that election officers otherwise eligible under the act shall have the *option* to become members of the retirement system which option is to be exercised in writing not later than 90 days after the effective date of the act. The fact that there is an option is clearly set forth, as well as the method of exercising it, and the time in which it is to be exercised. None of these elements are present in section 168.3. Other charter sections providing for the exercise of options concerned with the retirement system are sections 158.2, 158.3, 165.2, 166 and 169. Appellant's only answer to this argument is that in section 171.1.6 the benefits of Workmen's Compensation are alternative. As noted above, the Workmen's Compensation Act is a state law, and we are not dealing with a provision imposed by another section of the same charter.

Sections 169 and 171 of the Charter relate to two classes of firemen, section 169 to those who were in service before 1932, and section 171 to those who joined the department thereafter. If it were intended that the widows of older firemen were not to come under the provisions of section 168.3, undoubtedly the new provision would have been so drafted. If this had been done, then widows of firemen who had served approximately 15 years at the time this section was enacted would not be entitled to the husband's full pay for the next five years, but would receive half of his salary during that time and thereafter. In such cases the new provisions would probably be more advantageous. In cases such as the present, where the deceased was within a few months of retirement, section 169(b) would be more advantageous.

[5, 6] However, while there is a continuing right to a pension, Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 581, 59 P.2d 104, a pensioner does not have a right to a specific sum, hence the amount may be reasonably increased or decreased. Carr v. Fire Commission, 30 Cal. App.2d 208, 85 P.2d 959. Any time before the contingency happens upon which a right to a pension vests, the law granting such right is subject to alteration or repeal. Jordan v. Retirement Board, 35 Cal.App.2d 653, 657, 96 P.2d 973.

We hold that the trial court was correct in its conclusion that section 168.3 now provides the sole method of compensation for widows of firemen who die from injuries received in line of duty.

The trial court also decided that the cause of action, if any had existed, would have been barred by section 338 of the Code of Civil Procedure. Appellant contends that the statute would begin to run from August 1952, instead of from May, 1948, since the amount paid appellant under section 168.3 was sufficient to cover amounts which would have been due under section 169 until August 1952. This action was filed in October 1952. It is true that Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 59 P.2d 104, held that the right to a pension is a continuing right, and that the only installments of the pension which were barred were those which fell due three years before the filing of the action. However, where the right to a pension is denied, then the case of Dillon v. Board of Pension Comr's, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800, is applicable. In that case after denial of the pension the widow waited more than three years before filing her petition for a writ of mandamus. It was there held that the limitation on the right to bring an action in mandamus begins to run when the right first accrues, and claimant has no remedy by mandamus if more than three years have elapsed from the time the right first arose, exclusive of the time the matter was under consideration by the board.

[7] While appellant claims she was misled by the Retirement Board into believing that she had no right to a pension except under section 168.3, still her verified petition shows that at the time she signed the application she was advised that she had no right to a pension under any other provision than section 168.3, and that she was further informed that section 169 had been superseded by section 168.3. This is an admission that she knew more than 3 years prior to this

proceeding that the right to a pension under section 169 was denied by the board. The Dillon case would therefore appear to be applicable to this situation. The trial court was correct in deciding that the action was barred by section 338 of the Code of Civil Procedure.

In view of the foregoing, the judgment must be and is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

131 Cal.App.2d 798

Arbitration between SOUTHSIDE THEATRES, Inc.

and

MOVING PICTURE PROJECTIONISTS, LOCAL 150—I.A.T.S.E.

SOUTHSIDE THEATRES, Inc., Applicant-Respondent,

v.

MOVING PICTURE PROJECTIONISTS, LOCAL 150, I.A.T.S.E., A. F. of L., an unincorporated association, Defendant-Appellant.

Civ. 20480.

District Court of Appeal, Second District, Division 3, California.

March 25, 1955.

Proceeding to confirm award of arbitrators made under provision of contract between theatre owner and projectionists union. The Superior Court, Los Angeles County, Arnold Praeger, J., vacated award. Union appealed. The District Court of Appeal, Shinn, P. J., held that where theatre owner demanded arbitration of issue of whether contract required it to employ extra projectionists to run 3-D movies, and union moved to dismiss demand for arbitration on ground that dispute did not arise from contract, issue of whether contract covered 3-D operations of theatres was properly before arbitrators, and their award dismissing demand, based on decision that contract did not cover such operations, was proper.

Judgment reversed and cause remanded with instructions.

1. Labor Relations ⇐434

Where theatre owner, in demanding arbitration under contract with projectionists union, alleged that contract did not require it to employ additional projectionists to run 3-D movies, and union maintained that there could be no arbitration because contract did not cover projection of 3-D movies, and that there was no arbitrable issue, dispute arose out of contract, and basic issue was the scope of the contract.

2. Labor Relations ⇐431

Although projectionists union which objected to jurisdiction of arbitrators upon ground that no arbitrable issue existed, and theatre owner could have applied to court to determine if arbitrable issue existed, parties could voluntarily submit issue to arbitrators. West's Ann.Code Civ.Proc. § 1282.

3. Labor Relations ⇐434

Any controversy under a collective bargaining contract which requires first a determination that the contract does or does not define the rights or duties of the parties in an existing situation, is subject to arbitration if the agreement provides for the arbitration of disputes that arise out of contract.

4. Labor Relations ⇐461

Where arbitrators decided that contract between theatre owner and projectionists union did not cover 3-D operations of theatre, fact that such decision was made on a motion by union to dismiss arbitration, and fact that opinion stated there was no arbitrable issue were immaterial.

5. Arbitration and Award ⇐29

Arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.

Gilbert, Nissen & Irvin, Los Angeles, for appellant.

William R. Walsh, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by the Moving Picture Projectionists Local 150 I.A.T.S.E., A. F. of L. (hereinafter referred to as the Union) from a judgment vacating an award of arbitrators and from minute orders which denied appellant's motion for reconsideration of the judgment. The respondent is Southside Theatres, Inc. (hereinafter referred to as Southside) which owns and operates several motion picture theatres, the operation of three of which for the projection of three-dimensional pictures was and is the subject of the present controversy.

On or about October 1, 1952, contracts (hereinafter referred to in the singular) were entered into between Southside and the Union covering the wages, hours and working conditions of projectionists. By its terms the agreement was made retroactive to July 1, 1951. Prior to October 1, 1952, Southside was exhibiting only "flat" pictures. It is stated by the Union and not questioned by Southside that three-dimensional or "3-D" pictures were first shown in the jurisdiction of the Local November 25, 1952. Southside commenced exhibiting 3-D pictures on or about June 2, 1953. A controversy arose whether Southside could be required to employ an extra projectionist. The Union's brief says: "The dispute continued for some weeks. It was contended by the Union that the projection of 3-D pictures required the employment of an extra projectionist, while on the other hand Southside contended that the collective bargaining agreement between the parties did not so require when 3-D pictures were exhibited without the use of additional sound tracks, and that the only times the Union could demand an extra projectionist was under circumstances provided for in clauses 11 and 12 of the collective bargaining agreement."

The contract provided in paragraph 38 for arbitration in accordance with the established procedure of the American Arbitration Association.[1] On or about July 20, 1953, Southside made a demand upon the Union for arbitration in accordance with paragraph 38. A copy of the demand was filed with the American Arbitration Association. The demand stated that the Union had required Southside to employ an additional projectionist for 3-D pictures during June and July 1953 at a cost to Southside of $548.17 in additional wages. The relief sought through arbitration was: "(a) a *declaration* that the employer is not required under the terms of said contract to employ an extra projectionist when exhibiting a 3-dimension picture without additional sound tracks; (b) an order requiring Local #150 to *cease and desist* from requiring the employment of an extra projectionist * * *; (c) *reimbursement* to the employer from Local #150 for * * sums required to be paid as wages * *". Each of the parties named an arbitrator and when those selected were unable to agree upon a third to act as chairman, the arbitration association, when appealed to, named a chairman.

At the commencement of the hearing before the panel December 12, 1953, the Union made a motion to dismiss the demand for arbitration upon the ground that the projection of 3-D pictures was not covered by the collective bargaining agreement of the parties nor within their contemplation at the time the agreement was entered into. From this premise the Union contended that the dispute was not one "arising from the contract." Southside resisted the motion, contending that it went to the merits of the controversy, the dispute being whether the contract covered all the operations

1. "38. Any dispute, claim or grievance arising out of the agreement between the parties shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association. The arbitration shall be conducted and the award made by a board of three arbitrators, one of whom shall be named by the Local, one by the Employer and the third, who shall be chairman, shall be selected pursuant to the rules of the American Arbitration Associates."

of the theatres, including operations that might be undertaken thereafter, and therefore defined the respective rights and duties of the parties under the conditions created by the advent of 3-D pictures.

The Union's motion was based in part upon affidavits, one by the business manager of the projectionists union which averred that in the negotiations leading up to the contract no mention was made of 3-D pictures nor of anything but flat pictures. The other affidavit of the chairman of the negotiating committee of the Southern California Theatre Owners Association was to the effect that in the negotiation of identical contracts on behalf of many other theatres covering the period February 1952 to January 1954 no mention was made of 3-D pictures. Thus the Union submitted with its motion extrinsic evidence respecting the construction that should be given the contract.

By its motion the Union took the position, which it has since maintained, that as a matter of fact the contract did not cover projection of 3-D pictures, and hence there was no arbitrable question whether it covered 3-D pictures—an obvious non sequitur.

[1] It is clear that the controversy arose out of the contract. The basic dispute was over the scope of the contract. If it covered the projection of 3-D pictures the provisions respecting the employment of additional projectionists were controlling. If it did not cover the exhibition of 3-D pictures that matter was subject to settlement through a new or supplemental agreement. The basic question was submitted to the arbitrators by means of the Union's motion to dismiss and Southside's opposition. The arbitrators were required to decide the question and by their award to determine the scope of the contract. That was the initial decision the parties insisted upon. If Southside should prevail upon that issue it would contend that the Union could demand employment of an additional projectionist only in accordance with the terms of the contract. If the Union should prevail on the basic issue, an award to that effect would leave it free to insist upon a new or supplemental agreement settling the 3-D picture dispute.

A majority of the arbitrators signed an opinion, the substance of which was a statement of their conclusion that the contract did not encompass the exhibition of 3-D pictures and that the parties did not, at the time the contract was entered into, contemplate or intend that it should constitute the measure of their respective rights or duties under the circumstances and conditions that came into being when Southside commenced exhibition of 3-D pictures. This conclusion was responsive to the issue that was tried and an award consistent with the conclusion of the arbitrators would settle the controversy.

The majority opinion, after pointing out that the contract was silent as to 3-D pictures stated: "We therefore find that there is no arbitrable subject arising out of the existing contract to justify arbitration under clause 38 of the contract," and they made an award which read in material part: "We, the undersigned arbitrators—arbitrators—having been duly sworn and having duly heard the proofs and allegations of the parties, award as follows: The motion to dismiss the demand for arbitration is granted. Therefore the claim of Southside Theatres, Inc., is denied." Costs were assessed against Southside. The third arbitrator filed a dissenting opinion stating the view that the contract covered projection of 3-D as well as flat pictures and that the demand of the Union was not in conformity with applicable contract provisions.

[2] Although the Union in appointing an arbitrator purported to act "specially" and later objected to the jurisdiction of the arbitrators upon the ground that no arbitrable dispute existed, it nevertheless joined with Southside in submitting to the arbitrators the basic question as to the scope of the contract which, as it turned out, was, in the opinion of a majority, the determinative question. The ground of the Union's objection was that since the contract did not cover 3-D projection the controversy did not arise out of the contract, but, as we

have said, the premise did not lead to the conclusion. The dispute as to the scope of the contract arose out of the contract and it arose in no other manner.

It cannot be doubted that when the Union took the position that no arbitrable controversy existed Southside could have petitioned the Superior Court for a determination of that question in accordance with the procedure authorized by § 1282, Code Civ. Proc. However, the parties voluntarily submitted to the arbitrators the question whether the controversy arose out of the contract. This was their privilege. They introduced their evidence as to the meaning and scope of the contract and they sought an award of the arbitrators upon that issue. The Union says: "The arbitrators did not exceed their powers by deciding that the disputed claim herein arose outside of the collective bargaining agreement between these parties." This is to say that the arbitrators acted within their powers in undertaking to make a determination as to the scope of the contract. Southside upon this question says: "The Southside's position was that the employment of projectionists being the object of the collective bargaining agreement, that any dispute concerning their employment 'arose out of the agreement,'" and cites Royal Typewriter Co. v. Mechanical & Electrical Workers Union, Sup., 104 N.Y.S.2d 332, 333. The question in that case was whether servicemen on electric typewriters were within the general classification of the contract of "'Service Department Employees,'" the disagreement having arisen from the fact that when the contract was made the company was not making electric typewriters. In denying the application of the company to stay arbitration proceedings the court said: "The only issue before the court, however, is whether the union's stated question in controversy calls for an interpretation or application of any provision of the agreement. The court should not interpret whether the contract covers service men working on electric typewriters. That should be left to the Arbitration Board. There is an arbitrable issue."

[3] Any controversy under a collective bargaining contract which requires first a determination that the contract does or does not define the rights or duties of the parties in an existing situation is subject to arbitration if the agreement provides for the arbitration of disputes that arise out of the contract.

The foundational questions are: What was submitted to the arbitrators and what did they decide? There was in reality but a single factual question submitted for decision, namely, whether the parties understood and intended that the contract should cover operations of the theatre as to which it was silent. An affirmative answer to that question would have brought the proceeding to the further question whether the new operations created conditions in which the Union could properly demand employment of an additional projectionist. A negative answer would end the entire controversy; and a negative answer was given.

[4, 5] The claim of the theatre was denied by the award. That decision was a valid one if the arbitrators had the power to make it; and they had the power to make it under the submission and the evidence. It is immaterial that the decision was made on a motion to dismiss and likewise immaterial that the majority opinion stated there was no arbitrable dispute. The real decision was that the parties did not intend the contract to cover 3-D projection. That was the issue that was tried and it was so stated in the majority opinion and in the dissenting opinion. It is true that the award should have made a declaration as to the scope of the contract, thus expressly removing all doubt as to the ground upon which the demand of the theatre was denied. But that ground is clearly implied from the fact that no other question was submitted, and, of course, the implication is fortified by the opinions. The statement of the majority opinion that there was no arbitrable dispute was merely an erroneous reason for granting the motion to dismiss. The fact is that the demand of the theatre was denied because it was determined that the contract did not cover 3-D projection. Arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision. McKay v. Coca-Cola Bottling Co., 110 Cal.App.2d

672, 243 P.2d 35. The reason for the award was the one we have stated and it admitted of no disposition other than a denial of the demand of Southside Theatres.

The judgment is reversed with instructions to confirm the award. The appeal from the orders is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

131 Cal.App.2d 723

J. Thaddeus CLINE, Plaintiff and Respondent,

v.

William ZAPPETTINI, Defendant and Appellant.

Civ. 16202.

District Court of Appeal, First District, Division 2, California.

March 23, 1955.

Attorney's action against client upon contingent fee contract for services. From an adverse judgment of the Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., the client appealed. The District Court of Appeal, Nourse, P. J., held that the contract was not unfair or inequitable merely because it had effect of providing for additional compensation if cross-complaint was filed and defense was successful.

Judgment affirmed.

1. Attorney and Client ⇐143

Attorney's relationship to his client is of highest fiduciary character and contracts between the two for the former's compensation are presumptively invalid, and attorney has burden of showing fairness.

2. Attorney and Client ⇐123(1)

With respect to contracts between attorney and his client, attorney must offer clear and satisfactory evidence that transaction is fair and equitable and that client was fully informed of all pertinent facts so that he was able to act understandingly with the attorney.

3. Attorney and Client ⇐143

In attorney's action against client upon fee contract, evidence sustained finding that client was fully informed of all pertinent facts in regard to the contract.

4. Attorney and Client ⇐143

In determining whether contract between attorney and client is fair and equitable, court may consider (1) time and labor required, novelty and difficulty of questions involved and skill requisite properly to conduct cause; (2) customary charges of Bar for similar services; (3) amount involved in controversy and benefits resulting to client from services; (4) contingency or certainty of compensation.

5. Attorney and Client ⇐141, 143

In attorney's action against client upon contingent fee contract for services, evidence sustained implied finding that contract was fair and equitable and that $7,000 was reasonable for services rendered and results therefrom.

6. Attorney and Client ⇐147

Contingent fee contract between attorney and client was not unfair or inequitable merely because it had effect of providing for additional compensation if cross-complaint was filed and defense was successful.

7. Accord and Satisfaction ⇐1

Discharge of claim by way of accord and satisfaction is dependent upon contract, express or implied and essentials of valid contracts generally, i. e., proper subject matter, competent parties, consent or meeting of the minds and consideration, must be present.

8. Accord and Satisfaction ⇐11(3)

If debtor's offer is upon condition that remittance be taken in full payment, and creditor accepts with knowledge of the condition, there is accord and satisfac-

tion even if creditor states that he is not accepting check in full satisfaction.

9. Accord and Satisfaction ⇐9

Where client told his attorney in answer to latter's telephone demand for larger fee according to contingent fee contract, that attorney should keep check he had received from client because in any event client owed that much, attorney's retention of check did not extinguish debt or constitute accord and satisfaction.

Tobias J. Bricca and Duff & Ferdon, William L. Ferdon, San Francisco, for appellant.

Angell & Adams, Philip H. Angell, Robert M. Adams, Jr., J. Thaddeus Cline, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff, an attorney, brought an action for declaratory relief seeking a determination of his rights under a contingent fee employment contract. At issue was whether he was entitled to $3,750 or $7,041.66 for services rendered. The trial court, sitting without a jury, awarded plaintiff the larger sum and defendant Zappettini appeals from the judgment.

Defendant-appellant is a wholesale florist and has been in business in San Francisco since 1925. He first came to see plaintiff-respondent on March 21, 1952. At that time he stated in substance that he had "gotten himself into a mess." He told respondent that he had signed an exchange agreement to exchange a piece of real property owned by him and located in Mountain View for a piece of realty located in Redwood City. He claimed that he had revoked the agreement, but that Mr. Romano, the real estate broker, was pressing him for payment of his fee. Romano was claiming that the exchange agreement had been consummated to the extent that it was signed and therefore he was entitled to a broker's fee. A day or two before this he had gone to appellant's office and definitely threatened to sue.

Appellant and respondent met next in respondent's office on March 25, at which time the latter was doubtful of getting appellant out of his predicament. However further efforts disclosed the fact that the bank which was to loan a certain sum of money at a certain rate of interest according to the signed exchange agreement would not negotiate and complete the loan at those terms.

Thy met again in respondent's office on March 27 and respondent informed appellant that Mr. Stulsaft, president of the Land Development and Investment Co. (hereinafter referred to as Land Development Co.) the other party to the exchange agreement, refused to comment as to his projected action. In view of the various uncertainties, respondent suggested that the depositions of Romano and Stulsaft be taken in the hope of better ascertaining appellant's legal position.

Respondent proposed to handle the defense against the claim of Romano on the basis of one-third of whatever appellant saved. Specifically, he suggested that if the case was settled within one week before the first date the case is set for trial or if it went to judgment, he would receive one-third of the brokerage fee. If it was settled before that time, he would handle the matter for 25% of the brokerage fee saved. If appellant decided to abide by the exchange agreement, respondent would charge a reasonable fee, not to exceed $500.

In a letter dated April 1, 1952, respondent set forth the above terms and one other possibility not discussed orally. That latter possibility would be where the Land Development Co. sued or if Romano sued not only for the brokerage fee promised by appellant but also the one promised by the Land Development Co. This amounted to $21,125 and respondent suggested that in such a case his fee be based on that larger amount. If the settlement was made prior to one week before the first trial date the fee would be 25%; if the action was terminated by judgment or later settlement, the fee would be 33⅓%. Finally, if the appellant decided to abide by the agreement, respondent would receive a reasonable attorney's fee not to exceed $1,000.

On April 2 after receiving the letter appellant again conferred with respondent

in his office. Appellant did not understand the latter possibility of being sued for double fees because he felt confident that Mr. Stulsaft would not attempt to enforce the agreement. Respondent reminded him, however, that if the transaction would be to Mr. Stulsaft's advantage in the amount of $75,000, it was unrealistic to assume that he would waive his rights under the contract. Furthermore, appellant could not expect respondent to defend him in two actions for the same amount that he would defend against one. The two actions would be a suit for broker's fees and one for specific performance by the Land Development Co. Respondent further testified that appellant's reaction was that if he should be sued in order to force him to go through with the deal he would be happy to pay $7,000 in order to get out of it.

Respondent filed a complaint in declaratory relief against Romano and the Land Development Co. on April 3. Romano answered and filed a cross-complaint for $11,000 on April 14. On April 23, the Land Development Co. answered and cross-complained for specific performance.

The two met again to discuss the above developments and appellant asked if the fee arrangements previously agreed upon would apply. The two of them went over the letter referred to above and it was definitely stated that if the suit was prosecuted to a successful conclusion, appellant would pay a fee of $7,000.

At the conclusion of this action the trial court decreed that the exchange agreement was of no legal force and effect and that neither Romano nor the Land Development Co. were entitled to judgment on their cross-complaints.

Respondent sent his statement for services rendered in the amount of $7,041.66. Appellant sent respondent a check for $3,750 and one for $63.25 accompanied by a letter which stated in part that the checks were "as per agreement dated April 1, 1952".

Respondent informed appellant that he would not accept any reduction in his fee, that he was returning the checks and that he was filing a suit for his fee. Appellant acknowledged that he owed the $3,750 and that whatever happened respondent should keep the check. As a result, respondent turned the check over to his secretary for safe keeping. Unknown to respondent, she had the check certified which evidently was customary office practice in such a situation.

Respondent filed this action for declaratory relief on January 23, 1953 and on February 17, 1953 the check was returned to appellant.

[1, 2] The law regards the attorney's relationship with his client of the highest fiduciary character and therefore treats contracts between the two for the former's compensation as presumptively invalid with the burden of showing its fairness on the attorney. The attorney must offer clear and satisfactory evidence that the transaction is fair and equitable and that the client was fully informed of all pertinent facts so that he was able to act understandingly with the attorney, In re Estate of Witt, 198 Cal. 407, 419, 245 P. 197; Roberts v. Wachter, 104 Cal.App.2d 271, 278, 231 P.2d 534; 6 Cal.Jur.2d Attorneys at Law, sec. 142.

[3] Appellant is an experienced successful businessman who has operated his own business for many years. According to respondent's testimony appellant did not completely understand all the alternative courses of action and corresponding fee scales and therefore came in to talk it over. Respondent's explanation when considered with the letter is clear and unambiguous, and it seems unlikely that appellant as a prosperous businessman did not find it likewise after the conferences. After the conversation of April 2, appellant seemed to understand the various alternatives as pointed out in the letter and agreed to its terms. In fact, he agreed that if he could get out of the deal, he would be happy to pay $7,000. Such evidence if believed seems sufficient to support the finding that appellant was fully informed of all pertinent facts in regard to the contract.

[4] In order to determine whether a contract between attorney and client is fair and equitable, the following factors according to the "Canons of Professional Ethics" of the American Bar Association, are proper to consider:

"(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; * * * (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; * * *" (Canon 12).

[5] The respondent claimed to have done many hours of research work and the trial lasted for five days. The appellant stated that the exchange agreement if carried out would have cost him $75,000. The degree of skill required is difficult to ascertain, but at least it can be said that from appellant's point of view the best possible result obtained. Finally, the amount of the fee was contingent upon the degree of success achieved. All these factors indicate that $7,000 was reasonable for the services rendered and the results therefrom.

[6] Appellant's next contention is that the trial court's interpretation actually awards the respondent twice for the same services and is therefore invalid. This argument is based on the fact that a cross-complaint is part of the same action and it is not logical to assume that such an expected move by the parties imposes an additional burden on the attorney.

A cross-complaint is part of the same action, but it does not necessarily follow that appellant in that action was confronted with the same problem of proof against both parties. That is, it is entirely possible that the broker could have done all that was necessary in order to recover his fee under his agreement with appellant but that the exchange agreement would still not be enforceable.

Appellant's last major argument is that respondent's action in having the check certified was an accord and satisfaction and therefore bars any additional recovery.

[7] "The discharge of a claim by way of accord and satisfaction is dependent upon a contract, express or implied. It follows that the essentials of valid contracts generally must be present in a contract of accord and satisfaction. These are: a proper subject matter; competent parties; consent, or meeting of the minds; and consideration." 1 Cal.Jur.2d Accord and Satisfaction, sec. 2.

[8] The parties must agree that the obligation is extinguished or there is no accord. However, if the offer by the debtor is upon condition that the remittance be taken in full payment, and the creditor accepts with knowledge of the condition, there is accord and satisfaction even if the creditor states that he is not accepting the check in full satisfaction. 1 Cal.Jur. 2d, supra, sec. 10.

[9] The above rule is evidently what appellant has in mind, but it is not applicable to the facts. Respondent stated that appellant in answer to respondent's telephone demand for the entire fee told him to keep the check because no matter what happened he owed that much. Therefore, no condition of acceptance was attached so that it can be said the debt was extinguished.

Essentially this case appears to present a fact question only which the trial court resolved in the attorney's favor. The appellant evidently accepted the offer of respondent as set forth in the letter of April 1 on April 2. According to its terms the fee was to amount to one-third of the broker's fees saved if it was necessary to defend against both parties and the defense was successful.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

131 Cal.App.2d 581

Leslie L. ROBINSON, Plaintiff and Appellant,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, and California Western States Life Insurance Company, a corporation, Defendants and Respondents.

Civ. 20472.

District Court of Appeal, Second District, Division 2, California.

March 18, 1955.

Action by widow to enforce payment on policies covering life of deceased husband. From adverse judgment of the Superior Court, Los Angeles County, Fred Miller, J., the widow appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that husband's declarations and representations concerning present and prior illnesses were false and were known by him to be false and were made for purpose of deceiving insurers and of inducing them to issue the policies.

Judgment affirmed.

1. Insurance ⇐291(1)

Where beneficiary's own physician failed to disclose true facts concerning insured's physical condition when called upon for them, beneficiary could not take advantage of that failure in attempt to enforce payment on life policies, especially when scope of disclosure had been limited by insured's instructions to only one particular physical examination.

2. Insurance ⇐665(3)

In action by beneficiary to enforce payment on life policies evidence sustained finding that declarations and representations made by insured concerning his health were false and were known by him to be false and were made for purpose of deceiving insurers and of inducing them to issue the policies.

3. Insurance ⇐292

Where insured had been told by doctor that he suffered from high blood pressure, it was his duty to communicate in good faith such information to insurers in response to question in application for insurance concerning conditions for which he had consulted a physician and any diseases or injuries which he now or had ever had. Insurance Code, § 332.

4. Insurance ⇐255

The materiality of representations and declarations made by insured is determined "solely by the probable and reasonable influence" of those facts upon the insurer. Insurance Code, § 334.

5. Insurance ⇐291(1)

An insurer has a right to know all that the insured knows concerning his health whereby they might intelligently decide whether he is an insurable risk and it is not incumbent upon insurer to investigate statements made by insured to insurer's medical examiner.

6. Insurance ⇐253

An insurance company is entitled to determine for itself what risks it will accept and to rely upon insured for such information as it desires as a basis for a determination whether applicant is insurable.

7. Contracts ⇐187(1)

A contract, made expressly for benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. West's Ann.Civ.Code, § 1559.

8. Insurance ⇐246

Where life policies were mutually rescinded prior to commencement of action to enforce payment thereon, rescission terminated contractual rights of beneficiary. West's Ann.Civ.Code, § 1559.

Clock, Waestman & Clock, by E. W. Sheridan, Long Beach, for appellant.

Frank M. Benedict, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question here posed is whether the widow of a veteran can collect his insurance where he had contracted with respondents for insurance on his life to be

paid to the Department of Veterans Affairs at his death, and the veteran in his statement of insurability attached to the application, falsely answered inquiries relative to the condition of his health.

Charles Lindsey Robinson purchased a contract in the home protection plan of the Department of Veterans Affairs of California on July 14, 1951. He furnished the Department with statement of insurability to accompany its written application to the insurance companies as a part thereof. Such statement contained three questions and the answers thereto as follows:

"7. Do you know of any impairments now existing in your health or physical condition? No.

"8. Have you had any illness or injuries during the past three years? No.

"9. Have you ever had any of the following: Consumption, Rheumatism, Disease of heart, lungs, stomach, kidney, liver, brain or any other chronic disease? No."

Following the completed statement, decedent certified that his "answers and statements are true and correctly recorded and that no material circumstance or information has been withheld or omitted concerning my past and present state of health or employment" and he consented that such statement be made a part of any application "for insurance on my life made by Department of Veterans Affairs."

The Department applied to the Occidental Life Insurance Company of California, and California-Western States Life Insurance Company by written application for insurance on the life of its contractee. On August 21, 1951, he was examined by Dr. John B. Davis, a medical examiner for respondents. The doctor used a form entitled "Answers Made to the Medical Examiner," which document contains a statement that it is a continuation of and forms a part of the application for insurance. In answer to the *inquiry 16* as to the diseases, accidents or operations he had had, and for what conditions he had consulted a physician, he answered that he had suffered from virus pneumonia and had completely recovered in 1944 and that his attending physician was "U. S. N. Doctor," and that he had undergone a right inguinal hernioplasty in 1945 and was attended by "U. S. N. Doctor." Three other questions and their answers are as follows:

"17. Are you now in good health, as far as you know and believe? Yes.

"18. For what conditions have you consulted a physician or other practitioner within five years? Routine checkup. Dr. Walker, Long Beach, Calif. * * *

"23. Have you now, or have you ever had * * * any other disease or injury? Give details, dates, etc. No. 16 only."

These, also he certified to be complete and true.

The husband signed an authorization for Dr. Walker to disclose the contents of his findings, diagnosis and his treatment at the time of the "routine checkup," and when respondents requested the information of Dr. Walker, the latter replied "no disease," that Mr. Robinson had "reported for routine physical checkup—no complaints" and that he had attended his patient in February 1947 for a routine physical examination, but he made no mention of a vascular hypertension concerning which Mr. Robinson had consulted the doctor. The court found that in reliance upon decedent's declarations and representations made in connection with the application for the policy, Occidental and California-Western each agreed to issue a policy on his life for one half of the unpaid balance due on Robinson's contract with the Department at the date of Robinson's death and to pay such amounts to the Department; that such declarations were false and were known by Robinson to be false and were made for the purpose of deceiving respondents and of inducing them to issue such policies; that Robinson knew that in 1947, 1948, and 1949 he had suffered from vascular hypertension; had consulted a physician with reference to such condition within five years prior to the medical examination, and knew of the impairment of his physical condition, and knew that he was, in fact, in bad health.

Exactly ten months and eleven days after respondents had approved the applica-

tion, the unfortunate veteran died—August 19, 1952. After appellant had notified the Department of her husband's death, proofs of death were forwarded to respondents with a memorandum of the unpaid balance of decedent's contract, to wit, $7,283. Following the prompt investigation by respondents, they rejected appellant's claim on account of the false representations made by the insured in his statement of insurability, and paid to the Department $34.75, the total amount of premiums paid for the insurance.

Appellant contends that the findings are without evidential support. She argues that no proof was made that at the time of the application for insurance, Robinson was suffering from a heart condition, or that he had knowledge of any such condition. She points to the testimony of respondents' physician, Dr. Davis, to the effect that at the time of his examination, deceased's heart and blood pressure were normal, and to the testimony of Dr. Walker that Robinson's highest blood pressure was caused by infected teeth, a severe myositis of the shoulder and a respiratory infection, and that the pain caused by such ills can cause a rise in blood pressure. She further contends that her husband was not asked as to whether he had high blood pressure, and points to the testimony of both physicians that high blood pressure is not a disease, and to the testimony of Dr. Walker that on the last two calls deceased made on him, January 25, 1949, and August 8, 1951, his blood pressure was normal and that no treatment was given or required for any physical condition whatsoever.

It is evident that appellant does not understand the nature of respondents' claims. The charges against appellant are that her husband concealed a serious vascular hypertension, a knowledge of which would have required a rejection of his application for insurance. Dr. Davis testified that even though on the day of a person's examination, his blood pressure be normal, on a subsequent day he might have a hypertension and on a still later day his pressure might be perfectly normal; that a respiratory infection would not increase the blood pressure. Dr. Walker was decedent's physician from 1947 until decedent's death. From February 10, 1947 until August 8, 1951, decedent made eleven calls on his doctor. For that period Robinson's average blood pressure was 157 over 102, during which period Mr. Robinson was under the depressing influence of aminaphylline and phenobarbital. On the day of the first interview, February 10, 1947, prior to the use of the drugs, decedent's blood pressure was 180 over 108 as against a normal systolic count of 150 for a man of 60, decedent's age. The doctor testified that he informed Mr. Robinson in understandable language of his true condition. Both doctors, Davis and Walker, testified that in a man of 60, the high blood pressure probably indicated a pathological systemic condition, not one of emotional origin. Other expert proof was that a man with decedent's symptoms was such a poor risk as to make him unacceptable by an insurer.

[1] The vice of the misrepresentations made by decedent would still be seriously grave, in appellant's quest for payment, even though decedent had perished in a storm at sea. The beneficiary of his policy is now face to face with material, fatal misrepresentations and concealments made for the purpose of inducing the issuance of an insurance contract. Whitney v. West Coast Life Insurance Company, 177 Cal. 74, 80, 169 P. 997; Mutual Life Insurance Company of New York v. Hurni Packing Company, 8 Cir., 260 F. 641, 645, certiorari denied 251 U.S. 556, 40 S.Ct. 178, 64 L.Ed. 412; McEwen v. New York Life Insurance Company, 42 Cal.App. 133, 145, 183 P. 373. Appellant cannot take advantage of the failure of her own physician to disclose the true facts when called upon for them. Especially is this true where the scope of such disclosure had been limited by decedent's instructions to only the physical examination of August 8, 1951.

[2–5] The findings are not contrary to law. The representations made by decedent related to matters material to the contract. Deceased knew of his malady. His doctor had told him and he had suffered.

It was his duty to communicate in good faith all such facts. Insurance Code, § 332. Not only did he fail to disclose what he knew but he misstated the facts that were directed to his attention. Their materiality is determined "solely by the probable and reasonable influence" of those facts upon respondents. Insurance Code, § 334. He is bound to have known that a high blood pressure was not popular with an insurance company. But at the time of his examination, he denied he had either illness or injuries during the preceding three years; he answered that he was in good health and concealed knowledge of his high blood pressure. In her zeal to keep the inquiry directed to the subject of her husband's heart trouble, appellant quotes both doctors, Walker and Davis, that there was no heart trouble as of August 8, 1951. Such was not the issue, but rather it was: had her husband concealed knowledge of his vascular hypertension from the insurance companies? They had a right to know all he knew on that subject whereby they might intelligently decide whether he was an insurable risk. Mutual Life Ins. Co. of New York v. Hurni Packing Company, supra. It was not incumbent upon respondents to investigate Mr. Robinson's statements made to the examiner. It was his duty to divulge fully all he knew. No authority is cited and none will be found holding that an insured or his beneficiaries may escape the consequences of his deception by placing upon the insurer the burden of investigating his verified statements. Layton v. New York Life Insurance Company, 55 Cal.App. 202, 205, 202 P. 958. For a candidate for life insurance to represent his health to be good, when in truth it was bad, to deny that he had consulted a physician within five years on account of his vascular hypertension, although he had done so; to conceal his knowledge of such vascular hypertension by saying only that within five years he had gone to a physician for a "routine check-up" were material to the contract for insurance and are fatal to recovery on the insurance policy. Maggini v. West Coast Life Insurance Company, 136 Cal.App. 472, 475, 29 P.2d 263.

[6] It was proved that prior to decedent's statements attached to the application for insurance, he had suffered a blood pressure of 180 over 108. That was hypertension. Such condition could cause a coronary occlusion, a rupture of a coronary artery or of a blood vessel in the body. The victim of such condition is not a good risk. Also, when such condition exists in a person, something may be organically wrong. Longevity is definitely affected by it. There was evidence that the blood pressures of decedent during the four-year period after February 10, 1947, indicated cardiac damage. An insurance company is entitled to determine for itself what risks it will accept, and therefore to know all the facts relative to the applicant's physical condition. It has the unquestioned right to select those whom it will insure and to rely upon him who would be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting its risks. Mutual Life Insurance Company v. Hurni Packing Company, 8 Cir., 260 F. 641, 645.

[7, 8] Finally, appellant's hopes for recovery were blasted by the rescission of the insurance contract prior to the commencement of this action. It is the law that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Civ.Code, § 1559. The mutual rescission, as found, terminated the contractual rights of appellant.

Judgment affirmed.

McCOMB and FOX, JJ.

We concur.

131 Cal.App.2d 567

Walter I. DAUGHERTY, Plaintiff and Respondent,

v.

Edward KAPLAN, Mary B. Kaplan, John D. Boyle, Jerome Steinbaum, Jack D. Green, Lucille B. Green, Jessie D. Green, et al., Defendants,

John D. Boyle, Appellant.

Civ. 4921.

District Court of Appeal, Fourth District, California.

March 17, 1955.

Action by realty broker, who acted as agent for motel lessees, against lessors, purchaser, and another, for alleged fraudulent conspiracy to deprive broker of his commission by making of direct sale from lessors to purchaser instead of from lessees to purchaser. The Superior Court, Fresno County, Arthur C. Sheppard, J., denied motion for change of venue, and defendant other than lessees appealed. The District Court of Appeal, Mussell, J., held that complaint, which alleged that motel lessees, who had option to purchase motel, had agreed to pay broker commission for finding purchaser for motel, and that motel lessors consented to the sale, but that lessors and another, fraudulently conspired to make direct sale to purchaser through cancellation of lease and option agreement, to broker's damage in amount of commission lost, was sufficient to show good faith attempt to state cause of action against lessors, and therefore, venue was properly laid in county of lessors' residence.

Order affirmed.

1. Venue ⇐22(1)

Where action is transitory, county in which defendants, or some of them, resided at commencement of action is proper county for trial. West's Ann.Code Civ.Proc. § 395.

2. Venue ⇐46

Where none of several defendants resided in county in which action is brought, and action is one properly triable in county of defendants' residence, defendants have right to have venue changed to county where all or some of them reside. West's Ann.Code Civ.Proc. § 395.

3. Venue ⇐22(3)

In absence of showing that none of other defendants is resident of county in which action is brought, defendant may not have venue changed to county of his residence, even though all defendants joined in the demand or consent to such change, but cause will be retained where brought if any of defendants resided in county of venue, provided complaint attempts, in apparent good faith, to state cause of action against defendant or defendants in whose county of residence action is commenced.

4. Venue ⇐22(3)

Subsequent dismissal of defendant does not give right to change of venue where complaint, as originally filed, stated, in good faith, cause of action against such defendant.

5. Venue ⇐22(3)

Complaint, which alleged that motel lessees, who had option to purchase motel, had agreed to pay broker a commission for finding purchaser for motel, and that motel lessors consented to the sale, but that lessors, and another, fraudulently conspired to make direct sale to purchaser through cancellation of lease and option agreement, to broker's damage in amount of commission lost, was sufficient to show good faith attempt to state cause of action against lessors, and therefore venue was properly laid in county of lessors' residence.

Mason A. Bailey, Madera, for appellant.

Truman F. Campbell and B. W. Gearhart, Fresno, for respondent.

MUSSELL, Justice.

The complaint in this action was filed in Fresno county and appellant, who was named as a defendant therein and was a resident of Madera county, filed a motion for change of place of trial to the county of his residence. The motion was denied by the trial court and this appeal followed.

[1] It is conceded that the action is transitory and that in such an action the county

in which the defendants, or some of them, reside at the commencement of the action is the proper county for the trial thereof. Code Civ.Proc. § 395. It is also conceded that the defendants Jack D. Green, Lucille B. Green and Jessie D. Green are residents of Fresno county.

Appellant contends that a plaintiff may not fix venue in a county by naming residents as parties defendant without stating a cause of action against them; that no cause of action is stated against the three Fresno county residents named as defendants and that they were joined as parties defendant to prevent the transfer of the cause to the county of appellant's residence.

[2–4] In Kraft v. Innis, 57 Cal.App.2d 637, 640, 135 P.2d 29, 31, the rule is stated that:

> "'When none of several defendants resides in the county where the action is brought, they have a right, upon showing that fact—the action being one properly triable in the county of defendants' residence—to have the venue changed to the county where some or all of them reside. But a defendant may not have the action changed to the county of his residence in the absence of a showing that none of the other defendants is a resident of the county in which the action was brought, even though all the defendants join in the demand or consent to the change. In such case the causes will be retained if any of the defendants reside in the county of venue, provided the complaint attempts in apparent good faith to state a cause of action against the defendant or defendants in whose county of residence the action is commenced; and the subsequent dismissal of some of the defendants does not give the right to a change where the complaint as originally filed stated in good faith a cause of action against them.'"

And in Freeman v. Dowling, 219 Cal. 213, 216, 25 P.2d 980, 981, the court stated:

> "Upon a motion for a change of venue, however, if the allegations do no more 'than shadow forth the semblance of a cause of action,' they are 'proof against assault upon the ground that they' are 'sham and frivolous.' McClung v. Watt, 190 Cal. 155, 211 P. 17, 20. The more recent case of Mills v. Brown, 205 Cal. 38, 41, 269 P. 636, 637, quotes with approval from the McClung case as follows: 'It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith, and is not, *prima facie*, so glaringly and vitally defective as to be beyond correction by amendment.'"

In Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, 856, 252 P.2d 973, 975, the court restated the rule announced in Freeman v. Dowling, supra, and further held that:

> "In determining the question whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his residence 'the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that the plaintiff had a cause of action against the resident defendant.'" (Citing cases.)

It is alleged in the complaint herein that plaintiff is a licensed real estate broker; that defendants Jack D. Green, Lucille B. Green and Jessie D. Green resided and now reside in Fresno county; that said defendants were the lessees in possession of and had the right and option to purchase real property situated in Madera county known as the "Adobe Motel" and owned by defendants Edward Kaplan and Mary B. Kaplan; that pursuant to said right and option to purchase said Adobe Motel and on or about August 15, 1951, defendants Jack D. Green, Lucille B. Green and Jessie D. Green employed plaintiff to find a purchaser and to sell said Adobe Motel; that plaintiff and said defendants entered into an agreement in writing by the terms of which said defendants agreed to pay plaintiff as commission for his services five per cent of the selling price; that pursuant to said agree-

ment plaintiff found a purchaser who agreed to buy the property for $190,000; that said purchaser, Jerome Steinbaum, opened an escrow, signed escrow instructions and deposited $500 with a title company; that defendants Edward Kaplan and Mary B. Kaplan were fully advised of said sale and gave their approval and consent thereto; that defendant John D. Boyle, who was an attorney, represented the Kaplans and the Greens in said sale; that he fraudulently conspired with the Kaplans to eliminate the Greens from said sale and make a direct sale to Jerome Steinbaum and thereby cheat and defraud plaintiff out of his commission; that Boyle prepared a cancellation of the lease and option and a sixty day option agreement, which cancellation and option were executed on August 30, 1951, by the Greens by reason of the false representations of Boyle that said documents were necessary to expedite said sale; that thereafter defendant Steinbaum delayed in the performance of his agreement with plaintiff and defendants for the purchase of the motel until the said sixty day option had expired; that Steinbaum subsequently withdrew from said agreement; that as a result of said fraud and conspiracy the defendants Green were deprived of their right to sell the motel and were therefore incapable of performing their agreement with plaintiff; that as a result of said conspiracy the Kaplans were able to and did in fact effect a direct sale of the property to Steinbaum; that by reason of the premises plaintiff has been deprived of a commission amounting to $9,500 and has suffered damages in said sum.

[5] The facts pleaded in the complaint are sufficient to show that plaintiff attempted in good faith to state a cause of action against the defendants Jack D. Green, Lucille B. Green and Jessie D. Green. It further appears that the purported cause of action "is not *prima facie* so glaringly and vitally defective as to be beyond correction by amendment."

The order denying the motion for change of venue is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

131 Cal.App.2d 612

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Anthony PICARONI and Louis Chacon, Defendants and Appellants.

Cr. 1016.

District Court of Appeal, Fourth District, California.

March 18, 1955.

Defendants were convicted in the Superior Court, San Diego County, Dean Sherry, J., for burglary, and from the ensuing judgment and an order denying a new trial, they appealed. The District Court of Appeal, Griffin, J., held, inter alia, that even though door on fourth wall of garage was open at time of entry and theft, it was a building susceptible of burglary.

Affirmed.

1. Criminal Law ⇐202(1)

Where house and garage were separate buildings, acquittal on information count charging burglary of home did not bar conviction on remaining count for burglary of garage. Pen.Code, §§ 459, 460.

2. Burglary ⇐4

Even though door on fourth wall of garage was open at time of entry and theft, it was a building susceptible of burglary. Pen.Code, § 459.

3. Criminal Law ⇐1186(4)

Where defendant's attorney, when interviewing prospective jurors on voir dire, had inquired as to whether they would be prejudiced if it were shown that defendant had been guilty of prior felony, and, during trial, defendant's attorney, in cross-examining officer, inquired as to whether he had not received telephone call from defendant's parole officer, and there was overwhelming evidence of defendant's guilt of burglary charged, there was no prejudicial error in prosecution's introduction of evidence as to prior convictions which defendant had admitted before

trial. Pen.Code, § 1025; West's Ann. Const. art. 6, § 4½.

4. Criminal Law ⇐1165(1)

No prejudicial error resulted when investigator from district attorney's office came to jail to interview defendant charged with burglary after defendant, knowing that he was represented by counsel, requested district attorney to come to see him about something, where no confession of guilt had been obtained by virtue of anything that the investigator had said to defendant and no bad faith on the part of the prosecutor was indicated.

Anthony Picaroni, in pro. per.

Merideth L. Campbell, National City, for appellant Chacon.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants were jointly convicted of burglary by a jury on count one of an information and acquitted on another count. Defendant Picaroni admitted two and Chacon five prior felony convictions.

The evidence shows that the McKains, prosecution witnesses, resided at 2414 Chatsworth Boulevard, in San Diego. Their garage was a building separated from their residence. When they left their premises at about 8 p. m. on May 16, 1954, the garage door was left open, but they believed their home was locked. About 40 minutes thereafter they returned and found a blue truck backed up in their driveway and two men, wearing Navy T-shirts, with no hats, were seen loading boxes and crates on the truck. The lights were not burning in the garage nor on the truck, but a street light shone upon them. Mr. McKain walked up the driveway and believed the men were there servicing the soft-water tank. Defendant Picaroni, identified by McKain, came out of the garage and nonchalantly walked down the driveway past him and said: "Howdy". McKain asked what was going on and another man, claimed to be Chacon, came out of the garage and they both jumped in the truck and drove away at a high rate of speed with the lights turned off. Although McKain did not see Chacon's face, he noticed his general build and that he was wearing a T-shirt and no hat.

An inventory was taken of the house and garage. Two crates of dishes were missing from the garage. Jewelry, sterling silver, and electric kitchen utensils were missing from the house. The automatic washer had been disconnected from the wall in the garage. Within two miles of the McKain home, defendants Picaroni and Chacon were stopped by a police officer for speeding in a blue pick-up truck. Picaroni was bareheaded, wore a white T-shirt and khaki trousers. Chacon was similarly dressed but wore Levis. The officer checked the registration certificate of the truck and it belonged to Picaroni. He noticed some articles in the rear of the truck consisting of wooden crates, paper bags, etc. Picaroni said they were his and that he had been moving that day and was tired and was going to finish moving the next day. Defendant Chacon, identified by the officers, said he had been helping Picaroni because he had a family to support. The officers took the number of the truck and gave them a citation. The burglary was reported, and the following morning, at about 6 o'clock, the officers went to the home of Picaroni, where the blue truck was identified by the McKains. On it was found two boxes of Mrs. McKain's jewelry. Defendant Picaroni was awakened and asked about the burglary. He denied participation in it and explained his possession of the jewelry by saying that he had purchased it in Tijuana the previous evening while he was with one Shotwell, to whom he had previously loaned the truck. A box of silverware was recovered from the defendant Chacon's locker at his place of employment. Many of the articles taken were delivered by Chacon to the home of Mrs. Worrell, who testified Chacon said he wanted them stored there for a friend of his who was separated from her husband.

Plaster casts of footprints made on the McKain driveway were identified as those of Chacon and Picaroni. At the police station on May 17th, Picaroni stated he left home in his truck about 4 p. m. on May 16th and went to the Beach Comber's Cafe at Mission Beach, had a few drinks and met one Shotwell there; that Shotwell borrowed his truck and returned in 45 minutes with his girl friend and the three drove to Tijuana; that he left them and purchased a purse, and when he returned to the truck Shotwell showed him some jewelry and sold it to him for $11, and that this was the jewelry the officers found in his truck the next morning. He did not mention that Chacon was with them during this time or on this trip.

On the same day Chacon was picked up. He said that on May 16th he and Picaroni met at about 1:30 p. m. and were together for a while; that they agreed to go to Tijuana that evening at about 10 p. m.; that they so met, picked up Chacon's wife, and drove to Tijuana; that Picaroni purchased a lady's purse and Chacon purchased a set of earrings; that they subsequently parted; and that he did not see Picaroni again.

On May 18th, Picaroni was informed of Chacon's arrest and he materially changed his story. He then stated that he drove to Chacon's home on the afternoon of May 16th to return some fishing gear; that later they drove to Mission Beach and he let Chacon out at the amusement center; that he went on to the Beach Comber's Cafe and there met Shotwell; that Chacon later went there and told him he was leaving to meet his wife; that Shotwell borrowed the truck to move his girl friend's furnishings, and gave him the name and address where his girl friend lived; that he wrote it down in a note book; that after one hour he became concerned about his truck and decided to go to the address indicated in the note book; that he hitch-hiked a ride to the address and when he arrived there he saw his truck backed up in the driveway; that Chacon and Shotwell were there and just then the McKains returned home; that he and Chacon tried to "right" the washing machine in the garage and intended to remove the articles from the truck and replace them in the garage, but became frightened; that he greeted McKain, and Shotwell ran across the lot; that he and Chacon left in the truck with the lights on and were stopped by the officers as indicated by them; that they drove to Chacon's home, unloaded the articles, and then left with Chacon's wife for Tijuana to look for Shotwell; that the wife inquired about the jewelry that she saw on the seat of the truck and Picaroni stated it was his and he put it in his pocket. He then admitted that his previous story about purchasing it in Tijuana was false. He claimed they hid the wooden crates of dishes and the electric equipment until they could find out from Shotwell what had happened. He stated that Shotwell usually went to a certain bar in Tijuana and that he was well known to the owner of the Beach Comber's Cafe. On May 18th, Chacon informed the officers as to the whereabouts of the property and his attorney assisted them in recovering it. Efforts were made by the police officers to check on Shotwell, but neither the bartender nor the owner of the Beach Comber's Cafe knew him nor remembered him being present at the time indicated by defendants. The other persons interviewed by them had not seen Shotwell since 1953.

It appears that on July 12, 1954, an investigator in the district attorney's office visited Chacon in the jail, at his request. Chacon asked him: "If I 'cop out' on this, can I be sent back to Folsom as a parole violator? * * * I have a good case. They have nothing on me. The people couldn't identify me there". To this question the investigator replied: "Well, if you have a good case, why do you wish to plead guilty to this charge here?" Chacon replied that he was afraid that Judge Hewicker would send him up for life on two other cases, and mentioned that this was his "third time". When asked about his association with "this man" he said the "other fellow" had come to his house and brought Chacon back to the "other fellow's" house where they visited and then went to get some drinks; that on the way back the "other fellow" stopped the truck and went "back in the back", and the "other fellow" brought the stuff out and Chacon loaded it on, but "the people that were there, they came and they saw both of

us, but they refused to identify me". Chacon at that time did not mention Shotwell or any one else by name, but referred to him only as the "other fellow".

Defendant Chacon's wife testified at the trial that she, Picaroni and Chacon went to Tijuana that night in the truck; that she saw the jewelry and that Picaroni told her it belonged to a friend of his and he was trying to sell it for him; that Chacon told her the articles stored in the shed belonged to Picaroni and that they were storing them for him because he did not have any place to put them.

At the trial Chacon did not take the stand to testify. Picaroni was represented by separate counsel. His testimony was quite similar to the last story told the officers, with some embellishments. He stated that when he arrived at the McKain garage Chacon told him: "This Shotwell is going crazy. I don't know what he is doing"; that Chacon told him that while he was waiting for a bus at the amusement center, Shotwell came along with Picaroni's truck and asked him to help him move and he did so thinking that Shotwell was telling the truth, but he felt there was something wrong about the story so, after Shotwell ran, he and Picaroni started unloading the truck and picking up the parts of the washing machine when McKain walked up on them; that he did not mention Chacon in the first conversation with the officers because he did not want to involve him. Defendant Picaroni did produce a witness who testifed he picked "Toni" Picaroni up at the point indicated and drove him to the address stated on Chatsworth Boulevard the night of May 16th. The bartender and owner of the Beach Comber's Cafe both testified that Picaroni introduced Chacon to them on May 16th; that they did not know Shotwell; that he was never introduced to them that day; and to their knowledge he had never been in the cafe.

[1] On this appeal by defendant Picaroni, in propria persona, he raises the claim of double jeopardy, in that the two counts of the information charged but one burglary, growing out of the same transaction and act; that an acquittal on one count is a bar to a conviction on the other, and in violation of his constitutional rights, citing such authorities as People v. Stephens, 79 Cal. 428, 21 P. 856, 4 L.R.A. 845; Sutton v. United States, 5 Cir., 157 F.2d 661; State v. Smith, 43 Vt. 324; Wilson v. State, 24 Conn. 57; People v. Nor Woods, 37 Cal.2d 584, 586, 233 P.2d 897; People v. Hight, 94 Cal.App. 2d 100, 210 P.2d 270; and People v. Stickman, 34 Cal. 242.

From the amended information it appears that defendants were jointly charged in count one that on May 16, they entered the "home and building owned and occupied by the McKains at 2414 Chatsworth Boulevard"; and in the second count, that they did, on the same day "enter a building, to wit: a garage, owned and occupied" by the McKains, at the same address, "with intent then and therein, * * * to commit theft".

From the evidence it appears that the garage was a separate building from the dwelling house and that a cement walk led from one to the other. The distance they were apart is not clear from the testimony. Some of the articles stolen were taken from the garage and some from the dwelling. Upon what theory the jury found "defendants not guilty of entering the dwelling" but guilty of entering the garage, is not indicated. It clearly appears that defendants did enter and were found in the garage, and were endeavoring to and did remove certain personal property from it, and accordingly would properly be found guilty of burglary in the second degree if the jury believed the evidence produced by the prosecution. It may be that the jury felt that there was one Shotwell implicated in the burglary; that he was the one who entered the residence and took the remaining property and jewelry without the knowledge of these two defendants; and that these defendants did not aid and abet him in so doing. This may account for a "not guilty" verdict of first-degree burglary on the first count. It did return a verdict of guilty of second degree burglary on the second count, and the evidence fully supports the verdict.

Section 459 of the Penal Code provides that "Every person who enters any house, room, * * * shop, * * * barn, stable, outhouse or other building, * * * with intent to commit grand or petit larceny or any felony is guilty of burglary". It is clear from this section that the entering of the garage or the house, under the circumstances related, would be burglary. Section 460 of the Penal Code defines the degrees of burglary. Entering an inhabited dwelling house or building in the nighttime would be burglary of the first degree, and the entry of an uninhabited garage would be burglary of the second degree. Accordingly, the entry of the garage alone would not necessarily be an entry of the inhabited dwelling. People v. Olivar, 40 Cal.App.2d 48, 104 P.2d 382; People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400; People v. Stickman, 34 Cal. 242; People v. Patterson, 82 Cal.App. 96, 255 P. 209. In addition to the definition of the offense and the degrees of burglary indicated, the jury was furnished with verdicts as to each count. The degree fixed in the first count was specified as first degree, and in the second count as second degree, and the jury was specifically told to "note that the first count of the amended information applies to the McKain dwelling. The second count applies to the garage". Accordingly, it cannot be successfully maintained that the issues presented were inconsistent, confusing to the jury, or to the defendants, or that an acquittal on count one constituted an acquittal as to count two. The same question was fully considered by us and affirmed in People v. Amick, 20 Cal.2d 247, 125 P.2d 25. It was there held that under Penal Code section 954, providing that a verdict of acquittal of one or more counts shall not be deemed an acquittal of any other count, a verdict of not guilty upon a count charging manslaughter and of guilty upon a charge of negligent homicide is not inconsistent, although both charges grew out of the same act which resulted in the death of the same individuals. The two crimes are not identical. Under the code section, each count which charges a separate and distinct offense must stand upon its own merits, and the disposition of one count has no effect or bearing upon the verdict with respect to the others. See also People v. Dreyer, 71 Cal.App.2d 181, 162 P.2d 468.

[2] The claim that no corpus delicti was established is without merit as well as the statement that the garage contained walls only on three sides and was therefore not a structure or building coming within the provisions of section 459 of the Penal Code. The garage was possessed of a door on the fourth wall which, although open at the time, sufficiently classified the garage as a building susceptible of burglary. People v. Miller, 95 Cal.App.2d 631, 213 P.2d 534; People v. Buyle, 22 Cal.App.2d 143, 149, 70 P.2d 955. Contrary to the claims of Picaroni, no constitutional rights of his appear to have been violated. He was sufficiently informed of the charges against him. The court, district attorney, and defendant Chacon's counsel were not guilty of any prejudicial misconduct, and he had a fair trial. There is no showing that his conviction was founded on perjured testimony or that he was inadequately represented by his counsel.

[3] In the brief of defendant Chacon it is claimed that the prosecution willfully introduced evidence against him of his prior convictions after he had admitted those convictions, as pleaded, prior to the trial, citing People v. Jones, 31 Cal. 565; People v. Hartman, 62 Cal. 562; and Section 1025 Penal Code. He did not take the stand to testify. The claimed conversation above mentioned which took place in the county jail was between this defendant and the investigator of the district attorney's office. The portion of it, received in evidence over objection, related to the statement: "If I 'cop out' on this, can I be sent back to Folsom as a parole violator?" and where he mentioned that this was his "third time". It appears that only the first part of this conversation was offered by the prosecution and the latter portion was not offered for the reason that the prosecution believed it might be prejudicial error to receive it. The trial court apparently, not knowing the contents of the conversation, overruled defendant's objection as to its

admissibility, and then the investigator related the latter portion in reference to the "third time". No motion to strike any portion of the conversation was made. On a motion for a new trial the trial judge sensed the possible error of its reception and fully considered it.

The evidence shows that Chacon's counsel, when interviewing the prospective jurors on voir dire, asked: If "it was shown in this case that Chacon was guilty of a prior felony and served time in a penal institution, would that prejudice you in this matter to a degree that you would disregard the evidence * * * that you would try him today on the crime charged here—burglary, on what he did, and not what he did five or ten years ago?" It further appears that his attorney brought up this subject on cross-examination of one of the officers, wherein he asked him if he did not receive an anonymous telephone call from the "parole officer of Mr. Chacon". The court concluded, in view of the overwhelming evidence of Chacon's guilt of the offense charged, and in view of the first introduction of the subject matter by Chacon's attorney, that no prejudicial error resulted. We are in accord with this conclusion. People v. Wilkison, 30 Cal. App. 473, 158 P. 1067; People v. Tibbitts, 35 Cal.App.2d 669, 96 P.2d 812; People v. Gomez, 41 Cal.2d 150, 163, 258 P.2d 825; Art. VI, § 4½ Calif.Constitution.

[4] The last claim is that it was unethical for an investigator of the district attorney's office to interview defendant Chacon in jail after he knew that defendant had counsel representing him and failed to notify such counsel of this interview. This is an action against defendant Chacon for burglary and not one against an investigator of the district attorney's office for unethical conduct. It was this defendant who, knowing he was represented by his own counsel, requested the district attorney to come to see him about something. It may have been about better sleeping quarters or the menu, as far as the district attorney was concerned. At any rate, it appears that defendant Chacon was anxious to present some deal to the district attorney, in the absence of his counsel, whereby he might receive a lesser sentence by a plea of guilty. There is no evidence of any such agreement by the officer or district attorney. There is no contention that any claimed confession of guilt was obtained by virtue of anything that this investigator said to the defendant, and no bad faith on the part of the prosecutor is indicated. No prejudicial error resulted.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

131 Cal.App.2d 713

Josephine A. JOHNSON, Plaintiff and Respondent,

v.

F. Joseph BRAUNER, and Eugene W. Biscailuz, as Sheriff of the County of Los Angeles, State of California, John Doe and Jane Doe, Defendants,

F. Joseph Brauner, Appellant.

Civ. 20469.

District Court of Appeal, Second District, Division 3, California.

March 22, 1955.

Action by judgment debtor's wife to quiet title to real estate against judgment creditor's claims. The Superior Court, Los Angeles County, Louis H. Burke, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that fact that wife's homestead declaration did not contain statement, as required by statute, that she made declaration for joint benefit of herself and husband did not invalidate homestead.

Judgment affirmed.

1. Homestead ⇐95

A homestead declaration made pending litigation, after attachment but before a judgment, defeats the attachment.

2. Homestead ⇐206

Failure to pursue statutory procedure for sale of a homesteaded property renders execution sale void. West's Ann.Civ.Code, §§ 1245–1259.

3. Homestead ⇐43

When homestead declaration contains essence of statutory requirements, a reasonably successful attempt to follow prescribed form will be upheld, but essential matters may not be dispensed with. West's Ann.Civ.Code, § 1263.

4. Homestead ⇐1, 5

Policy underlying homestead legislation, whether providing for selection of homestead by a person during his lifetime or by court for his family after his death, is to provide a place for family and its surviving members, where they may reside and enjoy comforts of home, free from anxiety that it may be taken from them against their will, and to this end liberal construction of law and facts will be adopted. West's Ann.Civ.Code, §§ 1245–1259.

5. Homestead ⇐21

A homestead is not only for benefit of judgment debtor, but to protect each and every member of his family, even though wife declares upon husband's separate property.

6. Homestead ⇐166

It takes the signature of both spouses to effect an abandonment of homestead. West's Ann.Civ.Code, § 1243.

7. Homestead ⇐81

The homestead exemption extends to the entire interest of both spouses in property.

8. Partition ⇐12(3)

One spouse cannot destroy the total exemption of a homestead by device of a partition action.

9. Homestead ⇐43

That wife's homestead declaration did not contain statement, as required by statute, that she made declaration for joint benefit of herself and husband did not invalidate homestead. West's Ann.Civ.Code, §§ 1263, 3532.

Avery M. Blount, Los Angeles, for appellant.

Victor M. Reid, Jr., Los Angeles, for respondent.

ASHBURN, Justice pro tem.

This case turns upon the sufficiency of the form of a declaration of homestead made by plaintiff upon certain property owned by her and her husband as joint tenants.

On and prior to June 27, 1951 plaintiff-respondent Josephine A. Johnson and her husband James R. Johnson were vested as joint tenants with title to the real property in question; on that day the husband, without consideration, executed a quitclaim deed in favor of the wife, same being recorded two days later. On the day of the deed, the 27th, defendant-appellant Brauner caused an attachment to be levied upon the husband's interest. Neither party introduced any evidence to show which was done at an earlier hour,—delivery of the quitclaim or levy of attachment. But the fact, whatever it may be, has no controlling significance, as will appear. In due course the case giving rise to the attachment went to judgment against James R. Johnson (on December 28, 1951), and an abstract of judgment was recorded on January 8, 1952. Writ of execution issued and an execution sale of Mr. Johnson's interest in the property was held on April 28, 1952, defendant Brauner buying it in for $5,000. All this was done without any open recognition of the existence of a homestead on the property, i. e., without pursuing the method of subjecting homesteaded property to execution and sale as provided in Civil Code, sections 1245–1259.

[1–2] On July 14, 1951, plaintiff executed a declaration of homestead which was recorded on the 16th. This was after the attachment and before judgment. Counsel agree, and it is the law, that the homestead, if valid, would defeat the attachment. Yager v. Yager, 7 Cal.2d 213, 217, 60 P.2d

422, 106 A.L.R. 664; Lucci v. United Credit & Collection Co., 220 Cal. 492, 496, 31 P.2d 369; Jacobson v. Pope & Talbot, 214 Cal. 758, 760, 7 P.2d 1017. It is likewise indisputable that failure to pursue the statutory procedure for sale of a homesteaded property renders an execution sale void. 13 Cal. Jur. § 139, p. 565; City Store v. Cofer, 111 Cal. 482, 44 P. 168; Walton v. Walton, 59 Cal.App.2d 26, 30, 138 P.2d 54; Jacobson v. Pope & Talbot, supra. (The debt owing to Brauner did not fall within any of the exceptions to this rule, specified in section 1241, Civil Code.) If the homestead was invalid for any reason Brauner has good title; if it was valid he acquired no rights through his attachment and execution sale.

This action was brought by Mrs. Johnson to quiet title against the Brauner claims. The trial judge found "that it is true that said declaration of homestead contains all of the averments required by law", concluded that "the homestead of plaintiff on said premises is a valid one", and rendered judgment for plaintiff, from which judgment defendant has appealed.

The pertinent portions of the declarations are these: "That I, Josephine A. Johnson, do hereby declare that I am married, that my husband's name is James R. Johnson, and that I do now, at the time of making this declaration, actually reside on the premises hereinafter described, and that I claim said premises as a Homestead. * * That I estimate the actual cash value of said premises to be $7500.00. That no former Declaration of Homestead has been made by me, or by my husband, James R. Johnson, and the property so sought to be homesteaded, is a single residence with garage, located at 1510 Hill Street, Santa Monica, California." Appellant assails it upon the ground that it does not contain the statutory phrase "that she therefore makes the declaration for their joint benefit" found in section 1263, Civil Code. That section, so far as its mandatory provisions are concerned, is as follows:

"[Contents of declaration: Recorded declaration as evidence.] The declaration of homestead must contain:

"1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration and that she therefore makes the declaration for their joint benefit;

"2. A statement that the person making it is residing on the premises, and claims them as a homestead;

"3. A description of the premises;

"4. An estimate of their actual cash value; * * *."

And counsel invokes the strict construction rule which is voiced in Jones v. Gunn, 149 Cal. 687, 689, 87 P. 577, 578: "'While it is true that homestead and exemption laws are remedial, and, generally, must be liberally construed in order to effect the purposes intended thereby, yet it is equally true that homesteads and homestead exemptions are the creatures of statute, and that the failure to comply with any statutory requirement essential to a valid declaration of homestead cannot be supplied by liberal construction. Indeed, the Supreme Court of this state has generally held that homestead claimants must quite strictly comply with the statutory requirements as (formerly) to wife's acknowledgment (Beck v. Soward, 76 Cal. [527] 530, 18 P. 650); as to head of family (Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 77 Am.St.Rep. 206); as to residence on premises (Boreham v. Byrne, 83 Cal. [23] 27, 23 P. 212 [213]); as to statement of husband's failure to make declaration (Cunha v. Hughes, 122 Cal. [111] 113, 54 P. 535, 68 Am.St.Rep. 27) and as to estimate of the actual cash value of the premises, etc., Tappendorff v. Moranda, 134 Cal. [419] 421, 66 P. 491.'"

The trial judge impliedly found that the quoted statutory phrase is not necessary to a valid declaration. In his memorandum explaining the ruling he invoked the doctrine of substantial compliance, saying: "The Court finds that the declaration of homestead executed and filed by the plaintiff and referred to in the above entitled matter, substantially complies with the requirements of Civil Code, § 1263, subd. 1, notwithstanding the fact that such declara-

tion does not contain the precise words that the declaration is made for the joint benefit of husband and wife."

There are two apparently conflicting lines of decisions in this state, applying as occasion demands the "strict construction" or the "substantial compliance" rule. But they are not irreconcilable. And the necessity and basis for harmonizing them were foreshadowed in Southwick v. Davis, 78 Cal. 504, 21 P. 121, 122. It was there held that a statement in the declaration that the property " 'does not exceed in value the sum of $5,000' " was sufficient compliance with the requirement of "an estimate of their actual cash value". Civ.Code, § 1263, subd. 4. At page 507 of 78 Cal., at page 122 of 21 P. the court said: "Of course it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched and circumscribed and circumvented and beaten back. If the *facts* of an honest homestead claim be present, a substantial compliance with statutory provisions about making the claim public should be deemed sufficient." And at page 508 of 78 Cal., at page 122 of 21 P.: " 'Where these several acts have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to *advance* the object of the constitution and statute.' "

[3] A review of the authorities discloses that "when the declaration contains the essence of the statutory requirements" the courts have upheld a reasonably successful attempt to follow the prescribed form but that they have refused to dispense entirely with any of the essential matters set forth in subdivisions 1 to 4 of section 1263. This view is reflected by the opinion in Feintech v. Weaver, 50 Cal.App.2d 181, 183, 122 P.2d 606, 607, wherein the court says: "There are California cases in which it would seem that the expressed rule of liberality has not always been followed, particularly in decisions involving homestead declarations, and in which a rather strict compliance with the provisions of the code has been required. Most of these cases have held declarations invalid because of the *omission* of some one of the matters required by the code to be included in them." (Emphasis added.) In that case declarant used a printed form designed for a $5,000 homestead for the head of a family, but she was not in fact within that class. It was claimed that her statement that she was a family head destroyed the validity of the homestead. The declaration contained everything required of one who is not the head of a family and the court ruled as follows:

> "In the case at bar disregarding the recital that the claimant was the head of a family, treating it as surplusage, we have a declaration of homestead which contains every element required by the Civil Code, and which would be upheld without question in any court. To give this effect to the instrument secures to the defendant the right to a home, which the Constitution of our state (article XVII, section 1) enjoins the legislature to protect.
>
> "It is therefore concluded that the homestead declaration in this case should be given a liberal construction; that the recital in question is surplusage and unnecessary; and that there was a valid homestead upon the property in question which defeated the attempt of the judgment creditor to take title at an execution sale."

In the following cases, some of which are cited by appellant herein, the strict construction rule was applied in theory, but in fact it appeared that there had been a failure to comply substantially with one of the requirements of the statute.

In Jones v. Gunn, supra, 149 Cal. 687, 689, 87 P. 577, the description was such that it could not be ascertained just what property was claimed as a homestead.

In Reid v. Englehart-Davidson, etc., Co., 126 Cal. 527, 58 P. 1063, 1064, the declaration of "R. M. Reid" did not say that declarant was head of the family; it did say "'I am married, and that I do now actually reside, with my family, on that certain land'" etc. Held, that the sex of R. M. Reid did not appear and therefore the court could not infer that declarant was in fact head of the family, 126 Cal. at page 529, 58 P. at page 1064. And of course the amount of permissible exemption from debts depended upon that phase of the declaration.

Tappendorff v. Moranda, 134 Cal. 419, 421, 66 P. 491, 492, held insufficient an estimate of "'actual *cost* value'" given instead of the statutory "'actual *cash* value.'" A statement that the value was "$5,000 and over" was held to be bad in Ames v. Eldred, 55 Cal. 136. In Ashley v. Olmstead, 54 Cal. 616, there was no estimate of value; held fatal to declaration.

Morand v. Hoyerdahl, 38 Cal.App. 76, 175 P. 483, dealt with a failure to state, as required by the 1860 statute, that declarant was a married man, as well as head of a family.

Beck v. Soward, 76 Cal. 527, 18 P. 650, held an insufficient acknowledgment of a married woman's declaration to be fatal.

In Olds v. Thorington, 47 Cal.App. 355, 190 P. 496, there was no statement that declarant resided on the premises.

Boreham v. Byrne, 83 Cal. 23, 23 P. 212, holds that an allegation of possession is not the equivalent of a claim of residence.

In these cases—Booth v. Galt, 58 Cal. 254; Cunha v. Hughes, 122 Cal. 111, 54 P. 535; Hansen v. Union Savings Bank, 148 Cal. 157, 82 P. 768; Schuler-Knox Co. v. Smith, 62 Cal.App.2d 86, 144 P.2d 47; Crenshaw v. Smith, 74 Cal.App.2d 255, 168 P.2d 752—a wife's declaration contained neither a statement that the husband had not made a declaration nor one to the effect that she made it for their joint benefit. This was held fatal. A wife cannot file under section 1267, only under 1263, at page 159 of 148 Cal., at page 769 of 82 P. And the statement that the husband has made no declaration is necessary to evidence the fact that the spouses are not claiming two homesteads, at page 159 of 148 Cal., at page 769 of 82 P. Santa Barbara Lumber Co. v. Ross, 183 Cal. 657, 659, 192 P. 436.

In the case at bar the declaration does say that "no former Declaration of Homestead has been made by me, or by my husband, James R. Johnson". That is the important point. The only thing omitted is the phrase "that she therefore makes the declaration for their joint benefit." We will presently discuss the question of whether this phrase has any significance. But we first examine the substantial performance cases.

[4] That that approach should be made to the declaration seems self evident. "The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in [Re] Estate of Fath, 132 Cal. 609, 613, 64 P. 995, 997, 'to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors,' and to this end a liberal construction of the law and facts will be adopted by the courts." In re Estate of Kachigian, 20 Cal.2d 787, 791, 128 P.2d 865, 867. This phrase "a liberal construction of the law and facts will be adopted by the courts" (or its equivalent) also occurs in Lucci v. United Credit & Collection Co., supra, 220 Cal. at page 496, 31 P.2d at page 371 and Marelli v. Keating, 208 Cal. 528, 531, 282 P. 793. The law is the work of the legislature and the facts before the court are the result of the laborers of counsel. If they are to be liberally construed to promote the beneficent purposes of homestead legislation, does it not follow inevitably that the same rule of construction should apply to the acts of the homesteader himself, who often acts without aid of counsel and by use of a printed form? An affirmative answer lies in these cases.

Simonson v. Burr, 121 Cal. 582, 54 P. 87, upheld a declaration made jointly by husband and wife, over an objection that this was not permitted by the statute. There was no statement that the husband was head of the family. But the court recognized the implications of the writing and said at page 585 of 121 Cal., at page 88 of 54 P.: " 'The statute in reference to homesteads is a remedial measure, and, as such, is to be liberally construed;' and where the several acts required 'have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute.' Schuyler v. Broughton, 76 Cal. 524, 18 P. 436; Southwick v. Davis, 78 Cal. 504, 21 P. 121; Heathman v. Holmes, 94 Cal. 291, 29 P. 404. We think the declaration involved in this case shows a substantial performance of all the acts required by the statute, and that it was sufficient to create and establish a valid homestead upon the premises described therein. The declarants were husband and wife, and the husband was therefore the 'head of a family.' "

The same situation was presented in Parker v. Riddell, 41 Cal.App.2d 908, 916, 108 P.2d 88, and the homestead was upheld.

Rich v. Ervin, 86 Cal.App.2d 386, 390, 194 P.2d 809, 812 says: "Where the required acts have been substantially performed the construction of the declaration should be liberal, but there must be a substantial compliance or the declaration will be strictly construed."

Santa Barbara Lumber Co. v. Ross, supra, 183 Cal. 657, 659, 192 P. 436, held a slight departure from the statutory language did not vitiate the declaration because it was sufficient to accomplish the statutory purpose.

The opinion in Donnelly v. Tregaskis, 154 Cal. 261, 97 P. 421, was written by the same justice as Jones v. Gunn, supra. After citing that case to the effect that a description of the premises is essential to a valid declaration, Mr. Justice Henshaw said, at page 263 of 154 Cal., at page 422 of 97 P.: "To uphold homesteads, which are favored by the law, great liberality in this respect will be allowed; but the rule nevertheless obtains in full force that the description must be sufficient, so that the property may be identified in some legitimate manner."

In Re Estate of Geary, 146 Cal. 105, 108, 79 P. 855, reference in the description to certain nonexistent subdivisions was discarded as surplusage in order to sustain the homestead.

In Farley v. Hopkins, 79 Cal. 203, 206, 21 P. 737, 738, the wife's declaration stated " 'I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead.' " This was attacked because it did not use the statutory phrase "that she *therefore* makes the declaration for their joint benefit". (Emphasis added.) The court: "When she declares that her husband has made no declaration of a homestead, thus showing a state of facts under which she can make a declaration, and then explicitly makes it, it would seem that the reason of her doing so, if any was needed to be shown, is apparent. The statute does not require her, in addition to showing her competency to make it and that she does make the declaration, to go further, and state that the reason she makes it is that she is competent to do it because her husband has not made it." In other words, the substance rather than the exact form must control.

Schuyler v. Broughton, supra, 76 Cal. 524, 18 P. 436, 437, holding sufficient a statement that the value was " 'a sum not to exceed sixteen hundred dollars' ", says at page 525 of 76 Cal., at page 437 of 18 P.: "The concurrence of several things are necessary, under our statute, before exemption can be allowed. Where these several acts have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute." At page 526 of 76 Cal., at page 438 of 18 P.: "Not that the plain provisions of the statute can be dispensed with * * * but what is a substantial compliance with the terms of a stat-

ute is a question which is often to be determined by the nature, object, and effect of the act or acts set up as constituting compliance. We are far from commending the statement as to value, used in the case, as a precedent to be followed, and wish to be distinctly understood as only holding that it is not so positively bad as to render the declaration void."

In re Stotler, D.C.S.D.Cal., 114 F.Supp. 301, 302, 304–305, holds a substantial compliance with the statute to be enough to make a valid declaration. And " 'I estimate the actual cash value of the land and premises hereinabove described to be ——— ($———) Dollars' " was held to be good as it meant no value.

Michels v. Burkhard, 47 Cal.App. 162, 190 P. 370. The wife placed a homestead on the husband's separate property; the form of declaration complied with the statute in every respect but the lower court held that the wife did not in fact act for the joint benefit of the husband and herself and that the attempt to declare a homestead was ineffective. The ruling was reversed and the court said at page 165 of 47 Cal.App., at page 371 of 190 P.: "* * * as a matter of law, when the said declaration of homestead was so made and recorded, it actually placed the property described therein beyond the reach of creditors of her husband, or sale upon execution for his debts, etc., as effectively as though he had filed the same himself. To this extent, therefore, the declaration was made for their joint benefit. We think this legal implication, even standing alone, sufficient to support the statement that the declaration was made for their joint benefit."

[5–8] Respondent insists in the case before us that the implications of her declaration are sufficient to supply the place of a declaration that she acted for the joint benefit of herself and husband. It is true that a "homestead is not only for the benefit of the judgment debtor, but to protect each and every member of his family." Yager v. Yager, supra, 7 Cal.2d at page 219, 60 P.2d at page 425. And, as held in Michels case, supra, this is true even though the wife declares upon the husband's separate property. See, also, 13 Cal.Jur. § 14, p. 433. It takes the signature of both spouses to effect an abandonment, Civ. Code, § 1243; 13 Cal.Jur. § 85, p. 513. And the exemption extends to the entire interest of both in the property. It has been specifically so held with respect to joint tenancies. This in the cases of Swan v. Walden, 156 Cal. 195, 200, 103 P. 931; Watson v. Peyton, 10 Cal.2d 156, 159–160, 73 P.2d 906; In re Miller, D.C.S.D.Cal., 27 F.Supp. 999. And one of the spouses cannot destroy the total exemption through the device of a partition action. Walton v. Walton, 59 Cal.App.2d 26, 36, 138 P.2d 54.

[9] The inescapable legal implication of a homestead declared by the wife is that the act is performed on behalf of the husband as well as herself. What function does a specific assertion of the fact upon the record have? It furnishes no useful information to creditors and says nothing which the law does not plainly imply. It does not bind the creditor in any respect. Apprate v. Faure, 121 Cal. 466, 467, 53 P. 917; Rich v. Ervin, supra, 86 Cal.App.2d 386, 390, 194 P.2d 809; 13 Cal. Jur. § 129 at p. 558; § 130 at p. 559; § 132, p. 560. Nor can it be gainsaid by either spouse directly or indirectly. It neither adds to nor detracts from the legal effect of the wife's act. It is a useless formality if pursued. The same code which prescribes it says: "The law neither does nor requires idle acts." Civ.Code, § 3532.

We hold that the rule of liberal construction applies to a declaration of homestead; that a wife's declaration containing all prescribed matters other than the assertion "that she therefore makes the declaration for their joint benefit" accomplishes the full purpose of the statute; that its omission does not invalidate the homestead; that the plaintiff at bar did create a valid homestead upon the premises described in the pleadings; and that the court properly quieted her title against the claims of the defendant.

Judgment affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

131 Cal.App.2d 666

ESTATE of Hugh Francis HERBERT, also known as Hugh F. Herbert, also known as Hugh Herbert, Deceased.

Edward F. HERBERT, Appellant,

v.

MOTION PICTURE RELIEF FUND, Inc., a California corporation, Respondent.

Civ. 20688.

District Court of Appeal, Second District, Division 1, California.

March 21, 1955.

Hearing Denied May 18, 1955.

Proceeding in the matter of the estate of deceased testator, wherein brother of testator filed a petition to determine persons to whom distribution should be made. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered judgment adverse to brother, and he appealed. The District Court of Appeal, White, P. J., held that where will executed more than thirty days before testator's death bequeathed remainder of estate of testator to charitable corporation, and codicil executed less than thirty days before testator's death bequeathed contents of safe deposit box to individual, section of Probate Code providing that execution of codicil referring to previous will has effect of republishing will as modified by codicil, did not invalidate bequest to charitable corporation, under provision of section of Probate Code invalidating charitable devises or bequests made less than thirty days before testator's death.

Judgment affirmed.

1. Wills ⇐184(1)

Bequests made in will should not be set aside or disturbed by a codicil unless absolutely necessary to give effect to codicil. Probate Code, § 25.

2. Wills ⇐184(1)

A doubtful expression or inconsistent disposition in a codicil will not serve to revoke a clear disposition made by will. Probate Code, § 25.

3. Wills ⇐199

Section of Probate Code providing that execution of codicil referring to previous will has effect of republishing will as modified by codicil, should be so construed as to carry out, if reasonably possible, testator's intention. Probate Code, § 25.

4. Wills ⇐16

Where will executed more than thirty days before testator's death bequeathed remainder of estate of testator to charitable corporation, and codicil executed less than thirty days before testator's death bequeathed contents of safe deposit box to individual, section of Probate Code providing that execution of codicil referring to previous will has effect of republishing will as modified by codicil, did not invalidate bequest to charitable corporation, under provision of section of Probate Code invalidating charitable devises and bequests made less than thirty days before testator's death. Probate Code, §§ 25, 41, 43, 225.

Frederick W. Mahl, Jr., Los Angeles, for appellant.

Alpern & Vallier, Robert Vallier, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Los Angeles County upon a petition filed by appellant to determine the persons to whom distribution should be made. The case comes to us upon an agreed statement of facts which reflects that on February 27, 1950, testator made a Will bequeathing $10,000 in cash to one Rose Epstein Herbert, and the remainder of his estate to respondent Motion Picture Relief Fund, Inc., a charitable corporation.

On February 18, 1952, testator executed a codicil bequeathing the contents of a safe deposit box to one Tom Flynn. At the time of decedent's demise, the value of the estate was in the sum of $163,242.31, and included in said value was the contents of the safe deposit box in the sum of $8,500 in cash, which is 10% of the entire net distributable estate.

Less than 30 days after executing the said codicil, and on March 12, 1952, testator died. Thereafter, on April 25, 1952, the court below made its order admitting

the Will and said codicil to probate "as the Last Will and Testament of said Deceased."

The testator left as his heirs at law and next of kin the appellant, Edward F. Herbert, who is a brother of decedent, and Grace Van Schyndel, who is a niece of the decedent, neither of whom were mentioned or specifically referred to in the above-mentioned Will or codicil.

Judgment was rendered that respondent Motion Picture Relief Fund, Inc. is entitled to distribution of the full balance of the net distributable estate, pursuant to the foregoing Will and codicil, and that appellant Edward F. Herbert and Grace Van Schyndel are entitled to no distributive share in said estate. This appeal is from the judgment.

Appellant's contention on appeal is thus stated by him:

"It is the position of the Appellant that the Codicil of February 18, 1952, republished the Will of February 27, 1950; that the legal effect of such republication is that the Will and the Codicil are to be regarded as a single instrument executed as of the date of the Codicil; that the testamentary disposition to the charity, having thus been made within 30 days of the Testator's death, falls within the restrictions of Section 41 of the Probate Code with the result that the charity is not entitled to distribution but, rather, that distribution of the residual estate must be made to the heirs at law and next of kin pursuant to Section 225 of the Probate Code."

While the efforts of respective counsel and research by us have not been rewarded with the discovery of any case in which the precise point here involved has been squarely decided in this state, we are persuaded that a logical approach to the problem and reference to California cases discussing the principle involved, lead to the conclusion that the judgment must be affirmed.

Section 25 of the Probate Code provides: "The execution of a codicil referring to a previous will has the effect *to republish* the will as modified by the codicil." (Emphasis added.)

[1–4] We are persuaded, however, from a review of the cases having to do with the principle now engaging our attention, that bequests made in a Will should not be set aside or disturbed by a codicil unless absolutely necessary in order to give effect to the codicil, and that a doubtful expression or inconsistent disposition in a codicil will not serve to revoke a clear disposition made by the Will. Nowhere in the record before us can it reasonably be discerned that the codicil in question was intended to disturb the bequest made in the original Will to the charitable fund. Section 25 of the Probate Code should be so construed as to carry out, if possible in reason to do so, the intention of the testator. We are asked by appellant to give a construction to the codicil that would destroy the charitable bequest and thus thwart the evident testamentary design of the testator. The codicil did not in any manner change the terms of decedent's Will as to the bequest to the charitable fund, nor enlarge the portion of his estate subject to the provision for charity. In fact, the effect of the bequest made in the codicil operated to cut down slightly the residue available for the charitable fund, but did not, in our opinion, invalidate the bequest made to charity, In re Estate of McCauley, 138 Cal. 432, 434, 435, 436, 437, 71 P. 512; In re Estate of Pence, 117 Cal.App. 323, 330, 4 P.2d 202; In re Estate of McDole, 215 Cal. 328, 331, 10 P.2d 75.

From the foregoing we conclude that the residual bequest to respondent charity in the original Will of decedent, dated February 27, 1950, was not republished by the codicil later executed by testator on February 18, 1952, within 30 days of the latter's death. The bequest in the original Will to respondent charity was executed more than six months prior to testator's death, and by reason of the provisions of Probate Code, section 43, said bequest is valid against the claims of the surviving niece and appellant, the surviving brother of the testator.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA and the Executive Officer of the State Lands Commission of the State of California, Petitioners,

v.

The SUPERIOR COURT of the State of California in and for the COUNTY OF SACRAMENTO, Respondent.

Civ. No. 8779.

District Court of Appeal, Third District, California.

March 21, 1955.

Rehearing Denied April 13, 1955.
Hearing Granted May 18, 1955.*

The State Lands Commission invited bids for oil and gas leases on tide and submerged lands and accepted a bid of a corporation which proposed to drill from artificial islands erected on the lands. A petition for a writ of mandate was thereafter filed by a third party and the present proceeding in prohibition was instituted by the Commission, and a similar action was instituted by the corporation. The District Court of Appeal, Peek, J., held that the Public Resources Code did not prohibit a lease whereunder the lessee proposed to drill on tide and submergd land from an artificial island, that charges of pollution and interference with navigation and fisheries could not be considered at this time and that a writ of prohibition was properly issued.

Writ issued.

1. Mines and Minerals ⇐6

Under the Public Resources Code the State Lands Commission has no general power to permit offshore drilling or to permit drilling in submerged lands or tidelands merely for the purpose of producing oil, and before it may advertise for a lease, it must find that oil is or may be found in the area, and that such oil is being or may be drained by other wells but if it does not so find it still has only limited powers as to drilling and cannot authorize a construction of a new pier for drilling purposes but can permit drilling from a site located on "filled lands". Public Resources Code, §§ 6873(a), 6872.

2. Mines and Minerals ⇐5

The Public Resources Code permitting oil and gas lessees of tide and submerged lands to drill wells on "filled lands" authorizes a lease whereunder the lessee proposes to drill upon from an artificial man-made island. Public Resources Code, § 6873.

See publication Words and Phrases, for other judicial constructions and definitions of "Filled Lands".

3. Courts ⇐92

A decision upon a point in an opinion was "judicial dictum" as distinguished from "obiter" where the record of the case showed that the point was presented, argued and expressly passed upon.

See publication Words and Phrases, for other judicial constructions and definitions of "Judicial Dictum" and "Obiter".

4. Statutes ⇐219

The administrative interpretation of a statute is entitled to great weight and will be upheld unless palpably erroneous.

5. Statutes ⇐219

Where the attorney general on two occasions had advised the Public Lands Commission that artificially constructed islands constituted "filled lands" within the Public Resources Code and the Commission had followed and applied that interpretation, the interpretation was entitled to great weight and would be upheld unless palpably erroneous. Public Resources Code, § 6873.

6. Mines and Minerals ⇐6

Under that statute permitting oil and gas lessees of tide and submerged lands to drill wells on filled lands, the statute by specifically limiting drilling to a pier as already constructed for that purpose and by placing no restriction upon filled lands, whether filled prior to the adoption of the statute or to be thereafter filled placed no such limitations upon filled lands as were placed upon pier sites, and did not intend to require that filled lands be only those already existing and hence thereby impliedly permitted filling of lands for drill site purposes. Public Resources Code, § 6873.

* Dismissed Sept. 1, 1955.

7. Mines and Minerals ⇐5

A party was not entitled to prevent the State Lands Commission from leasing tide and submerged lands for the purpose of oil and gas on which the lessee proposed to drill from artificial islands on the ground of pollution and interference with navigation and fisheries, since such matters became material only if and when the islands had been constructed and did in fact, pollute or impair navigation. Public Resources Code, §§ 6872, 6873, 33 U.S.C.A. § 403.

8. Mandamus ⇐168(2)

To warrant the issuance of a writ of mandamus against the State Lands Commission against the leasing of tide and submerged lands for oil and gas the petitioner must show either that the Commission had erred in law, had clearly abused its discretion or had acted clearly in excess of its jurisdiction.

9. Prohibition ⇐3(3)

Where petitioner by virtue of restraint provisions in alternative writ of mandate had tied hands of Public Lands Commission as regards its statutory duty of leasing tide and submerged lands to prevent drainage of oil therefrom and thereby in effect enjoined the Commission from carrying out its statutory duty, prohibition would lie on the ground that appeal was not an adequate remedy.

10. Prohibition ⇐10(1)

"Lack of jurisdiction" as respects the issuance of prohibition, is not limited to fundamental situations but may be applied where though the court has jurisdiction over the subject matter and parties in the fundamental sense it has no jurisdiction to act except in a particular manner or to give certain kinds of relief or to act without the occurrence of certain procedural prerequisites.

See publication Words and Phrases, for other judicial constructions and definitions of "Lack of Jurisdiction".

11. Prohibition ⇐5(3)

Where the Public Lands Commission had found that existing conditions were such that an oil and gas lease ought to be given to prevent loss to the state on tide and submerged lands and the Commission had followed all the requisite statutory provisions, prohibition would lie to prevent further action in mandamus proceeding pending in the Superior Court which had tied the hands of the Commission and prevented it from performing its statutory duty. Public Resources Code, §§ 6872, 6873.

Attorney General by George G. Grover, Deputy Atty. Gen., for petitioner.

Hill, Farrer & Burrill, Los Angeles, Price, Postel & Parma, Santa Barbara, for real party in interest.

PEEK, Justice.

This controversy arises out of the following matters: The petitioner, hereinafter referred to as the Commission, found that certain State-owned tide and submerged lands located near Rincon in Ventura County, were known to, or believed to contain oil and might be, or were being drained of oil by means of wells upon adjacent land. It thereupon invited bids for an oil and gas lease of said lands, and accepted a bid submitted by Richfield Oil Corporation, a corporation, hereinafter referred to as Richfield, which, among other things, stated it proposed to drill from artificial islands erected on said submerged lands. Thereafter one Hugh B. Martin, hereinafter referred to as real party, filed his petition for a writ of mandate in the Sacramento County Superior Court, and said court issued its alternative writ. Shortly thereafter, this proceeding in prohibition was instituted by the Commission. A similar action was instituted by Richfield, and alternative writs of prohibition were thereupon issued by this court.

The contentions of real party raised here are the same as those he raised in the respondent superior court and before the Commission at the meeting at which the Richfield bid was accepted, and are (1) that the words "filled lands" as used in section 6873(a) of the Public Resources Code, do not authorize drilling for oil from artificial islands as provided in said proposed lease; (2) that said code section

does not authorize said lease for the further reason that the operation under the same would pollute and contaminate the tidal waters, thereby interfering with bathing, fishing and navigation; and, (3) would impair recreational and residential use of the beaches.

It is the contention of petitioner in the matter now before this court that the mandamus proceeding in the superior court is wholly without the jurisdiction of that court since it can take no action under the law other than to discharge the alternative writ it previously issued and dismiss the proceeding for the reasons that (1) the so-called "islands" constitute filled lands within the meaning of the Public Resources Code, and (2) that real party's contentions that such islands will substantially interfere with navigation and fishing, and will result in pollution of the beaches, are prophecies only, and since the lease contains provisions against the occurrence of such nuisances, any attempt to litigate the question of nuisance is premature.

By the provisions of section 6872 of the Public Resources Code, the circumstances which authorize the Commission to lease such lands for drilling are as follows:

> "Whenever it appears to the commission that oil or gas deposits are known or believed to be contained in any such lands and may be or are being drained by means of wells upon adjacent lands, the commission shall thereupon be authorized and empowered to lease any such lands * * *."

Section 6873 provides the form of lease and sets out the conditions which the lease must contain and which govern the manner in which the drilling shall be conducted. Specifically it requires that each well drilled under a lease—

> "[S]hall be drilled only upon filled lands shall be slant drilled from an upland or littoral drill site to and into the subsurface of the tide or submerged lands covered by the lease, or shall be drilled or slant drilled to and into the subsurface of tide or submerged lands covered by the lease, from a drill site located upon any pier heretofore constructed for drilling purposes and available for such drilling upon any tide or submerged lands described in any valid existing lease heretofore issued * * *. The derricks, machinery, and any and all other surface structures, equipment, and appliances shall be located only upon filled lands or upon the littoral lands or uplands, or upon any pier heretofore constructed and available for such drilling upon any tide or submerged lands described in any valid existing lease * * *."

Additionally that section expressly declares that, "Pollution and contamination of the ocean and tidelands and all impairment of and interference with bathing, fishing or navigation * * *" is prohibited as is likewise prohibited any "impairment of or interference with developed shore line recreational areas or residential areas * * *."

[1] It is thus apparent from the wording of said statute that the Commission has no general power to permit offshore drilling nor to permit drilling in submerged lands or tidelands merely for the purpose of producing oil. Before it may advertise for a lease, it must find that oil is, or may be, found in the area proposed to be leased; and additionally, it must find that such oil is being, or may be, drained by other wells. However, if it does find such conditions to exist, it still has only limited powers as to the drilling which it may permit to be done under its lease. It can permit slant drilling from littoral lands or uplands. It can permit drilling from a pier already constructed for drilling purposes, but apparently it cannot authorize the construction of a new pier for drilling purposes. It can permit drilling from a site located on "filled lands".

[2, 3] Turning to the first contention by real party, that the statute does not authorize a lease whereunder the lessee proposes to drill from an artificial, man-made island, we find that a like contention was advanced in the case of Monterey Oil Co. v. City Court, 120 Cal.App.2d 31, 260 P.2d 846, 850. In that case prohibition was sought to restrain the City of Seal Beach

from prosecuting the oil company for asserted violation of a local ordinance prohibiting the drilling for oil within the city limits. In the course of its opinion the court there said:

> "[T]he commission determined herein that the best interests of the state would be served by the drilling of a well or wells from filled lands to be located in the tidelands approximately one and one-half miles, more or less, distant from the shore and at a site to be approved by the War Department. We have no hesitancy in holding that the operations being conducted by the appellant herein [lessee] are upon an 'island' which constitutes filled lands within the purview of the statute."

Real party claims that the foregoing is dictum. But at least it is "judicial dictum" as distinguished from obiter since the record of the case shows that the point was presented, argued and expressly passed upon. See People's Lumber Co. v. Gillard, 5 Cal.App. 435, 90 P. 556.

[4, 5] Here it should be noted that the Attorney General, on two occasions, has advised the Commission that artificially constructed islands constitute "filled lands" within the meaning of section 6873, and the Commission has followed and applied that interpretation. By so acting, it has posed the further rule that administrative interpretation is entitled to great weight and will be upheld unless palpably erroneous. Shealor v. City of Lodi, 23 Cal.2d 647, 145 P.2d 574; People v. Southern Pac. Co., 209 Cal. 578, 290 P. 25.

[6] Furthermore it would appear that under ordinary rules of construction the language of the statute must mean that by specifically limiting drilling to piers already constructed for that purpose, and by placing no restriction upon filled lands, whether filled prior to the adoption of the section or to be thereafter filled, the Legislature has indicated it placed no such limitations upon filled lands as were placed upon pier sites. It also appears that the Legislature, in permitting drilling from "filled lands", did not require that such lands be only those already existing and hence impliedly permitted filling of lands for drill site purposes.

[7] In answer to the objections of real party based upon the charge of pollution and interference with navigation and fisheries, petitioner argues that these matters are mere prophecies and become material only if and when the islands have been constructed and do, in fact, pollute or impair. In the leading case of Boone v. Kingsbury, 206 Cal. 148, at page 183, 273 P. 797, at page 812, the court said:

> "With full knowledge of the subject, the legislature found that there was nothing in the drilling and operation of oil wells conducted in the manner provided by the statute that would substantially impair the paramount public interest in the lands and water remaining, and upon a consideration of the case we find nothing that would justify us in holding that the finding of the Legislature, which is conclusive in such matters (People v. California Fish Co., 166 Cal. 576, 138 P. 79), is not fully supported by the facts. To justify an interference by courts with the right of the Legislature to alienate tide or submerged lands it must appear that such grants do or will impair the power of succeeding Legislatures to regulate, protect, improve, or develop the public rights of navigation and fishing. City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277. It cannot be seen that the legislation in the instant case will embarrass immediate or remote legislation."

It should be further noted that the act under consideration in the Boone case reserved for the State, as does the Public Resources Code, supervisory control over the operation under the lease there involved, and the court in that case also held:

> " 'The words of the Constitution are to be considered as incorporated in the grant or patent (granting tide lands) the same as if inserted therein. They become a part of it and qualify it, so

that the estate granted is limited to the permitted uses.' Forestier v. Johnson, 164 Cal. 24, 127 P. 156. So, in the instant case, should said permittees offer any substantial interference incompatible with navigation, fishing, or commerce, the state and federal government would have the unquestionable right to abate it." 206 Cal. at page 184, 273 P. at page 813.

The contention of real party in this regard is noted in the opening brief of Richfield in action number 8780, Richfield Oil Corp. v. Superior Court, Cal.App., 281 P.2d 64, with this pertinent comment: "The vice of real party's position lies in the fact that, should he obtain the relief which he seeks [in his mandate action], the State's power would be hamstrung even if his prophecies should ultimately turn out to be wrong." Additionally, under the provisions of Section 403 of Title 33, U.S.C.A., Congress has conferred power upon the U. S. Army Engineers to determine whether or not that which is proposed to be done in navigable waters under the jurisdiction of the United States will or will not obstruct navigation. And here the record shows that the approval or permit of the Army Engineers has been provided for.

For the reasons heretofore set forth, we conclude as did the court in the Monterey Oil Co. case that the artificial islands constructed as proposed by Richfield come within the meaning of "filled lands" as those words are used in the code sections; and that the Commission has properly exercised its delegated duties to protect and conserve the oil resources of the State. Although the provisions of the statute are couched in permissive terms, yet when the purpose of the legislation is considered it is clear that when the Commission has determined that conditions exist which warrant leasing, it is then charged with the duty to lease in order that loss to the State be avoided.

[8] It is conceded that the proceeding in the respondent court does not come within the purview of section 1094.5 of the Code of Civil Procedure, but, to the contrary, is the traditional mandamus proceeding sought as against an administrative board. Therefore to warrant issuance of its writ by the respondent court, the petitioner in mandate there (the real party here) was under the necessity of showing either that the Commission had erred in law, had clearly abused its discretion or had acted clearly in excess of its jurisdiction. 2 Cal.Jur.2d 359, Sec. 219.

[9] As noted by petitioner here, without any showing of error of law, abuse of discretion or act in excess of jurisdiction on the part of the Commission, the respondent court has, by virtue of the restraint provisions contained in its alternative writ of mandate, tied the hands of the Commission as regards its statutory duty of leasing tide and submerged lands to prevent drainage therefrom. The result then is precisely as if, without cause, the respondent court had enjoined the Commission from carrying out its statutory duty. It is well settled that in such a case prohibition will lie, and that an appeal is not an adequate remedy.

In the case of Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 P. 845, 846, the court had under consideration a statute creating a reclamation district upon which was imposed the "duty * * * to construct a levee". An action was instituted to restrain the building of the levee, and the superior court granted a temporary injunction restraining the construction activities of the district. Following a petition to the Supreme Court, a writ of prohibition was issued, and in its opinion that court pointed out that since the statute was constitutional, the performance by the district of its statutory duty could not be enjoined. Specifically, the court held:

"It is true that in the case at bar the petitioner might by appeal review the correctness of any judgment or order enjoining it, but we do not think that such appeal would, under the circumstances here described, be an adequate remedy. Glide v. Superior Court, 147 Cal. 21, 81 P. 225. To say nothing of the burden and expense of a trial of issues which, as we have seen, are not properly triable in the

superior court, it may be observed that the preliminary injunction already issued ties the hands of the petitioner, and that an appeal from such injunction would not affect its operative force pending the appeal. If the petitioner is entitled to proceed with the work of building the levees which the statute commands it to build, an appeal would obviously not give adequate relief." 171 Cal. at page 683, 154 P. at page 850.

[10] Again in the leading case of Abelleira v. District Court, 17 Cal.2d 280, 109 P.2d 942, 947, 132 A.L.R. 715, the Supreme Court pointed out the distinction between lack of jurisdiction in its most strict or fundamental sense (absence of power to hear or determine the case or an absence of authority over the subject matter or the parties), and the lack of jurisdiction or power to act except in a certain manner or to give certain kinds of relief—the lack of jurisdiction petitioner here asserts with reference to the respondent superior court. In that case the court held that,

"[I]n its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determining the right to review by *certiorari,* restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." See also Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8.

Therefore, said the court—

"The writ of prohibition is not refused nor held in abeyance because the lower tribunal may ultimately realize the error of its assumption of jurisdiction; it is granted at the time the act in excess of jurisdiction occurs." 17 Cal.2d at page 304, 109 P.2d at page 955.

[11] Since in the instant case the Commission has found that existing conditions are such that a lease ought to be given to prevent loss to the State, and since artificial filled land islands constitute filled lands within the meaning of section 6873 of the Public Resources Code, and since the Commission has followed all of the requisite statutory provisions, and in the language of the statute has provided for the very contingencies which real party asserts may come to pass, it necessarily follows that prohibition will lie to prohibit further action in the mandamus proceeding now pending in the respondent court.

By reason of what has heretofore been said, we deem it unnecessary to discuss any of the remaining matters raised by the parties.

The writ will issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

RICHFIELD OIL CORPORATION, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF SACRAMENTO, Respondent.

Civ. 8780.

District Court of Appeal, Third District, California.

March 21, 1955.

Rehearing Denied April 13, 1955.

Hearing Granted May 18, 1955.*

O'Melveny & Myers and Mervyn W. Phelan, Los Angeles, for petitioner.

Hill, Farrer & Burrill, Los Angeles, Price, Postel & Parma, Santa Barbara, for real party in interest.

PEEK, Justice.

The petition herein raises substantially the same issues as were decided in State Lands Commission of the State of Califor-

* Dismissed Sept. 1, 1955.

nia and the Executive Officer of the State Lands Commission of the State of California v. Superior Court of the State of California in and for the County of Sacramento, Cal.App., 281 P.2d 59, and hence is controlled by that decision.

The writ will issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

131 Cal.App.2d 669

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Trinidad VERA, Defendant and Appellant.

Cr. 5296.

District Court of Appeal, Second District, Division 1, California.

March 21, 1955.

Defendant was convicted of assault with a deadly weapon on her daughter, of assault by means of force likely to produce great bodily injury, and of mayhem. The Superior Court of Los Angeles County, Mildred L. Lillie, J., entered judgments on the verdicts and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that statute providing that neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding, to which one or both are parties, except with consent of both, or in cases of criminal violence on one by the other, or on the child or children of one by the other, did not require exclusion of testimony of mother's husband, who was not the natural father of the mother's daughter, against mother without her consent.

Judgments and order affirmed.

1. Witnesses ⇐52(7)

In prosecution of mother for assault with a deadly weapon on her daughter, assault by means of force likely to produce great bodily injury, and mayhem, statute providing that neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with consent of both, or in cases of criminal violence on one by the other, or on the "child" or children of one by the other, did not require exclusion of testimony of mother's husband, who was not the natural father of the mother's daughter. Pen. Code, § 1322.

See publication Words and Phrases, for other judicial constructions and definitions of "Child".

2. Criminal Law ⇐1186(4)

Judgment will not be set aside on ground of improper admission or rejection of evidence unless, after examination of entire cause, including evidence, reviewing court shall be of opinion that error complained of has resulted in miscarriage of justice. West's Ann.Const. art. 6, § 4½.

3. Criminal Law ⇐1186(4)

In prosecution of mother for assault with a deadly weapon on her daughter, assault by means of force likely to produce great bodily injury, and mayhem, alleged error in admission of testimony of the mother's husband, who was the stepfather of the daughter, against mother without her consent, was not prejudicial error, where facts established by husband's testimony were all established by testimony of the daughter and by detailed confessions of the mother. Pen.Code, §§ 203, 1322; West's Ann.Const. art. 6, § 4½.

4. Witnesses ⇐255(5)

Where tape recording was made of conversation of defendant with deputy sheriff, and legal statement reporter listened to recording, transcribed conversation, typed mimeograph stencils, and made mimeographed copies, and deputy sheriff testified that he required mimeographed copy to refresh his recollection, it was not error to permit deputy sheriff to

read mimeographed copy to jury. West's Ann.Code Civ.Proc. § 2047.

5. Witnesses ⇐255(5)

Where tape recording was made of conversation of defendant with deputy sheriff, and legal statement reporter listened to recording, transcribed conversation, typed mimeograph stencils, and made mimeographed copies, and deputy sheriff testified that he was present at conversation, required mimeographed copy to refresh his recollection, and that mimeographed copy contained a correct transcription of conversation, and reporter testified that mimeograph stencil was right, proper foundation was laid for reading of mimeographed copy to jury. West's Ann. Code Civ.Proc. § 2047.

6. Witnesses ⇐255(5)

Where tape recording was made of conversation of defendant with deputy sheriff, and legal statement reporter listened to recording, transcribed conversation, typed mimeograph stencils, and made mimeographed copies, and deputy sheriff used mimeographed copy to refresh his recollection of conversation, prosecution properly refrained from offering mimeographed copy and properly relied on primary evidence of conversation, as shown by testimony of deputy sheriff, though defendant, if she had so desired, could have treated mimeographed copy as evidence. West's Ann.Code Civ.Proc. § 2047.

Teran & Galea, by Carlos M. Teran, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information against the defendant wherein she was charged in Count I with assault with a deadly weapon upon Celia Sanchez; Counts II, III, V and VI accused the defendant of the crime of assault by means of force likely to produce great bodily injury upon Celia Sanchez; and Count IV alleged the commission by defendant of the crime of mayhem, Penal Code, § 203, allegedly committed upon Celia Sanchez.

To each count of the information defendant pleaded not guilty and not guilty by reason of insanity. The cause proceeded to trial before a jury which found her guilty as charged in each count of the information, and also found that she was sane at the time she committed the offenses of which she was found guilty. Motion for a new trial was denied and defendant was sentenced to imprisonment in the California Institution for Women on each count, the sentences to run consecutively. From the judgments of conviction and the order denying her motion for a new trial, defendant prosecutes this appeal.

The factual background surrounding this prosecution may be thus epitomized. Defendant and Joe Cruz Vera were married in 1947. At that time defendant was the mother of two daughters, Celia and Jessie. Six children were born as the issue of the marriage of defendant and Mr. Vera, and at the time of trial defendant and said Joe Cruz Vera were husband and wife. The record discloses that during the three years preceding the trial defendant committed cruel, bestial and horrible assaults upon her daughter Celia who was nine years old at the time of trial. Defendant broke the child's arms by twisting them while holding Celia on the floor with her foot and shoulder. She burned Celia's hand with an electric iron and placed her hands in hot water. She knocked some of Celia's upper teeth out with a shoe. She flattened Celia's nose by placing the child against a wall and hitting her. She also bit Celia's fingernails down to the flesh. She twisted her fingers and popped out the knuckles, and hit her fingers on the edge of the table. She hit the child's left eye with a shoe and injured it. She also hit Celia all over her body with a piece of hose.

Since defendant does not challenge the sufficiency of the evidence to support the verdict rendered, it is unnecessary to set forth further testimony concerning the inhuman and brutal atrocities inflicted by defendant upon this unfortunate child.

In seeking a reversal of the judgments and order, appellant first contends that inasmuch as her husband, Joe Cruz Vera, was not the natural father of the victim, Celia, he was incompetent to testify against appellant without her consent and that the court committed prejudicial error in overruling her objection to his testimony.

Penal Code, Section 1322 provides: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, * * * or in cases of criminal violence upon one by the other, or upon the child or children of one by the other * * *."

Appellant relies heavily upon the case of People v. Kasunic, 95 Cal.App.2d 676, 213 P.2d 778. In that case defendant was accused of violating section 288 of the Penal Code for offenses committed upon his stepdaughter, and one count of violation of section 288a for an act committed upon his stepson. Defendant's wife, mother of the two children, was called as a witness by the prosecution and was permitted to testify over defendant's objection that she was not a competent witness against her husband by reason of the provision in section 1322 of the Penal Code. While it is true that in the case just cited the court said, 95 Cal.App.2d at page 678, 213 P.2d at page 779: "Both the intent of the Legislature and grammatical construction lead to but one conclusion, to wit, that one spouse should be permitted to testify against the other when a criminal act is charged to have been committed by one spouse *upon the child of the spouse who is called to testify.*" (emphasis added), but from a reading of the language used by the court in its entirety, in the interpretation of section 1322 of the Penal Code, we are impressed it was not intended to hold that by the reservatory language used in section 1322, that before one spouse may testify against the other in a prosecution for criminal violence upon a child, the victim must be the issue of both spouses. This conclusion seems inescapable in view of the following language used by the court in 95 Cal.App.2d at page 677, 678, 213 P.2d at page 779: "Such a construction does violence to the intent and purpose of the statute and is contrary to grammatical construction. * * * While this statute is in derogation of the common law rule that one spouse was not a competent witness against the other in any case, the language cannot be given such a strained construction as would result in a miscarriage of justice and in rejecting a spouse's testimony in a case in which the defendant is not the parent of the child on which the offense was committed and admitting it if he or she is its parent. There can be no logical reason for holding that in a case such as this the mother of the children should not be permitted to testify because her husband, the defendant, is not the father of the children offended against and that she would be a competent witness if the defendant charged with the crime against them were their father."

[1] So, in the case at bar, the language of the statute should not be given such a strained construction as would result in a miscarriage of justice by rejecting a spouse's testimony in a case in which he is not the natural parent of the child involved and admitting it if he was the natural parent.

[2] We find ourselves in accord with the holding in State v. Strome, 26 Ohio N. P.,N.S., 406, where, under a statute providing that one spouse may testify against the other in a criminal case where the charge involves cruelty to "their children", the court in ascribing to those words their ordinary meaning, held that the term "child" includes stepchild, and that the statute applies in a case involving a stepchild. Having in mind the end sought to be achieved by the reservatory language of section 1322 of our Penal Code and the evils sought to be remedied, we see no logical reason to assume that the Legislature did not intend the term "child" as used in said section to include stepchild and that exception to the incompetency of the spouse to testify should not apply in cases of criminal violence committed by one spouse upon the stepchild of the other spouse. Moreover, even if it be conceded

that the ruling of the trial court in admitting the testimony of the stepfather was error, the facts established by his testimony were all established by the testimony of the child as to the beatings and cruelties visited upon her by her mother, as well as by the detailed confessions of the beatings given by the mother. The testimony of the stepfather was merely cumulative and, therefore, not prejudicially harmful. Also, it is firmly established in our law that a judgment will not be set aside in any case on the ground of improper admission or rejection of evidence unless, after an examination of the entire cause, including the evidence, the appellate tribunal shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Const. of Calif., Art. VI, Sec. 4½.

[3] Giving consideration to the other evidence above referred to, we cannot see how the exclusion of the testimony of the stepfather could have resulted in any verdicts other than those rendered. Therefore, there was no prejudice or miscarriage of justice resulting to appellant, Const. of Calif., supra; People v. Epstein, 21 Cal.App.2d 488, 490, 69 P.2d 454; People v. Forman, 67 Cal.App. 693, 700, 228 P. 378.

Finally, appellant contends that it was prejudicial error to permit a witness for the prosecution to read to the jury, in detail, a mimeographed transcription of a conversation had by the witness and another officer with appellant. It is the latter's contention that if the document was used to refresh the recollection of the witness it should not have been read to the jury, but merely examined and read by the witness before he testified. It is further contended that if the witness had used the memorandum as past recollection recorded, it should have been introduced in evidence, but that it was inadmissible as evidence because the tape recording, and not the memorandum, was the best evidence.

The record reflects that subsequent to the arrest of appellant, Sergeants Flouton and Barner had a conversation with her. It is conceded that all of the statements which appellant made were free and voluntary; that no force was used upon her and no threats nor promises of immunity were made to her. A tape recording was made of the conversation. Then, to quote the unchallenged narrative as to subsequent events, contained in respondent's brief, "On July 6th a legal statement reporter in the District Attorney's office went to the sound laboratory in that office and listened to the recording. She wrote the words that she heard down in shorthand and transcribed those notes in a rough draft. * * * The next day Sergeant Flouton and she checked the transcript which she had made from her notes against the recording, and Sergeant Flouton supplied certain words which she had not been able to understand completely from the recording, and they were inserted into the rough draft. * * * The rough draft was rechecked with the recording, and the reporter then typed mimeograph stencils from the rough draft. She compared the stencils with the rough draft and they were 'right'. * * * The reporter and a clerk ran the mimeograph stencils off and assembled the pages. * * * Deputy Sheriff Flouton read a mimeographed copy. * * * It was a true and correct transcription of the conversation that was had between the Sergeants Flouton and Barner and the appellant."

On the witness stand Deputy Sheriff Flouton testified that he was present at the conversation with appellant and that he required the mimeographed document to refresh his recollection as to all the details of the conversation. He was asked to read the document and he did so, but the document itself was not introduced into evidence.

[4] We perceive no error in the ruling of the court. Section 2047 of the Code of Civil Procedure allows a witness to refresh his memory "respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But

in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

Answering a similar challenge as the one here made, and under more or less similar circumstances, the court, in People v. Sica, 112 Cal.App.2d 574, 587, 247 P.2d 72, 79, speaking through Mr. Justice Fox, said: "Defendants' contention that the memoranda used to refresh the recollection of the officers was improperly prepared cannot be sustained. The requirements of section 2047 of the Code of Civil Procedure were fully satisfied by the nature of the writing used to refresh the officers' recollection. The transcriptions made by the stenographer under the direction of the police officers came from recordings of conversations which had been concurrently overheard by the officers. These transcriptions were corrected by the officers to correspond with what each had actually heard soon enough after the conversations to make the memoranda accord with their recollections while the events were still fresh in their memories. That a witness may refresh his memory with a memorandum so prepared is abundantly supported. People v. Deckert, 77 Cal.App. 146, 151, 246 P. 157; People v. Amaya, 44 Cal.App.2d 656, 658, 112 P.2d 942; People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180. The record shows that the officers simply used the memoranda to refresh their memories as to information directly obtained by them."

In the instant case a rough transcript was made by a reporter, Sergeant Flouton then took it, listened to the recording, and supplied portions which were lacking in the rough draft. The rough draft, being a document prepared under the Sergeant's direction, fully met the requirements of section 2047 of the Code of Civil Procedure, and it was proper for him to use it at the trial to refresh his recollection of the conversation.

Appellant's contention that if the document was used to refresh the present memory of the witness, the latter should have referred to the writing and then testified, independent of the memorandum—as of his own personal recollection, is answered by the court in People v. Brown, 3 Cal.App. 178, 179, 84 P. 670, 671, wherein it is said: "And the rule is not different where the witness has a copy of the original in his hands, which he has compared, and swears that the same is an exact copy of the original memorandum". See, also, Anderson v. Souza, 38 Cal.2d 825, 832, 243 P.2d 497.

[5] In the case now engaging our attention, the reporter testified that the mimeographed stencils from which the copy testified from was made were "right", and the witness, Sergeant Flouton, testified that the document contained a correct transcription of the conversation, and that he required the document (which contains 16 pages) in order to refresh his memory as to exactly what was said during the conversation. We, therefore, conclude that a proper foundation was laid for the reading of the document in question. People v. Zammora, 66 Cal.App.2d 166, 224, 152 P.2d 180; People v. Deckert, 77 Cal.App. 146, 149, 152, 246 P. 157; People v. Burns, 109 Cal.App.2d 524, 539, 540, 241 P.2d 308, 242 P.2d 9.

[6] In no sense however was the document here used to revive the recollection of the witness' testimony, evidence, and the prosecution properly refrained from offering it as such and relied upon primary evidence of the conversation as shown by the testimony of Sergeant Flouton concerning what he had seen and heard, People v. Sica, supra, 112 Cal.App.2d at pages 587, 588, 247 P.2d 72, although the adverse party, appellant herein, if she so desired, could have treated the writing as evidence. Hawkins v. Sanguinetti, 98 Cal.App.2d 278, 284, 220 P.2d 58; People v. Deckert, supra, 77 Cal.App. at page 149, 246 P. 157.

For the foregoing reasons the judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

131 Cal.App.2d 505

Adam F. BERGAN et al., Plaintiffs and Respondents,

v.

Leonard D. ORMSBY et al., Defendants and Appellants.

Civ. 20463.

District Court of Appeal, Second District, Division 1, California.

March 15, 1955.

Rehearing Denied April 11, 1955.

Hearing Denied May 11, 1955.

Action arising out of intersectional automobile collision, by driver and passengers of one automobile against driver and owner of other automobile. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for plaintiffs and the defendants appealed. The District Court of Appeal, Doran, J., held that under the circumstances the damages awarded were not excessive.

Judgment affirmed.

1. Appeal and Error ⇐930(1)

On appeal from plaintiffs' judgment in injury action arising out of intersectional automobile collision, where record disclosed abundant, substantial evidence in support of judgment, court was not free to review evidence but would have to indulge in all reasonable presumptions in favor of verdict and judgment.

2. Appeal and Error ⇐1001(1)

Record disclosed that verdict for plaintiffs was based on abundant, credible evidence of defendants' negligence in running red light and bringing about collision with plaintiffs' automobile entering intersection on green light and was not based on defendants' wealth or ownership of airplanes and expensive automobiles or on their intoxication.

3. Appeal and Error ⇐1052(8), 1060(1)

In automobile accident case, any error in admission of evidence or improper reference to such matters as possible bribery of police officers, criticisms of police activities and insurance coverage was harmless where no different result would have been probable if there had been no such evidence or reference.

4. Trial ⇐252(1), 260(1)

Refusal to give requested instructions was not error where such instructions were either not required by evidence or were covered by other instructions given.

5. Damages ⇐132(3)

Award of $61,764 to 49 year old woman who incurred $2,518 in special damages, including loss of salary, and who suffered skull fracture 7 to 8 inches long, remained unconscious for 5 days, in hospital for 14 days and in bed at home for 3 or 4 weeks, and who suffered complete loss of smell and impairment of taste, depression, extreme nervous and emotional instability and bladder trouble, was not excessive.

6. Appeal and Error ⇐1004(3)

On appeal from judgment in action for personal injuries, conclusion of trial court on motion for new trial that amount awarded was not excessive is persuasive in determining whether verdict is based upon passion or prejudice.

7. Damages ⇐134(3)

Award of $46,311 to 59 year old man who suffered serious and continued injury to right arm and shoulder, involving ruptured and detached bicep tendons, requiring operation and extensive physiotherapy, and who, prior to accident had held responsible position as traffic manager, and who after accident was demoted at loss of salary of $150 per month, was not excessive.

8. Damages ⇐96

Determination of amount of damages is, in first instance, left to exercise of sound discretion of jury.

9. Appeal and Error ⇐1032(1)

Appellants seeking to set aside judgment on grounds that it was induced by prejudice had burden of proving such prejudice. West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 475.

Gerald F. Delamer and Schell, Delamer & Loring, Los Angeles, Joseph D. Taylor, Los Angeles, of counsel for appellants.

Charles R. Thompson, Los Angeles, Walter W. Heil, Beverly Hills, for respondents.

DORAN, Justice.

This is an appeal from a judgment in a personal injury action following an automobile collision which occurred at the intersection of Robertson and Olympic Boulevards in Los Angeles. A jury brought in a verdict awarding damages as follows: $46,311 in favor of Adam F. Bergan; $61,764 to Mr. Bergan's wife, Anne L. Bergan; and $5,252.80 for Mrs. Bergan's daughter, Ann Shingleton, the latter award being later reduced to $2,252.80.

The accident occurred on September 7, 1951 at about 10:30–11:00 p. m. on a clear, dry night, and the intersection traffic was controlled by four traffic signals with green, amber and red lights. The plaintiffs, Adam Bergan, aged 59, Mrs. Bergan, aged 49, and the daughter Ann Shingleton, aged 19 years, were driving south on Robertson Boulevard, en route home from Glendale, in a Hudson five-passenger coupe. There is evidence that before Bergan entered the intersection, the signal for southbound traffic had changed from red to green, and that Bergan had proceeded approximately three-fourths through the intersection, when defendant's Cadillac, going east on Olympic, collided with the right rear end of the Bergan car. A disinterested witness driving on Olympic along with and in the same direction as defendants' Cadillac, testified that the Cadillac did not stop for the red light but proceeded into the intersection.

The Cadillac automobile belonged to the defendant De Lange and was being driven by the defendant Ormsby, who, with three friends had attended the races at Del Mar. Ormsby had flown the party from Del Mar to Long Beach; from there the men had taken a taxi cab to the Santa Monica Airport to pick up the Cadillac. At the time of the accident Ormsby was driving to the Wilshire Country Club. There was evidence that three of the men in the Cadillac, including the driver Ormsby, had been drinking intoxicating liquor, and that one of the passengers admitted being drunk. No sobriety tests were given by the police. Ormsby admitted having had two drinks before dinner, prior to the accident.

Appellants "do not contend that there was insufficient evidence to support the judgment had no errors been committed and had there been no misconduct, it is obvious that the question of liability was a close one, the evidence in favor of a finding that Ormsby entered on an amber light being stronger than the contrary evidence. In this situation the errors and misconduct were prejudicial". Appellants' various objections on appeal relate to (1) misconduct of plaintiffs' counsel; (2) erroneous instructions to the jury; (3) errors in rulings on evidence, and (4) excessive verdicts.

It is appellants' contention that plaintiffs' attorney schemed to obtain a verdict not based on evidence as to negligence by "implanting firmly this 'group liquor' idea in the minds of the jury"; that to this end the men were repeatedly pictured as wealthy and drunken "play boys" owning private airplanes, Cadillac automobiles, etc.; that plaintiffs "attempted to hold Ormsby responsible for the liquor consumed by two of his companions"; and that prejudicial error was committed in allowing such matters to be brought into the case during examination and cross-examination of witnesses. Complaint is likewise made in respect to questions concerning possible bribery of police officers, attempts to keep the matter quiet, criticism of the police, the fact the defendants were insured, etc.

[1] Appellants' argument that "the question of liability was a close one", is not borne out by the record. On the contrary there is abundant, substantial evidence in support of the jury's verdict of liability. Disinterested witnesses who saw the accident affirmed that Ormsby entered the intersection against the red light, and that plaintiff Bergan entered with the green light. The trial court at the hearing of the motion for a new trial stated: "it seemed to me at the trial the liability was very clear. I frankly couldn't see any question after hearing all the evidence". Such being the situation there can be no appellate review of the evidence, and all reasonable presump-

tions in favor of verdict and judgment must be indulged in.

[2] It is true, as appellants maintain, that Ormsby was not charged with drunk driving. However, there was testimony by a Mrs. Ashley that the driver, Ormsby, "appeared to be under the influence of liquor and it could be smelled", and was "very vague in manner. He was unsteady on his feet"; the witness saw two men "lolling" in the front seat in the manner of men under the influence of liquor. As said in respondents' brief, "the jury would have a right to assume that it was drinks other than the two he admitted, that explained his (Ormsby) condition as testified to by the witnesses". There was other testimony that three of the four men in the Cadillac were intoxicated. Mr. Gibbs, an abstainer, testified to being "the only occupant of the Cadillac who was not drunk". These were pertinent facts surrounding the accident testified to by eyewitnesses, and the record fails to support appellants' assertion that Ormsby was being held responsible for the intoxicated condition of the passengers.

Nor does the record indicate that the verdict was based upon the defendants' wealth or ownership of airplanes and Cadillac cars. Regardless of the defendants' wealth or poverty, the fact remains that there was abundant, credible evidence of negligence in running a red light and bringing about the collision with plaintiffs' car. In this state of the record, appellants' contention that the verdict was based on something other than the evidence, is untenable.

[3] The same may be said in reference to such matters as possible bribery of the police officers, criticism of police activities, insurance, etc. If any error was committed in the admission of evidence or improper reference made to such matters, the same must be deemed harmless since, as respondents say, "no different result would have been probable if such error, ruling, instruction or defect had not occurred or existed".

[4] It is alleged that the trial court committed prejudicial error in the giving and refusal of various instructions relating to traffic signals, negligence and contributory negligence, unavoidable accident, conjectural and speculative damages, earning power, and aggravation of pre-existing ailment. As pointed out in respondents' brief the instructions given were largely general in nature and taken from the B.A.J.I. book of instructions. As to instructions requested by the defendants, it appears that these were either not required by the evidence or covered by other instructions. In no instance does it appear that any instruction "erroneously compelled the jury to find that defendant Ormsby was negligent", as appellants maintain, or that any prejudice resulted. Reading as an entirety the instructions given by the trial court leads to the conclusion that the appellants' fundamental rights were adequately protected and that the jury could not have been misled at any point.

After citing a number of alleged errors in introduction of evidence, conduct of the trial court and of respondents' attorney, appellants' contention is that since the evidence was very close, and the verdicts excessive, "their cumulative effect is to make the trial unfair to the defendants". As hereinbefore indicated, the evidence as to defendants' liability was not "close", and no adverse "cumulative effect" is apparent.

[5] One of appellants' chief contentions is that the verdicts in favor of Mrs. Bergan of $61,764, and to Adam Bergan of $46,311, "are so excessive as to show the effect of the passion and prejudice introduced into evidence". It appears from the evidence that Mrs. Bergan, 49 years old, had a life expectancy of 21.63 years, had previously been in good health; that as a result of being thrown from the car to the pavement the patient suffered a skull fracture 7 to 8 inches long, remained unconscious for 5 days, was in the hospital for 14 days, and at home in bed for 3 or 4 weeks.

Since the accident Mrs. Bergan has suffered a complete loss of smell and impairment of taste, suffers from depression, extreme nervousness and emotional instability. There was medical testimony that pathological brain changes from the cerebral contusion are permanent, and that nothing can be done for the brain injury, or for the loss of smell or taste. There is also bladder trouble which will require operation. Al-

though Mrs. Bergan had been examined by defense physicians, defendants failed to offer any medical testimony as to the patient's condition.

It cannot justifiably be said that the award of damages was so excessive as to shock the conscience, or to indicate that the jury was swayed by prejudice. The evidence clearly indicates that Mrs. Bergan was very seriously and permanently injured; special damages for doctors, hospital, medical and loss of salary had already amounted to $2,518, with more expenses to follow. Considering the nature of the injuries, pain and suffering already endured, coupled with an unfavorable prognosis for the future, the verdict, although large, cannot be termed unreasonable.

[6] The trial court's opinion on the question of excessive damages, when that matter came up on defendants' motion for a new trial, was expressed as follows: "there is nothing that would indicate that the jury was influenced by bias, prejudice, or passion of any kind. As a matter of fact, there is a possibility that if the Supreme Court had not held that additure was not permitted, the Court might be inclined to add for (to) the verdict for Mrs. Anne Bergan". As said in Roedder v. Lindsley, 28 Cal.2d 820, 822, 172 P.2d 353, 354, and elsewhere: "The trial court concluded on the motion for new trial, that the amount awarded was not excessive, and its conclusion in that regard is persuasive in determining whether the verdict was based upon passion or prejudice".

[7] What has been said in reference to the award for Mrs. Bergan, will likewise apply to the verdict of $46,311 in favor of Adam Bergan. Mr. Bergan's age was 59, with a life expectancy of 14.74 years, and there was previous good health. The accident resulted in serious and continued injury to Bergan's right arm and shoulder involving ruptured and detached bicep tendons requiring operation and extensive physiotherapy. There was medical testimony that the patient suffered from impaired breathing, emotional disturbance, and a brain injury, in addition to continued trouble with the right shoulder and arm, and inability to lift weights.

Previous to the injury, Mr. Bergan was a traffic manager, responsible for the shipment of $250,000 to $350,000 worth of material per month. As result of the accident this plaintiff was unable to hold down the previous job by reason of physical and nervous impairment, and was demoted to another job. Disregarding any bonuses which Bergan received incidental to the traffic manager position, there was a loss of salary of $150 per month. Bergan had also received a bonus of $2,876.89 during a year period preceding the injury. The evidence discloses substantial evidence showing that Mr. Bergan was seriously and permanently injured and, as said in the respondents' brief, the jury might well infer that plaintiff "was the mere shell of the former Mr. Bergan who has held a key position".

[8] As stated in Roedder v. Lindsley, 28 Cal.2d 820, 822, 172 P.2d 353, "there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents". Necessarily the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury. As said in the Roedder case, "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion". In the state of the present record, it does not appear that the awards given by the jury are such as to require appellate interference.

[9] A careful examination of the evidence, instructions, conduct of the trial court and of the attorneys, and of the many assignments of error in connection therewith, fails to indicate that there has been any miscarriage of justice. Under the express provisions of Article VI, Section 4½ of the California Constitution, and of Section 475 of the Code of Civil Procedure, no judgment may be set aside unless, upon an examination of the entire record, it appears that "a different result would have been probable if such error, ruling, instruction,

or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown". The burden was upon the appellants to show prejudice. No such prejudicial error is apparent.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

131 Cal.App.2d 595

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henry BAUMAN, Defendant and Appellant.

Cr. 5239.

District Court of Appeal, Second District, Division 2, California.

March 18, 1955.

Defendant pleaded guilty to two counts of complaint charging felonious issuance of checks without sufficient funds. The Superior Court, Los Angeles County, Joe Raycraft, J., entered an order denying defendant's motion to set aside plea of guilty and permit him to enter plea of not guilty and judgment suspending proceedings and ordering probation, and from such order and judgment, defendant appealed. The District Court of Appeal, Moore, P. J., held that under the circumstances, trial court did not abuse its discretion in denying motion to set aside plea of guilty or in suspending proceedings and placing defendant on probation.

Appeal from order denying motion to set aside plea of guilty dismissed, and judgment affirmed.

1. Criminal Law ⇐1023(3)

Order denying defendant's motion to set aside plea of guilty and permit him to enter plea of not guilty was not appealable.

2. Criminal Law ⇐274

Defendant, having entered plea of guilty, must show good cause, with convincing evidence, to warrant setting aside such plea.

3. Criminal Law ⇐274

Granting of motion to set aside plea of guilty and permit defendant to enter plea of not guilty rests in the sound discretion of trial court, and its order will not be reversed, unless abuse of discretion is clearly shown.

4. Criminal Law ⇐274

Where one accused of a felony, comprehending fully the significance of a judgment of guilt, pleads guilty, he is restricted to the grounds authorized as bases for vacating such plea and is in no position to claim that he is to be presumed to be innocent or to argue the doctrine of reasonable doubt.

5. Criminal Law ⇐273

Voluntary entry of plea of guilty with full comprehension of charge and plea thereto and without threat or fraudulent promise admitted every element of the charge, and such admission constituted conclusive proof of guilt.

6. Criminal Law ⇐274

Evidence was insufficient to establish psychopathic condition of accused at time of entering plea of guilty as ground for setting aside such plea and permitting accused to enter plea of not guilty.

7. Criminal Law ⇐274, 982

Where accused, voluntarily and without threat or fraudulent promise and with full comprehension of charges against him and plea thereto, entered plea of guilty to two counts of complaint charging felonious issuance of checks without sufficient funds, trial court did not abuse its discretion in refusing to set aside such plea and permit accused to enter plea of not guilty, or in suspending proceedings on such counts and placing accused on probation for ten years. Pen.Code, § 1237.

Forno & Umann, by Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The questions for decision are (1) whether the trial court abused its discretion in denying defendant's motion to set aside his plea of guilty to two counts of issuing checks without sufficient funds and (2) whether it was error to suspend proceedings as to the same counts and grant probation for ten years.

On April 21, 1954, appellant was arraigned in the Municipal Court of Long Beach Judicial District before Judge Wallace on a complaint of six counts charging the felonious issuance of checks without sufficient funds. He was accompanied by counsel of his own choosing and pleaded guilty to two counts. The remaining four counts were dismissed. Prior to the acceptance of his plea, however, Judge Wallace vigorously inquired whether appellant understood the charge against him or comprehended the significance of his act in entering a plea of guilty. He asked appellant whether the latter understood his constitutional rights to a preliminary hearing and to a jury trial in the superior court and told him there was no hurry. "We don't want you to feel in three days that you have been railroaded." In answer to further questioning, appellant stated substantially:

"I understand the court's position. No one has held out promises of immunity to get me to take the position that I wish to plead guilty to these two counts. Nobody has promised me that I will be dealt with more leniently or will be treated more liberally by the superior court if I plead guilty here. Neither Mr. Kartz nor any other police officer has promised me immunity or reward for pleading guilty now. I am acting freely and voluntarily. I am aware of the nature of the charges, six counts of issuing checks to the Pacific Finance Corporation without sufficient funds. That corporation was defrauded by the checks. I understand the nature of the charge. I desire to plead guilty now to the two counts solely because I am guilty of those two crimes."

Appellant thereupon formally entered his pleas of guilty to counts one and three and the court and all counsel consented to the entry of the pleas.

[1] Judge Wallace then certified to the superior court the plea of guilty to the two counts. On April 26, appellant and his counsel waived time for sentence and requested leave to file an application for probation. Such leave was granted, and June 1 was set for hearing the application and for pronouncing judgment. On that day, Attorney Forno was substituted as counsel for appellant and he filed his motion to set aside the plea of guilty and to be permitted to enter a plea of not guilty. Continuances of the matter brought the final hearing on the motion to July 6 when all witnesses were heard and the motion was argued and denied. Attempt is made to appeal such order. It is not appealable. People v. Ottenstror, 127 Cal.App.2d 104, 111, 273 P.2d 289. On July 12, proceedings were suspended and probation was ordered. This is the judgment on review. Penal Code, § 1237.

[2, 3] A plea of guilty having been entered, the defendant must show good cause, with convincing evidence, to warrant its being set aside. The granting of such relief rests in the sound discretion of the trial court. Its order will not be reversed by the reviewing court unless an abuse of discretion is clearly shown. People v. Ottenstror, supra; People v. Cooper, 123 Cal.App.2d 353, 356, 266 P.2d 566; People v. Broady, 120 Cal.App.2d 901, 903, 262 P.2d 669.

[4, 5] A plea of guilty is not a light matter. When a person is accused of a felony and comprehends fully the significance of a judgment of guilty, and pleads guilty, he is in no position thereafter to claim that he is presumed to be innocent or to argue the doctrine of reasonable doubt. He is restricted to the grounds

authorized as bases for vacating a plea of guilty. He neither pleaded nor proved that he was menaced or threatened to induce his plea; he was given no fraudulent promise to induce it and was attended by his counsel when he entered his plea before the magistrate. That official went to extreme pains to see that appellant understood his act. Having, under such circumstances, entered his plea, he admitted every element of the charge which admission constitutes conclusive proof of guilt. People v. Outcault, 90 Cal.App.2d 25, 30, 202 P.2d 602.

[6, 7] The attempt to establish a psychopathic condition of appellant at the time of entering his plea of guilty was also ineffective. Dr. Reese had treated him for an emotional disorder in November 1953. His patient was very agitated, but "calmed down. He was in a marked state of apprehension and anxiety, he was confused and despondent and his judgment was greatly impaired." But the trial court appraised Dr. Reese as extremely confused and his statements were contradictory. Neither did appellant improve his standing by his own testimony. On behalf of the People, Officer Kortz perceived that when the plea was entered April 21, appellant was oriented, normal, not confused and knew what he was doing. He was neither upset nor nervous when he appeared in the judge's chambers the day he pled guilty, but was calm. His poise was best illustrated after his application for probation had been filed. He began to transfer some motor cars to the north in such a way as to use the proceeds for purposes other than restitution. Because of such activities the court issued a bench warrant for appellant in order that "he could be brought in and taken out, and questioned * * *. It was thereafter * * * that defendant felt he should change his plea because he was in custody." Having found no indication that appellant was not mentally capable of entering the pleas and that as Dr. Crahan found, he knew what he was doing at the time he plead guilty, the court denied the motions to vacate the order granting probation and to withdraw the plea of guilty.

The appeal from the order denying the motion to set aside his plea of guilty is dismissed.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

131 Cal.App.2d 625

Robert E. DE KAY, doing business as De-Kay Machine Products Company, Plaintiff, Cross-Defendant and Appellant,

v.

DE KAY PNEUMATIC TOOLS, Inc., a California Corporation, Defendant, Cross-Complainant and Respondent.

Civ. 16184.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Hearing Denied May 18, 1955.

[Action for declaratory relief under a contract for the sale and distribution of tools to be manufactured by the plaintiff, wherein defendant filed a cross-complaint. From a judgment in the Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., the plaintiff appeals. The District Court of Appeal, Kaufman, J., construed the agreement between the parties and determined their rights thereunder and held that certain findings were supported but that a finding by which the defendant was given the credit of $6,000 on the purchase order was not supported and was insufficient to support the judgment for such amount in favor of the defendant.

Affirmed in part and reversed with directions in part.

1. Declaratory Judgment ⇐393

In action for declaratory relief under a contract to distribute and sell tools manufactured by the plaintiff, statement in the finding that the purchase order was in

all respects regular and valid, if improper, as a conclusion of law and insufficient to support the judgment, was harmless where the remainder of finding was properly a finding of fact.

2. Sales ⇐82(1)

Under a contract for sale and distribution of tools manufactured by plaintiff and providing that if necessary defendant would make available 50 per cent of costs of tools which were under order, the phrase to "make available" meant to make accessible or attainable, ready or handy and implied that the defendant could be called on for funds up to the maximum, but did not guarantee a 50 per cent deposit in every case, but only if the defendant was called upon to that extent.

See publication Words and Phrases, for other judicial constructions and definitions of "Make Available".

3. Declaratory Judgment ⇐347

In suit for declaratory relief under a contract for the sale and distribution of tools manufactured by the plaintiff a finding that a $6,000 credit existed in favor of the defendant under a particular order was not unsupported by the evidence.

4. Evidence ⇐450(8)

Under a contract for the sale and distribution of tools manufactured by the plaintiff, phrase that the defendant agreed to make available up to 50 per cent of defendant's cost on any order presented was sufficiently ambiguous to permit the use of parol testimony to aid in its clarification.

5. Sales ⇐82(1)

Under a contract for the sale and distribution of tools manufactured by the plaintiff, where the defendant agreed to make available up to 50 per cent of the cost on any order presented, the "costs" covered by such paragraph were the manufacturer's costs.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs".

6. Sales ⇐60

Under a contract for the sale and distribution of tools manufactured by the plaintiff, the court, in construing the phrase with respect to the defendant's agreement to make available up to 50 per cent of the plaintiff's costs on any order, considered the conduct of the parties under it.

7. Declaratory Judgment ⇐369

In suit for declaratory relief under a contract to sell and distribute tools manufactured by the plaintiff, finding which was really summary of the effect of the findings relating to purchase of drills was not objectionable as a conclusion of law.

8. Contracts ⇐202(1)
Sales ⇐71(5)

Under a contract for the sale and distribution of tools manufactured by plaintiff, by which plaintiff agreed to manufacture tools and parts for customers as quickly as possible, an order for tools could be valid without defendant designating the person to whom it would resell the tools and defendant under the contract was obligated only to purchase from the plaintiff the number of tools specified for the year and not to resell them.

9. Contracts ⇐279(2)

An adequate tender of performance by a party to a contract fulfills his duty thereunder, and if his tender is unjustifiably rejected, he is not then in default.

10. Sales ⇐71(5)

Under a contract for the sale and distribution of tools manufactured by the plaintiff, where because of previous dealings of the parties the defendant was not notified within a year that an order for tools was rejected, it was entitled to believe that it had been accepted by the plaintiff.

11. Declaratory Judgment ⇐369

In suit for declaratory relief under a contract for the sale and distribution of tools manufactured by the plaintiff, a finding that the defendant was not given credit for $6,000 on a purchase order and that he had not been paid such sum, which conflicted with the prior part of the finding of an agreement for $2 credit per tool on future orders, which was supported by the testimony, was insufficient to support a

judgment for $6,000 in favor of the defendant.

12. Declaratory Judgment ⇐369

In suit for declaratory relief under a contract for the sale and distribution of tools to be manufactured by plaintiff, where main issue was whether defendant had fulfilled its obligation to purchase a minimum of 1,000 tools, findings of the trial court were adequate to cover the issues tendered by the pleadings.

Gordon M. Emanuel, Beverly Hills, for appellant.

Reginald G. Hearn, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of the City and County of San Francisco in favor of defendant and cross-complainant DeKay Pneumatic Tools, Inc., in an action for declaratory relief brought by Robert E. DeKay, doing business as DeKay Machine Products Company.

On August 24, 1951, appellant Robert DeKay and the DeKay Pneumatic Tools Corporation entered into a manufacturer-distributor contract. Robert DeKay is a licensed mechanical engineer who had for some years prior to the date of the aforesaid contract, operated a small machine shop under the name "DeKay Machine Products Company" wherein he manufactured air tools which he generally sold to wholesalers who distributed them to their customers. Harry Hanover, president of respondent corporation, who first became active in operations relating to the marketing of the appellant's tools in January 1951, testified that between $30,000 and $35,000 had been spent in developing a market for appellant's tools from that time till the commencement of this action. The parties first operated under a letter agreement of February 3, 1951.

The written agreement of August 24, 1951 is incorporated in the complaint for declaratory relief. Appellant, designated in that contract as the first party, grants to respondent corporation, the second party, the exclusive right to purchase, distribute and sell "any and all of First Party's various types of pneumatic tools, accessories, and parts for same."

Other pertinent provisions of the agreement are as follows:

"2. First Party agrees to manufacture Tools and Parts of acceptable and equal or better quality and performance as Tools and Parts previously and currently manufactured, and to further, research and improve Tools and Parts from time to time as required to keep line of Tools competitive and equally acceptable to trade, however, this shall in no way compel or require First Party to make any special or new tool which is not profitable for First Party to produce.

"3. First Party agrees to reserve and incorporate new features, improvements, inventions, mechanical and design styles, pneumatic tools and parts for same, as well as improvements for manufacturing same, to the *producting* of Tools and Parts covered by this Agreement, and all benefits from such new developments shall be solely for the refinement, workability and trade acceptance of Tools and Parts hereof.

"4. First Party agrees to direct all inquiries and requests for the manufacture of a complete or any portion of pneumatic tools or parts for same over to Second Party along with First Party's recommendations for accepting or rejecting such inquiry or order in question, however, this shall not include bona fide orders contracted for before August 15, 1951; with it being mutually agreed herewith by both parties hereto that no improvement or feature specially characteristic of Tools and Parts covered by this agreement may be produced for or made available in any manner on such classes of inquiries, unless mutually agreed to in writing. * * *

"9. First Party agrees to accept and manufacture orders for Tools and Parts for Second Party's customers as quickly as possible, or as agreed upon for any order or orders in question, and herewith authorizes Second Party to so advise any such customer that this guarantee of manufacture is herewith extended and assured such customers, through Second Party. * * *

"11. Second Party agrees to maintain a sales department for the promotion and resale of said Tools and further agrees to bear all expenses thereof, including promotion, advertising selling, administrative, traveling expenses and compensation of executives and salesmen of Second Party; and including taxes applicable to operations of Second Party under this Agreement; as well as expenses necessary to establishment of approved agents, dealers, distributors, and wholesalers for Tools and Parts.

"12. In conformity with provisions of the foregoing paragraph, Second Party will maintain a sales personnel to handle the sales and distribution of Tools and Parts, when and where same may be disposed of on a profitable sales basis, and further, Second Party agrees that when proven production capacity of First Party warrants, sales efforts shall be initiated throughout the United States to promote use and sale of Tools and appoint bona fide representatives in such states where profitable sales may be made; and further. Second Party agrees that when added production warrants it and it is possible to make profitable sales in foreign markets, proper export representation will be secured, with all such export sales obligations being conditioned upon export and import regulations and ability to delivery Tools as required and at competitive prices."

Paragraph 16 contains a price list of tools to be used by respondent in placing orders with appellant, and it is therein provided that such prices may be changed from time to time to reflect increase or decrease in cost of material and/or labor upon 15 days' written notice to respondent. Subdivision E of this paragraph provides: "Second Party agrees to make available up to fifty (50%) per cent of *Second* Party's cost on any order presented for Tools or Parts under this Agreement." (Emphasis ours.)

Paragraph 20 provides that should appellant require funds for the manufacture of tools or other products to be manufactured, he shall first request the loan of such funds from respondent, and if respondent should be unwilling or unable to supply such funds, appellant then agrees to obtain such funds from Harry T. Hanover, before appellant shall attempt to borrow such funds elsewhere. Paragraph 21 provides: "As a condition of this Agreement Second Party [respondent] agrees to purchase from First Party a minimum of one thousand (1,000) Tools per year." Paragraph 22 provides that unless cancelled by failure of second party to comply with provisions of foregoing paragraph this agreement shall remain in force from August 24, 1951 till January 31, 1961.

Appellant, following his refusal to accept an order of respondent for 642 tools dated August 22, 1952, filed this suit for declaratory relief on August 29, 1952, asking that the contract be declared terminated because of respondent's failure to perform its obligation under paragraph 21, to purchase a minimum of 1,000 tools within the years.

The complaint alleged that on or about November 9, 1951, appellant and respondent entered into an oral agreement under which respondent agreed to appellant's sale of 6,000 air drills to the Air Speed Tool Company under appellant's promise to pay respondent $6,000 upon certain conditions, and that this oral agreement was thereafter confirmed in writing. It was further alleged that from the date of execution of the written agreement of August 24, 1951 till August 25, 1952, respondent purchased and resold approximately 329 air drills, and that appellant during this time sold 6,000. Appellant then alleged that paragraph 21 of the agreement requiring respondent to purchase a minimum of 1,000 tools per year is to be interpreted according to the intention of the parties thereto as meaning a duty to purchase and *resell* a minimum of 1,000 tools.

Paragraph VII of the complaint states that respondent contends that it has fulfilled its annual minimum obligation as a consequence of the sale of the 6,000 tools to Air Speed Company, and further, that the purchase, without *resale* of 1,000 drills is sufficient compliance with said provision, so as to permit continuance of the

right of respondent to exclusively purchase all pneumatic tools manufactured by appellant.

Respondent in its answer alleged that on November 9, 1951, appellant asked respondent's permission to sell 6,000 tools to Air Speed Company; that all such sales had to be made by or through respondent by virtue of the agreement of August 24, 1951; that "upon the express condition that the aforesaid sale be made pursuant to the terms and provisions of said agreement", respondent "consented to the aforesaid sale and agreed to accept as remuneration therefor the sum of $6,000.00"; that appellant agreed to pay said $6,000 "when the Air Speed Tool Company paid plaintiff (appellant) the entire purchase price for the aforesaid tools;" that the purchase price has been received and that "the entire sum of $6,000.00 is now due and owing" respondent by appellant.

Respondent denied other allegations of the complaint and alleged that it has purchased 1,010 drills from appellant and had received credit pursuant to paragraphs 1, 4, and 21 of the agreement of August 24, 1951, for the sale of 7,010 drills.

Respondent also filed a cross-complaint, alleging that as the agreement of August 24, 1951, was for a ten-year period, cross-complainant conducted its first year operations predicated upon a long range promotion and sales program, and that by reason of certain changes in design of the tools, cross-complainant was prevented from conducting its operations over a considerable period of time. It was again alleged as was alleged in the answer, that on November 9, 1951, appellant asked respondent to permit the direct sale by him of 6,000 air drills to Air Speed Tool Company, and that respondent agreed on condition that such sale be made pursuant to the terms and provisions of the agreement of August 24, 1951, with the exception that the usual remuneration be modified so that respondent would receive $6,000 for the sale; that they agreed that appellant would pay respondent the aforesaid sum when Air Speed Tool Company had paid for the aforesaid order in full; that despite the fact that Air Speed Tool Company has paid appellant in full, appellant has not paid respondent the said $6,000, which sum is now due and owing from appellant to respondent.

Paragraph IX of the cross-complaint alleged that the parties conferred on or about August 7, 1952, regarding the foregoing agreement, respondent taking the position that the sale to Air Speed Tool Company satisfied the requirements of Paragraph 21 of the agreement of August 24, 1951, and appellant taking the position that such sale was exempted therefrom; that appellant agreed to extend the limitation of Paragraph 21 for 6 months from August 14, 1952, and that appellant later repudiated this agreement; that respondent on August 22, 1952 directed a letter to appellant which read as follows:

"Reference is made to that certain agreement by and between DeKay Machine Products and DeKay Pneumatic Tools, Inc. dated August 24, 1951 and, in particular, provisions 1 and 21 thereof. Further reference is made to that certain sale of 6,000 drills to Air Speed Tool Company on or about November 9, 1951 and your letter directed to us on said day acknowledging a cash credit in our favor in the sum of $6,000.00 incident to said transaction.

"It is our position that full compliance with provision number 21 of the aforesaid agreement has been accomplished by virtue of the terms of provision 1 of said agreement and the aforesaid sale of 6,000 units. It is our understanding that you contend that the aforesaid sale of 6,000 units is not applicable to provision 21 of the aforesaid agreement and, as a consequence thereof, additional units must be purchased by us prior to August 24, 1952 in order to prevent the breach of the aforesaid agreement. In order to protect our rights under the aforesaid contract but, on the other hand, without in any way prejudicing our indicated position and pursuant to provision 21 of the aforesaid agreement, we hereby purchase from you 642 tools of the following descriptions: * * *

"Pursuant to Subdivision (E) of Paragraph 16 of the aforesaid agreement, we hereby agree to forthwith make available

50% of your cost on the aforesaid order. Inasmuch as we possess a cash credit with you in the sum of $5,000.00 which you have acknowledged in your aforesaid letter of November 9, 1951, this sum can be applied in regard to the aforesaid 50% and you are hereby authorized and empowered to forthwith effect such application. The balance of the aforesaid 50%, to-wit, $1,204.25, will be immediately disbursed to you upon receiving your request therefor.

"Kindly advise us when the hereinabove described units have been manufactured in order that appropriate shipping instructions can be given. In the event there are any matters herein described which, in your opinion, require clarification or warrant further discussion, please notify us immediately."

It was alleged that this letter was received by appellant on August 23, 1952; that he refused to respond thereto, and that on August 29, 1952, his counsel directed a letter to respondent stating that the contract was breached, and on that same date appellant filed this action seeking termination of the contract. Respondent asserted full compliance with paragraph 21 of the agreement of August 24, 1951, by either the 6,000-unit deal with Air Speed, or the purchase of 642 drills in its letter of August 22, 1952. Cross-complainant asked a declaration of the rights and duties of the parties under the aforesaid agreement with particular reference to Paragraph 21 thereof, and a declaration that the contract is in full force and effect.

[1–3] After trial an amendment to the cross-complaint was allowed which described certain conduct of appellant subsequent to August 29, 1952. It alleged that appellant in violation of the terms of the agreement, sold tools to persons other than respondent for prices lower than those listed by respondent and in areas where respondent had previously made sales and had made efforts to develop a market, and that appellant had publicly represented that the contract between him and respondent had been terminated. The court was requested to extend the performance obligation of respondent for a period of 60 days from the date upon which judgment should become final.

Answers were filed by appellant to the cross-complaint and the amendment thereto.

After a lengthy trial in which considerable evidence, both oral and documentary was introduced, the trial court made certain findings of fact which are attacked by appellant herein as unsupported by the evidence.

The trial court found that between August 24, 1951 and August 21, 1952, respondent purchased 360 drills from appellant. This finding was not attacked. It then found that the purchase order of respondent dated August 22, 1952, for 640 tools was regular and valid, was duly received by appellant prior to August 24, 1952; that no cash payment accompanied said order nor was respondent requested to make available 50% or any part of appellant's cost on said order; that respondent at that time had a credit of $6,000 which could have been used toward the cost and purchase of the 640 tools; that no payment accompanied any of the previous orders sent by respondent to appellant; that appellant at no time during the year ending August 24, 1952, requested respondent to make available 50% of appellant's costs on any order, and that respondent was not advised of appellant's costs in manufacturing the 640 tool order. Appellant attacks the statement in this finding that the purchase order was "in all respects regular and valid" as a conclusion of law, and that it may not be used to support the judgment. Lowe v. Copeland, 125 Cal.App. 315, 13 P.2d 522; Johndrow v. Thomas, 31 Cal.2d 202, 187 P. 2d 681. However, if the finding that the purchase was regular and valid, is a conclusion of law, still the remainder of the finding is properly a finding of fact. There is evidence in the record, as pointed out by respondent, that no cash deposit accompanied any previous orders of respondent, that respondent was not requested by appellant to make available 50% or any part of appellant's cost on said order, and that a credit of $6,000 existed with appellant in favor of respondent. There was

considerable testimony at the trial as to the background of the clause in the contract making 50% of the cost available to appellant. Colonel Hanover testified that in the earlier agreement of February 3, 1951, it was agreed that DeKay should come to respondent first of all if he should be in need of finances, and that if necessary respondent would make available 50% of the cost of the tools which were under order. The phrase "to make available" means to make "accessible or attainable, ready or handy" according to Webster's Dictionary. The fact also that the expression in the contract is "up to 50%" not simply 50%, implies that respondent could be called on for funds up to that maximum, but it clearly does not mean a guarantee of a 50% deposit in every case, but only if respondent is called upon to that extent. Since appellant admits that the $6,000 credit existed in favor of respondent as a result of the Air Speed order, the finding that a $6,000 credit existed is not unsupported. The dispute between the parties is only as to how such sum was to be paid to respondent, appellant contending that it was collectible under a special agreement at $2 per tool on all future orders, respondent maintaining that it was all due, owing and payable immediately after appellant had collected the sum from Air Speed. Appellant concedes that the credit of $6,000 could have been used to the extent of $2 per tool or $1,280 toward the cost of the August 22, 1951, purchase order for 640 tools.

[4, 5] Appellant devotes a large portion of his brief to the argument that the trial judge has confused the "First Party" and "Second Party" to the contract, and has confused and reversed them, because of the fact that in Finding IV the court has referred to "50% of plaintiff's and cross-defendant's costs." It is pointed out that the contract of August 12, 1951, in paragraph 16(B) states: "Second Party [respondent] agrees to make available up to fifty (50%) per cent of *Second* Party's [respondent] cost on any order presented * * *." The paragraph as written in the contract does not appear to make sense. The phrase is sufficiently ambiguous to permit the use of parol testimony to aid in its clarification. From the testimony concerning the financial arrangements between the parties, as well as provision 20 of the contract relating to financing, the trial judge properly concluded that the costs covered by this paragraph of the contracts were the manufacturer's costs.

[6] Appellant admitted that prior orders were not always accompanied by 50% of the purchase price and also that when a check did not accompany an order, he did nothing about notifying respondent, but proceeded to manufacture the tools. It is true, of course, that all these prior orders were much smaller in amount than the order of August 22nd. Nevertheless, the trial court could consider this fact as bearing on appellant's construction of the provision of the contract by his conduct under it. Carl Ulrich testified that he placed 90% of the orders for respondent, that all of the orders were not accompanied by a deposit. He further testified that all of the orders did not indicate the name of a purchaser—that is the name of respondent's customer.

[7] Appellant attacks Finding V as a conclusion of law. It states: "That defendant and cross-complainant ordered from plaintiff and cross-defendant a minimum of one thousand (1000) tools pursuant to and in compliance with the terms and provisions and intent of the aforesaid contract between the dates of August 24, 1951 and August 24, 1952." This finding is really a summary of the effect of Findings III and IV, relating to the purchase of 360 drills and the attempted purchase of 640 drills to realize the minimum of 1,000.

[8] Appellant argues that respondent has agreed to *purchase* 1,000 tools per year, and the mere *ordering* cannot constitute performance of this provision. He points to the provision of the contract which states that appellant agrees to manufacture *orders* for tools and parts for second party customers as quickly as possible, or as agreed upon for any order or orders in question. Appellant asserts that he had a duty to accept respondent's orders for respondent's *customers,* and on this order of August 22nd no customer was indicated. Paragraph 1

of the contract states that appellant grants to respondent the exclusive rights to *"purchase,* distribute, and sell any and all" of appellant's tools. Clearly, then, an order can be valid without respondent designating the person to whom it will resell the tools. Respondent guarantees under paragraph 21 only to *purchase* from appellant, *not to resell,* 1,000 tools per year.

Finding IV shows that an adequate tender of performance was made by respondent to fulfill the requirement of paragraph 21 of the contract, but that appellant rejected the purchase order. We believe the trial court's interpretation is the only reasonable construction of this provision of the contract. If the 1,000 tools had to be manufactured so that they could be completely paid for and accepted by respondent and resold within the year, then it would always be within the power of appellant to prevent performance by respondent by not completing the order within the year.

[9, 10] It is certainly well established that an adequate tender of performance by a party to a contract fulfills his duty thereunder, and if his tender is unjustifiably rejected, he cannot then be said to be in default, as here, where appellant complains that there is no evidence that the parties entered into a contract of sale of the 640 tools, when appellant prevented the completion of such contract by refusing to perform. Because of the previous dealings of the parties, respondent not being notified within the year that the order was rejected, was entitled to believe that it had been accepted by appellant. See Restatement of Contracts, Sec. 72(1) (c).

Numerous other findings are criticized but we believe that the only finding against which appellant has a justifiable complaint is Finding XVII. That finding reads as follows:

[11] "That on or about July 23, 1951 plaintiff and cross-defendant received an order from Air Speed Tool Company for 6,000 air drills. That on or about the 7th day of November, 1951 plaintiff and cross-defendant requested defendant and cross-complainant to permit the direct sale by plaintiff and cross-defendant to Air Speed Tool Company of said 6,000 air drills; that plaintiff and cross-defendant and the defendant and cross-complainant agreed to the aforesaid sale upon the condition that it be made pursuant to the terms and provisions of the agreement of August 24, 1951 with the exception, however, that the usual remuneration in regard thereto be modified in order that *defendant and cross-complainant would receive and have a credit from plaintiff and cross-defendant of the sum of Six Thousand Dollars ($6,000) against any and all drills thereafter ordered by defendant and cross-complainant of plaintiff and cross-defendant at the rate of Two Dollars ($2.00) per tool; that said parties agreed that plaintiff and cross-defendant credit defendant and cross-complainant with the aforesaid Six Thousand Dollars ($6,000) on such a basis if, as and when Air Speed Tool Company had paid for the aforesaid order in full; that the order for said 6,000 air drills was completed by plaintiff and cross-defendant about the month of March, 1952; that said Air Speed Tool Company had at the date of the institution of this action and prior to August 24, 1952 paid the plaintiff and cross-defendant in full for the aforesaid order; that defendant and cross-complainant was not given credit for said sum of Six Thousand Dollars ($6,000) on the purchase order of August 22, 1952* which plaintiff and cross-defendant refused to accept, nor has defendant and cross-complainant been paid the sum of Six Thousand Dollars ($6,000)." (Emphasis ours.)

There is no merit in the claim that the finding is unsupported because the order of Air Speed was sent to appellant on July 23, 1951, and the contract of August 24, 1951, excludes all bona fide orders contracted by DeKay before August 15, 1951. The finding recites that the order was *received* on July 23, 1951. The agreement of August 24, 1951, states that "bona fide orders contracted for" before August 15, 1951 shall be excluded from the agreement. Apparently appellant himself did not believe that the Air Speed order though received, had as yet been *contracted for,* thus making it exempt from the agreement of

August 24, 1951, or he would not have made the agreement for a $6,000 credit with respondent which he admits making.

Finding XVII definitely finds that an agreement was made between the parties that the $6,000 credit would be paid out to respondent on any and all drills thereafter ordered by respondent from appellant at the rate of $2 per tool, that the parties agreed for the credit *on that basis* if, as and when Air Speed had paid in full, and that such payment had been made in full prior to August 24, 1952. The finding then states that respondent was not given credit for the sum of $6,000 on the purchase order of August 22, 1952, nor has respondent been paid the sum of $6,000. This part of the finding clearly conflicts with the prior part of the finding. The agreement for $2 credit per tool on future orders is well supported by the testimony of both parties. The trial court found only 1,000 tools were purchased and ordered by respondent in conformity with the contract of August 24, 1951. Clearly, at the rate of $2 per tool, only $1,280 credit could be used against the order of August 22, 1951. If the 360 tools were purchased subject to this credit also, then another $720 credit would have accrued to respondent, or a total of $2,000. Since the trial court has found that 1,000 tools had been ordered and purchased up to August 24, 1951, the entire sum of $6,000 was not payable under the agreement of the parties until a total of 3,000 tools had been purchased.

Since the judgment has decreed the contract of August 24, 1951, to be still in full force and effect, this finding does not support the judgment for $6,000 in favor of respondent with interest from August 29, 1952, the date when respondent was notified of the rejection of the order. Such a judgment is consistent only with a finding that the contract has been terminated, or with a finding that the credit arrangement for $2 per tool was never agreed upon, but that the sum was payable in full at all times after it was paid to appellant by Air Speed. The evidence pointed out by respondent could support a finding that the $6,000 was due when paid by Air Speed, even though the testimony and documentary evidence is certainly abundant to support a finding that the commission was to be absorbed at $2 per tool if the contract was not terminated. The trial court, however, must find one way or the other. The difficulty with Finding XVII is that it appears to find both ways on this issue. If it finds that it is true that such a credit agreement was made, then it cannot give judgment for the $6,000, since 3,000 tools have not yet been ordered. If it finds that the commission was to be paid when paid by Air Speed, and that the credit agreement was never consummated, then the $6,000 judgment may stand.

[12] Appellant contends that the trial court made no finding of fact or conclusions of law on the complaint and answer at all. The main issue in the case was whether respondent had fulfilled its obligation under paragraph 21 of the contract to purchase a minimum of 1,000 tools. If it had not, then the contract was terminated by virtue of its own terms. The trial court found that this minimum had been met and that the contract was in full force and effect on the date when appellant attempted a termination. The findings therefore adequately cover the issues tendered by the complaint and answer.

It is clear that there is a material conflict in Finding XVII, the determination of which is essential to the rendition of a correct judgment. Accordingly the judgment is reversed with directions to the trial court to amend Finding XVII so that it will be clear as to whether the parties reached an agreement to pay the $6,000 credit to respondent immediately it was received by appellant or to pay respondent on a $2 per tool credit basis. When said finding has been so amended judgment shall be entered to conform thereto.

In all other respects the judgment of the trial court finds support in the findings and evidence and is affirmed.

That portion of the judgment awarding respondent $6,000 is reversed with directions to trial court as specified.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER, J., dissenting.

131 Cal.App.2d 557

Alex SLOBODEN, Plaintiff-Respondent,

v.

TIME OIL COMPANY, a corporation, Defendant-Appellant.

Civ. 16216.

District Court of Appeal, First District, Division 1, California.

March 17, 1955.

Action by employee of repair company against tank trailer owner, who had delivered tank trailer to repair company for repairs, for injuries sustained when trailer exploded. The Superior Court, Contra Costa County, Hugh H. Donovan, J., granted plaintiff's motion for new trial, and defendant appealed. The District Court of Appeal, Peters, P. J., held that erroneous instruction that doctrine of assumption of risk applies when plaintiff, in exercise of ordinary care, should know that a danger exists supported grant of new trial where it was fairly debatable that instruction might have been misleading.

Order affirmed.

1. Appeal and Error ⇐901

On appeal from grant of new trial on grounds that erroneous instruction had been given, burden was upon appellant to show that such erroneous instruction could not possibly have misled or confused the jury.

2. Appeal and Error ⇐977(1)

Granting or denial of new trial is so largely in discretion of trial court that it will not be disturbed except upon manifest and unmistakable abuse, especially when discretion is used in awarding a new trial, and so long as a reasonable or even fairly debatable justification under law is shown for action taken, that action will not be set aside.

3. New Trial ⇐39

In action by employee of repair company, to recover from tank trailer owner for injuries sustained when tank trailer, which owner delivered to repair company for repairs, exploded, erroneous instruction that doctrine of assumption of risk applies when plaintiff, in exercise of ordinary care, should know that a danger exists supported grant of plaintiff's motion for new trial, where it was fairly debatable that instruction might have been misleading.

4. Negligence ⇐105

A plaintiff does not assume a risk unless he has actual knowledge of the danger.

5. New Trial ⇐39

That trial court gave an instruction conflicting with an admittedly erroneous instruction tended to support conclusion that it was fairly debatable that the instruction might have been misleading and supported grant of new trial, not only because of erroneous instruction given, but because of conflicting instructions.

6. Explosives ⇐7

In action by employee of repair company against tank trailer owner for injuries sustained when tank trailer, which owner had delivered to repair company for repairs, exploded, evidence was sufficient to take to jury issues whether employee had relied, and had right to rely, on owner to furnish properly cleaned tanks, and had no actual knowledge of danger resulting from owner's possible negligence in this respect.

7. Appeal and Error ⇐856(5)

On appeal from order granting motion for new trial, reviewing court was not limited to ground specified by trial court, but could affirm order if any proper ground for granting new trial appeared.

8. Appeal and Error ⇐840(1)

Where reviewing court determined that order granting new trial should be affirmed because of the giving of an erroneous instruction, it would pass on propriety of appellee's proffered instructions for benefit of trial court on retrial. West's Ann.Code Civ.Proc. § 53.

9. Explosives ⇐7

In action by employee of repair company for injuries sustained when tank trailer, which tank trailer owner delivered to repair company for repairs, exploded, evidence whether any negligence on part

of repair company or its employees was a concurrent or an intervening cause presented issue for jury.

10. Negligence ⇐27

The supplier of a chattel to those who use chattel supplied for supplier's business purposes has duty to use reasonable care to make chattel safe for use.

11. Explosives ⇐7

In action by employee of repair company against tank trailer owner, which delivered tank trailer to repair company for repairs, for injuries sustained when trailer exploded, evidence was sufficient to take to jury issue whether owner had agreed to furnish tanks cleaned and prepared for welding and whether owner had been negligent in failing to fulfill this agreement.

Frederick M. Van Sicklen, James C. Calkins, Alameda, for appellant.

Hoberg & Finger, San Francisco, Russell F. King, Richmond, for respondent.

PETERS, Presiding Justice.

In this action for personal injuries the jury returned its verdict in favor of defendant, Time Oil Company. Plaintiff's motion for a new trial was granted "on the grounds that erroneous instructions were given at the time of the trial." Defendant appeals.

[1] It is conceded that the trial court gave, upon the request of defendant, a partially erroneous instruction on the doctrine of assumption of risk. Appellant argues its appeal as if the issue were whether the giving of this erroneous instruction was prejudicial, and assumes that the burden is on respondent to show that it was. That is not the law. Quite to the contrary, the burden is upon appellant to show that such erroneous instruction could not possibly have misled or confused the jury. The proper rule, supported by many cases, is stated as follows in 4 Cal.Jur.2d, p. 476, § 598:

[2] "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. This is especially so when the discretion is used in awarding a new trial, for this action does not finally dispose of the matter, and it is only in rare instances and on very strong grounds that the reviewing court will set aside such an order * * *.

"* * * But so long as a reasonable or even fairly debatable justification under the law is shown for the action taken, that action will not be set aside, even if, as a question of first impression, the appellate court might feel inclined to take a different view."

In Bolton v. Martin, 126 Cal.App.2d 178, at page 180, 271 P.2d 991, at page 992, in discussing an appeal from an order granting a new trial because of an erroneous instruction, this court stated:

"Thus, on this appeal, the action of the trial court in granting the motion for a new trial because of the giving of the challenged instruction can be reversed only if, assuming the facts warranted instructions on last clear chance at all, the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury. All presumptions favor the order as against the verdict. It is not necessary to find, in order to uphold the trial court, that the giving of the instruction was prejudicial to the plaintiffs. If the challenged instruction was erroneous in any degree, or even if it is only 'fairly debatable' that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed, even if this court, had the question been presented to it in the first instance, would have found the error minor, and would not have granted the motion. Thus, the burden on the one attacking such an order is a very heavy burden indeed." See also Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680; Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738; Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165, 153 P.2d 338; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93.

[3] Tested by these standards, it is obvious from the facts that it is at least "fairly debatable" whether the erroneous instruc-

tion "may have been misleading." That being so, the order must be affirmed.

Alex Sloboden, the plaintiff and respondent, in March of 1952, when injured, was employed as a welder by the Richmond Tank Car Co.[1] He had worked for that company for 2 years, and was a welder of 10 years' experience. The Time Oil Company, the appellant, owned some automotive equipment, including gasoline tank trailers, that occasionally needed welding repair. Appellant, in 1949, approached the Richmond Co. to do this work. Richmond Co. gave appellant an estimate on such repairs, which estimate required Richmond Co. to degas the tanks before welding. This is necessary as a preliminary safety precaution before welding. Tank trailers are degassed by steaming them for 7 or 8 hours. Appellant had just purchased a steam cleaning machine to be used for this purpose. Accordingly, the superintendent of appellant requested a welding estimate without Richmond Co. performing the steam cleaning of the equipment. Such an estimate was given. It was agreed between the appellant and Richmond Co. that appellant would steam clean all tank trailers to be repaired so as to make them gas free before delivering them to Richmond Co. The oral contract provided that appellant would be billed only for the welding, and the employees of appellant were instructed "to be certain to gas free this equipment and deliver them ready for welding to Richmond Tank Car Company." Appellant, prior to this time, had paid out large sums to have its equipment steam cleaned, and had purchased the steam cleaning machine to save itself that expense.

At the time this agreement was entered into nothing was said about any tests to be made by either of the contracting parties to determine whether the tanks were gas free. As a matter of fact, appellant had no equipment to make such a test. The Richmond Co. did possess a gas indicator, which is a rod about a yard long which is inserted into the tank, and a reading obtained from a battery-operated instrument indicating the degree of concentration of explosive vapors. This three-foot wand could not effectively reach all portions of the tank's interior. A specified employee of Richmond Co. was delegated the duty of testing all tanks undergoing welding repair for gas, and no welding was performed by the welders until given a clearance by this employee.

Pursuant to the 1949 agreement, appellant sent 10 or 12 tank trailers to Richmond Co. for welding, always steam cleaning the trailers before sending them to Richmond Co. On the morning of March 19, 1952, appellant's shop foreman wanted a particular tank trailer repaired. He assigned two employees to steam clean the tank so that when it was delivered to Richmond Co. it would be ready for welding. These employees testified that they steam cleaned the various compartments in the tank for a period of 7 or 8 hours. Although the shop foreman of appellant knew that after steam cleaning it was a good safety measure to allow the equipment to ventilate for some time, in this instance, immediately upon the conclusion of the steam cleaning operation, he ordered the equipment delivered to Richmond Co. Appellant's shop foreman accompanied the equipment, and, upon arrival at the Richmond Co. plant, told the foreman of the latter company, apparently in the hearing of respondent, that the equipment had been "steam cleaned good."

The gas testing employee of Richmond Co. tested the tank for gas, and found the portions tested gas free. As already stated, the testing equipment was unable to reach all portions of the compartments of the tank. Respondent, who knew that he was not supposed to weld until given a clearance by the testing employee, asked that employee if he could proceed to weld and was told that he could. On this particular job, welding was required on cracks near the plugs on the top of the tank leading to the front and rear compartments. Respondent climbed up on the tank with his equipment and welded the cracks in the first compartment without incident. He then started to weld the cracks in the second compartment when an explosion occurred because of the explosive vapors still in the tank. Respondent was hurled to the ground and suffered severe injuries.

1. Hereafter generally referred to as Richmond Co.

Respondent's complaint charged appellant with negligence in inspecting and delivering the tank trailer containing volatile gasses to Richmond Co., and in not giving notice of its condition. Appellant denied this allegation and affirmatively pleaded the defenses of contributory negligence and assumption of risk. The jury found for appellant. The motion of respondent for a new trial was granted, the order specifying that the jury had been erroneously instructed.

The following instruction on the doctrine of assumption of risk, at the request of appellant, was given by the trial court:

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger.

"One who has thus assumed a risk is not entitled to recover for damage caused him without intention and which resulted from the dangerous condition or conduct to which he thus exposed himself."

[4] Insofar as the instruction informed the jury that the doctrine of assumption of risk applies when the plaintiff "in the exercise of ordinary care would know, that a danger exists" the instruction is clearly and admittedly erroneous. It is now settled law that a plaintiff does not assume the risk unless he has actual knowledge of the danger. Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 265 P.2d 904; Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580; Plotts v. Albert, 120 Cal.App.2d 105, 260 P.2d 621. In the Prescott and Plotts cases judgments for defendants were reversed because of the giving of such instructions, while in the Hayes case a judgment for plaintiff was affirmed, the court holding, among other things, that an instruction proposed by defendant on assumption of risk was properly denied because it included the language here involved.

Appellant concedes that the instruction here given was erroneous, but contends that, under the facts, respondent assumed the risks here involved in that the evidence is uncontradicted that he had actual knowledge of the danger involved. This argument is largely based on the evidence that respondent knew that appellant had not tested the tanks and relied on the test made by his own fellow employee. Appellant also calls attention to an instruction given to the jury to the effect that "plaintiff did not assume the risk of any injury that could have come to him only through the negligence of the defendant"; and contends that this instruction cancelled out the erroneous one.

[5] However relevant these arguments might be, had the trial court denied the motion for a new trial, they have no relevance to this appeal from the order granting the motion for a new trial. The trial court determined that its erroneous instruction may have misled or confused the jury. The correctness of that conclusion is at least "fairly debatable" and therefore within the discretion of the trial court. Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 76 P.2d 104; Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244; Hart v. Briskman, 110 Cal.App.2d 194, 242 P.2d 341. The fact the court later gave another instruction conflicting with the erroneous instruction supports the granting of the new trial, because it indicates that not only was an erroneous instruction given, but that conflicting ones were given.

[6] The argument that, under the facts, respondent assumed the risk as a matter of law is not sound. Under the evidence the jury could find that respondent relied, and had a right to rely, on appellant to furnish properly cleaned tanks, and had no actual knowledge of the danger resulting from possible negligence of appellant. This was a jury question. Meloy v. Texas Co., 121 Cal.App.2d 691, 263 P.2d 897.

[7, 8] Respondent also argues that, independently of the erroneous instruction, the trial court committed error in refusing to give certain instructions proffered by

him. Although this failure was not given as a basis for the granting of the motion, in such a situation the appellate court is not limited to the grounds specified by the trial court, but may affirm the order if any proper ground for granting it appears in the record. (See cases collected 4 Cal.Jur.2d p. 393, § 539.) Moreover, inasmuch as the order granting the new trial must be affirmed because of the giving of the erroneous instruction, this court should pass on the propriety of the proffered instructions for the benefit of the trial court on the retrial. § 53, Code Civ.Proc.; Cake v. City of Los Angeles, 164 Cal. 705, 130 P. 723.

[9] Respondent submitted a series of instructions, which were refused by the trial court, to the effect that any negligence of the Richmond Co. or its employees was at most, as a matter of law, a concurring cause and not an intervening one. These instructions were largely predicated on the rules of law set forth in the Restatement of Torts, § 393, and Comment (a) to that section, and the case of Northwestern etc. Ins. Co. v. Rogers etc. Foundry, 73 Cal. App.2d 442, 166 P.2d 401. Under these rules, under certain circumstances, the liability of the supplier of a chattel who supplies it in a defective condition is not affected by the subsequent negligence of a third person who is under a duty to make an inspection. However, these rules have no application if Richmond Co. had as much or more knowledge of the dangers as did appellant. Under the facts it would have been improper to have instructed that the assumed negligence of Richmond Co. was, as a matter of law, either a concurrent cause or an intervening one. It is for the jury to decide this question because it is a fact question. Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405; Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119. The court gave a general instruction to this effect. It properly refused any instruction directly or indirectly stating that the question was one of law.

Respondent also contends that the trial court erroneously failed to give two instructions setting forth his basic theory of the case. The two instructions are substantially similar in legal effect. One of them reads as follows:

"If you find from the evidence that the defendant Time Oil Company, a corporation, undertook to prepare the gasoline tank for welding by plaintiff's employers, then a duty of reasonable care devolved upon them to make such tank safe for the purpose for which it was supplied; and

"If the defendant Time Oil Company, a corporation, failed to exercise reasonable care to make such tank safe for welding, then it would become liable to the plaintiff for all damage or injury proximately caused thereby, provided plaintiff was free from contributory negligence."

[10, 11] The instructions correctly set forth the law applicable to a supplier's liability to those who use a chattel supplied for the supplier's business purposes. The duty of such a supplier is to use reasonable care to make the chattel safe for use. Under the facts of this case the jury could find that appellant agreed to furnish the tanks cleaned and prepared for welding, and could find negligence in failing to adequately clean the tank prior to delivering it to Richmond Co. for welding. In Hinds v. Wheadon, 19 Cal.2d 458, at page 461, 121 P.2d 724, at page 726, in a somewhat similar situation, the court laid down the duty of a supplier of such a chattel as follows: "The evidence indicates further that defendants undertook to prepare the dehydrator tank for the welding operation, and, in that event, a duty of reasonable care devolved upon them to make the tank safe for the purpose for which it was supplied. [Citing a case and the Restatement of Torts, § 392.]" See also McCall v. Pacific Mail S.S. Co., 123 Cal. 42, 55 P. 706.

No comparable instruction was given by the court. The proffered instructions, or similar ones, should have been given, and should be given on the new trial. This is an additional reason for affirming the order.

The order granting the new trial is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

131 Cal.App.2d 587

Harry GLASCOCK, Plaintiff and Respondent,

v.

Thomas W. SUKUMLYN, Defendant and Appellant.

Civ. 20576.

District Court of Appeal, Second District, Division 2, California.

March 18, 1955.

Action was brought for specific performance of option to purchase shares in corporation. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that where shares in corporation organized by plaintiff and others were not ordinarily obtainable, plaintiff owned over fifty percent of the shares, defendant, who owned some shares, wished to purchase more shares from third party, but lacked means or ability to purchase additional shares without help of plaintiff, and, in order to secure help of plaintiff, defendant joined with plaintiff in executing option agreement, which for ten dollars paid to defendant gave plaintiff option to purchase stock owned by defendant or thereafter acquired, for amount paid by defendant for the shares, and which was to be in effect for two years and was to be automatically extended for additional periods of two years unless defendant elected not to extend period of option, option was valid, and plaintiff was entitled to specific performance thereof after complying with terms thereof and tendering defendant price of shares owned by defendants.

Judgment affirmed.

1. Specific Performance ⇐68

Ordinarily, equity will deny specific enforcement of contract to sell personalty, but there are exceptions.

2. Corporations ⇐116

Specific Performance ⇐57

Where defendant, who owned some shares in corporation, wished to purchase more from third party, but lacked means or ability to do so without help of plaintiff, and, to secure help of plaintiff, defendant joined with plaintiff in executing option agreement, which, for ten dollars paid to defendant, gave plaintiff option for two years to purchase stock owned by defendant or thereafter acquired, for amount paid by defendant for shares, option was valid and plaintiff was entitled to specific performance thereof.

3. Specific Performance ⇐51

Where defendant lacked means or ability to purchase additional shares in corporation without help of plaintiff, and, in order to secure help of plaintiff, defendant joined with plaintiff in executing option agreement, which for ten dollars paid to defendant, gave plaintiff option for two years to purchase stock owned by defendant or thereafter acquired, for amount paid by defendant for shares, specific performance would not be denied on ground that option agreement was unfair.

4. Specific Performance ⇐57

Where defendant lacked means or ability to purchase additional shares in corporation without help of plaintiff, and, in order to secure help of plaintiff, defendant joined with plaintiff in executing option agreement, which for ten dollars paid to defendant, gave plaintiff option to purchase stock owned by defendant or thereafter acquired, for amount paid by defendant for shares, specific enforcement of option agreement would not be denied because agreement did not require plaintiff to do anything.

5. Sales ⇐24

An "option agreement" is not a binding agreement to sell, but is merely an offer to sell on prescribed terms, and there is no contract until offer is accepted.

See publication Words and Phrases, for other judicial constructions and definitions of "Option Agreement".

6. Sales ⇐64

When offer to sell in option agreement is accepted, and optionee complies with express terms of agreement, unilateral contract becomes bilateral, and, on payment

of price named in option within time specified, optionor no longer owns interest in optioned property.

7. Contracts ⇐53

Adequacy of consideration for option agreement must be related to date of option and not to date of bilateral contract when option is accepted.

8. Appeal and Error ⇐170(1)

Where contention that option agreement was too indefinite to be specifically enforceable because it did not appear who would be required to execute note, was not mentioned in trial court, contention was unavailable on appeal.

9. Appeal and Error ⇐1010(1)

Where there was no claim that findings were unsupported by evidence, such findings were final on appeal.

10. Contracts ⇐172

Option agreement, which provided that it was to be in effect for two years and was to be automatically extended for additional periods of two years unless defendant elected not to extend period of option, did not become an ordinary offer without consideration at end of two years.

11. Appeal and Error ⇐173(2)

Where defendant, in action for specific performance of option agreement, failed to plead and prove that plaintiff's tender did not comply with terms of option agreement because the tender was short, the point would be deemed to have been waived on appeal.

12. Trover and Conversion ⇐40(4)

In action for specific performance of option agreement, which gave plaintiff option to purchase shares of defendant in corporation, evidence sustained finding that plaintiff had not converted some of defendant's shares before exercising option.

13. Trover and Conversion ⇐7

Where defendant exercised option under option agreement to purchase all shares of defendant in corporation, refusal of plaintiff to return to defendant certain shares, which defendant had previously delivered to plaintiff, was not a conversion.

J. Q. Gilchrist, Los Angeles, for appellant.

Harry A. Chamberlin, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent sued to enforce specific performance of an option to purchase shares in a corporation in which both parties were stockholders. From a judgment in his favor, appeal has brought the matter to this court and reversal is urged on several grounds.

Prior to June 21, 1947, respondent and others had organized Dynamic Air Engineering, Inc. On that date, respondent owned over fifty per cent of the issued stock. Appellant was owner of 111 shares. For the sum of ten dollars, appellant on that date executed in favor of respondent an option to purchase all shares of the corporation which appellant then owned or might thereafter acquire. The pertinent terms of the option appear on the margin below.* Appellant was desirous of acquiring additional shares from one Vernon Sharpe who owned 412⅝ shares, but he pos-

* "That in consideration of Ten Dollars ($10.00), the receipt of which is hereby acknowledged, First Party [Sukumlyn] herewith grants and gives to the Second Party [Glascock] the absolute and irrevocable right, privilege, and option at any time within a period of two (2) years from the date hereof to purchase from First Party or, in the event of the death of First Party, to purchase from his heirs, executors, or administrators, the whole number of shares of the stock of Dynamic Air Engineering, Inc., a California corporation, which the First Party now owns or which he may hereafter acquire; and during the life of the option herewith granted, the First Party agrees that he will not directly or indirectly dispose of, hypothecate, or encumber such stock, but that he will hold the same intact to the end that the Second Party may have an opportunity during the aforesaid two (2) years of taking advantage of such option and exercising the same.

"The term of this option shall be extended automatically for successive periods of two (2) years following the ex-

sessed neither the means nor ability to purchase any of such shares without the effort and collaboration of respondent who declined to assist unless appellant should execute the option in his favor. The result was that as a further consideration for the execution of the option by appellant, respondent agreed with appellant to employ his best efforts to provide an opportunity for appellant to purchase some portion of the shares owned by the same Vernon Sharpe.

In reliance upon the validity of the option so granted to him, respondent expended his best efforts to provide such opportunity for the purchase of the Dynamic stock by appellant, and as a result of respondent's efforts and of his placing all of his own Dynamic shares in escrow as security for the performance of a purchase agreement with Sharpe, respondent provided opportunities to, and assisted in making it possible for, appellant to purchase 268 shares subsequent to the date of the option. Such efforts by respondent in assisting appellant to purchase additional shares were made solely by reason of his reliance upon the enforcibility of his option.

Certain terms of the option must be kept in mind. (1) The initial term of the option was two years. (2) Such term was automatically *extended for successive periods* of the same duration, unless sooner terminated by notice from appellant 90 days prior to the expiration of any such period. (3) The price of the shares to respondent was to be the cost thereof. (4) The aggregate cost to respondent was to be paid by respondent's promissory note in favor of appellant, payable two years after date, bearing interest at four per cent per annum or at respondent's option, part or all cash.

After appellant had granted the option and acquired 268 additional shares, his holdings were 379 shares. The cost of the 111 shares to appellant had been $275 per share; for those he acquired after the date of the option, $121.20 per share. The court found the average cost of all 379 shares to appellant was $168.09 per share; that on the date of the option, June 21, 1947, they had a reasonable market value of no more than $100 per share, and that in March 1953 their fair market value was no more than $150 each, and have never had a greater fair market value.

On March 18, 1953, respondent delivered to appellant a notice of election to exercise his option to purchase the stock and tendered his promissory note in the sum of $63,006.60, payable two years after date with interest at four per cent per annum from date until paid. At the same time he demanded all the Dynamic Air Engineering stock then owned by appellant who rejected the demand and tender and refused to deliver certificates for the shares. At all subsequent times respondent stood ready, willing and able to purchase such Dynamic stock according to the terms of the option.

Respondent's amended complaint alleged

piration of the initial, and each ensuing two (2) year period hereof, unless at least ninety days prior to the expiration of any such two year period the First Party shall serve upon the Second Party notice, in writing, of this intention not to extend further the period of the said option.

"In the event of the death of First Party, while this option agreement remains in force, then regardless of any other provisions of this agreement, or action by the parties, the term of this option shall be fixed at and it shall terminate two (2) years after the death of First Party.

"The purchase price of such shares to Second Party shall be an amount equal to the cost of the said shares to the First Party. Upon the exercise of the option herewith granted the purchase price shall be payable by the execution of unsecured notes bearing four percent (4%) interest per annum and maturing two (2) years from date thereof, or at the option of the Second Party, part or all of the payment may be made in cash. First Party states that as of the date of execution of this option agreement he is the record owner of one hundred eleven (111) shares of such stock and that the cost of those shares is Two Hundred Seventy-five Dollars ($275.00) a share.

"Immediately upon the exercise of the option herewith granted all rights, privileges, and benefits pertaining to all of the such shares shall pass to and be the unincumbered (sic) property of the Second Party.

"This Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, and assigns of the parties hereto."

the execution of the option for a consideration, the due exercise thereof, demand for compliance and tender of the promised consideration. Appellant by his answer denied (1) execution of the option, (2) adequacy of the consideration tendered, (3) the reasons for executing the option as alleged in the complaint, (4) respondent's reliance thereon, (5) prejudice to respondent if unable to obtain the shares contracted for. Also, appellant pleaded affirmatively (1) the insufficiency of the complaint, (2) fraud inducing the granting of the option, (3) inadequacy of the consideration tendered at the exercise of the option, (4) termination of the option by a "counter-offer," (5) laches in the exercise of the option. By his cross complaint, appellant pleaded conversion of the 111 shares and alleged his ownership and right to have their possession restored to himself.

The court made findings substantially in accordance with the complaint; found neither fraud by respondent, nor lack of understanding on the part of appellant attendant upon the execution of the option, and rejected all the affirmative defenses and appellant's claim of ownership of the 111 shares.

The Option Valid

[1, 2] While ordinarily equity will deny specific enforcement of a contract to sell personal property, there are exceptions to the rule. The instant cause reveals that the subject shares were not ordinarily obtainable; they were required by respondent for a definite purpose and a specific use; respondent agreed to "employ his best efforts to provide an opportunity for said defendant to purchase some portion of the shares owned by said Sharpe," and he did employ his best efforts to provide appellant such opportunity and such efforts of respondent and his placing his own shares in escrow as security for the performance of a purchase agreement made with Sharpe all contributed to make it possible for appellant to purchase the 268 shares acquired by him after the date of the option.

Option Not Unfair

[3] Appellant contends that the option was unfair for the reason that he was paid only $10 therefor. His serenity is agitated because he received only $10 for the privilege of selling stock within two years with automatic extensions for successive periods of the same duration. Evidently appellant is confusing an option to buy at a specified price within a designated time with a bilateral contract to purchase. He was not overreached and thereby induced to sell. He exercised his free-born right to sell his stock. He consciously and knowingly agreed to sell the shares. He allowed his optionee two years to exercise the privilege and did not terminate it by use of the power he reserved. He dared not do so for the simple reason that he was using respondent to assist in acquiring the 268 shares from Mr. Sharpe. Such aid of respondent was one of the main considerations for the option.

[4–6] Also, appellant argues that the optionee was not obliged by the option to do anything. That is generally true of options. They are not binding agreements to sell the subject of the option—land, mines, livestock, merchandise, corporate stock. They are offers to sell on prescribed terms and there is no contract until the offer is accepted. When the latter occurs and the optionee complies with the express terms, the unilateral contract becomes bilateral. Upon payment of the price named in the option within the time specified, from that moment, the optionor no longer owns an interest in the optioned property, but is owner of only the property he received as consideration. It is no hardship on a man to receive for his property the price he has demanded. If his option extends the time in which the payment may be made, he can blame no one but himself. He exercised a civil right to fix the period within which he must be paid. It would be judicial legislation to impair that right as it affects either party. A and B, two shareholders, caused their corporation to issue additional shares to B who executed an option in favor of A on condition that A might purchase one half of such shares at cost within the named period. The only consideration to B was his agreement with A that B should have a controlling voice in management until otherwise agreed. B having received his price, it was held that the option

for purchase of shares at cost was equitable and was enforced. Hirschman v. Casey, 121 Neb. 471, 237 N.W. 584. The facts there recited parallel those at bar except the latter have the further advantage in that respondent relied upon the option and his own purchase of the 111 shares at a much higher price.

This action has little concern with the option. The issue is whether the bilateral contract which came into existence with respondent's tender of the purchase price is a valid agreement. "It is not the option which it is sought to enforce, but that which, by plaintiff's acceptance of defendant's offer, has ripened into an executory contract, whereby, for an adequate consideration the one agrees to buy and the other agrees to sell. The sale of an option is an executed contract; that is to say, the lands are not sold, the contract is not executed as to them, but the option is as completely sold and transferred *in praesenti* as a piece of personal property instantly delivered on payment of the price. Marsh v. Lott, 8 Cal.App. 384, 389, 97 P. 163. Similar language is found in Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A., N.S., 522. The court there, 156 Cal. at page 364, 104 P. at page 691, observed: "The plaintiff is not seeking in this action to enforce the option, but to compel compliance with the contract, which resulted from his exercise of the option." See also Walter G. Reese Co. v. House, 162 Cal. 740, 744, 124 P. 442.

[7] Appellant argues that he was not fairly compensated because of the likely increase in value of the shares and because respondent thereafter caused all earnings of the corporation to be reinvested in its business, and that if they had been distributed among the stockholders, appellant would have received about $99,000 as dividends. Such argument is a "looking backward." In the first place, appellant never, as a director, moved for a declaration of dividends and on two occasions moved for an increase of respondent's salary. But, in addition to those facts, the adequacy of consideration must be related to the date of the option; not to the date of the bilateral contract. Drullinger v. Erskine, 71 Cal.App.2d 492, 495, 163 P.2d 48. Moreover, appellant was paid $168.09 per share, the contract price, whereas the fair market value per share at the time of the exercise of the option did not exceed $150.

But the right of respondent to specific performance arises not only out of the reasonable value tendered, but also from the fact that the shares of Dynamic Engineering had a peculiar value for respondent. They could not have been purchased readily on the open market; could be acquired from only one person; were required by respondent as a part of his own business program and therefore appellant's failure to deliver could not have been compensated by money judgment. Korabek v. Weaver Aircraft Corp., 65 Cal.App.2d 32, 39, 149 P.2d 876.

[8] The contention is urged that the option is too indefinite to be enforceable in that it does not appear who would be required to execute the promissory note. If A is selling one tractor to B for a promissory note of $8,000, and no other person was ever mentioned, could A reasonably expect the promissory note of anyone other than B? But when respondent herein tendered his promissory note and demanded the shares held by appellant, we find no record of an objection to respondent's note as a noncompliance with the option. But if there were any merit in such contention, it could not avail now, since the question of the identity of the author of the note to be delivered to appellant was not mentioned in the trial court.

As to the asserted uncertainty of the time of payment, the option speaks for itself. The terms and time of payment are clearly set forth.

[9] Contention is made that the offer contained in the option was rejected; that the option was terminated by reason of a counter offer by respondent; that a substitute offer abandons the original offer unless the optionee expressly declares that the offer in the option shall not be abandoned. But this matter was entirely dis-

posed of by the findings that respondent did not submit to appellant a new and materially different offer for the stock, or a written counter-offer for the 379 shares; that respondent did exercise the option within a reasonable time after the expiration of the period prescribed. Such findings are final, no claim having been made that any finding is unsupported. Moreover, the arguments about the so-called counter-offer apply to offer and counter-offer in the ordinary business transactions, whereas in the case of the option from appellant to respondent, it was granted for a consideration, was the initial step to a bona-fide contract fully executed when exercised. See Corbin on Contracts; First National Exchange Bank v. Roanoke, 169 Va. 99, 192 S.E. 764.

[10] Appellant's belated assertion that the option became an ordinary offer without consideration at the end of two years was born of an indifferent consideration of the terms of the document. The finding that there was no laches is final on this point. The option provided for automatic renewals. It is a completed transaction, irrevocable by its terms. Marsh v. Lott, supra, 8 Cal.App. 390, 97 P. 163.

[11] The contention that respondent's tender did not comply with the terms of the option approaches sterility. Appellant says that he tendered only $63,006.60 while it should have been $63,025; that to maintain an action in specific performance, compliance with its terms must be unequivocal and positive; that " 'the acceptance must in every respect correspond with the offer' ". Caldwell v. Dalaray Mines, Inc., 68 Cal.App.2d 180, 184, 156 P.2d 52, 54. But the finding is that the true amount required to meet the offer was the amount tendered by respondent, to wit, $63,006.60. If that was not the correct sum, it was appellant's duty to plead, in some way, at the trial that the tender was $18.50 short. No evidence is designated as proof of error by the court in its finding. In the absence of such showing, the point is deemed to have been waived. Tesseyman v. Fisher, 113 Cal. App.2d 404, 248 P.2d 471; Kruckow v. Lesser, 111 Cal.App.2d 198, 244 P.2d 19.

[12, 13] Appellant contends that prior to the exercise of the option, he had demanded the return of 111 shares he had delivered to respondent and that his demand had been refused; that thereby such shares were converted; that the finding there was no conversion is without evidential support. The answer to such claim is that the option provides for the holding intact of the shares during the life of the option so that the optionee might have an opportunity to acquire the stock. Also, it was agreed that upon the exercise of the option, all rights pertaining to the shares shall become the unencumbered property of respondent. The proof shows and the court found that long prior to the exercise of the option, appellant endorsed the certificate for the 111 shares and delivered them to respondent to abide the exercise of the option. How could such a transaction become an act of conversion by respondent? While the latter so held the certificate, appellant demanded it of respondent. Could the latter's refusal be construed as a conversion? It was held under a written agreement for the happening of a certain event. Such agreement had not been terminated. Respondent's exercise of his contractual right to pay for the shares and become their owner clearly vested legal title to them in respondent. His action to enforce his right against the arbitrary conduct of appellant does not constitute conversion. The findings give respondent a clear title to the 111 shares as well as to all other Dynamic Air Engineering Inc. shares held by appellant when the option was exercised. And even if conversion of the shares had been proved, the record is destitute of proof of damage. The court found the value of the shares to have been $150 each at the time the option was exercised, whereas respondent paid appellant $168.09 per share.

Judgment affirmed.

McCOMB and FOX, JJ.

We concur.

131 Cal.App.2d 758

Application of Betty Short HOFMANN, For a Writ of Habeas Corpus.

Cr. 5397.

District Court of Appeal, Second District, Division 3, California.

March 23, 1955.

Proceeding upon application for writ of habeas corpus for relief of petitioner who was confined in a hospital. The District Court of Appeal, Per Curiam, held that the petitioner had had a right to remain at home pending the hearing as to her mental condition, in the absence of a showing that she was likely to injure herself or others if not restrained, and that the deprivation of this right affected adversely her interests in all subsequent proceedings.

Petitioner ordered released.

1. Mental Health ⇐38, 43

Son's petition which set forth facts sufficient to warrant inquiry into his mother's mental condition but did not allege facts showing necessity for her immediate confinement or that she was likely to injure herself or others if not restrained, and physician's certificate that the mother was in state of paranoid reaction and should be observed in psychiatric unit, did not sustain order which recited she was likely to injure herself or others if not immediately hospitalized and which commanded her immediate detention. Welfare and Institutions Code, § 5050.

2. Mental Health ⇐41

Where order for immediate detention pending hearing as to mental condition was on printed form on which extent and character of penciled alterations and deletions were difficult to determine, and person involved was not otherwise apprised of right to counsel and her intermittent requests during confinement for opportunity to communicate with counsel were denied, and she received only two days' notice of hearing held in her hospital room, and she did not realize hearing was taking place and was not advised in any way and did not waive proper notice of hearing, her subsequent confinement was illegal. Welfare and Institutions Code, §§ 5050, 5052.

3. Mental Health ⇐39

Where hearing as to lady's mental condition was held in hospital room assigned to her, she was entitled to five days' notice of hearing. Welfare and Institutions Code, § 5052.

4. Mental Health ⇐40

Right, pending hearing as to mental condition, to remain at liberty with an opportunity to consult with relatives and friends, to receive legal advice and in other ways to prepare for examination and hearing, is one that should be scrupulously observed by the authorities. Welfare and Institutions Code, § 5050.

5. Mental Health ⇐40

Lady had right to remain at home prior to hearing as to her mental condition, in absence of showing she was likely to injure herself or others if not restrained, and deprivation of this right affected adversely her interests in all subsequent proceedings. Welfare and Institutions Code, § 5050.

Gordon W. Levoy and Leonard F. Herzog, Hollywood, for petitioner.

Harold W. Kennedy, County Counsel, Los Angeles, Richard L. Riemer, Deputy County Counsel, Culver City, for respondent.

PER CURIAM.

[1–5] Upon petition of one of the attorneys for Betty Short Hofmann representing that the latter is confined at Kimball Sanitarium in Los Angeles County as a mental patient under an order of commitment of the Superior Court, we issued a writ of habeas corpus to which return has been filed and upon which a hearing has been held. We conclude that the petitioner should be ordered released because of irregularities in the proceedings leading up to her commitment. Pertinent provisions of § 5050, Welf. & Inst. Code, are set out in

the margin.[1] The proceedings may be outlined as follows. The son of petitioner filed an affidavit which set forth facts sufficient to warrant examination into the mental health and condition of the patient but failed to allege any facts showing necessity for the immediate apprehension of his mother, that is to say, no facts were alleged from which it would appear that the condition of Mrs. Hofmann was such that she was likely to injure herself or others if not placed under restraint. At the same time there was presented certificate of a physician that he had several times examined Mrs. Hofmann, the last time on February 4, and which stated: "It is my impression that she is in a state of paranoid reaction and that she should be observed in Psychiatric Unit No. 3 LACGH." Upon the basis of the affidavit and the certificate an order was made by a judge of the superior court which recited that Mrs. Hofmann was likely to injure herself or others if not immediately hospitalized and detained and which commanded that she be forthwith apprehended and detained for examination and hearing, pending the further order of the court. Mrs. Hofmann was taken from her home and immediately placed in the Psychiatric Unit of County General Hospital where she remained until February 9 when she was committed by order of court to the care and custody of the Counselor of Mental Health to be placed in Kimball Sanitarium, there to remain under the supervision of the Counselor of Mental Health until further order of the court. The order for the examination and detention of Mrs. Hofmann was on a printed form consisting of an entire page of closely typed material comprising several paragraphs and it contained what purported to be a notice to the person involved of a right to a hearing, to produce witnesses and to be represented by counsel. The printed form was designed to be used in a number of different situations and if read as a whole it would be meaningless. If care was taken to delete the paragraphs and other statements inappropriate to the proceeding in hand, it could constitute an intelligible notice to the person addressed. Likewise, the notice of hearing and of the right to be represented by counsel, the latter of which is in small print at the bottom of the notice, would, if read by a person of intelligence and understanding, be sufficient to advise him of his rights. However, portions of the writing were stricken out by heavy pencil lines in a manner which rendered it impossible to determine what was intended to be stricken and what to be retained. The portion containing the statement as to the right to notice, right to produce witnesses and to be represented by counsel was so emasculated that it might well indicate that the whole thereof was intended to be stricken and rendered ineffective.

In no other manner nor at any other time was any attempt made to inform Mrs. Hofmann of her right to counsel. It appears from her affidavit attached to the

1. "If the judge is satisfied that the person is sufficiently mentally ill that examination should be made into the state of his mental health, the judge shall issue an order notifying the person to submit to examination at such time and place as designated by the judge. The order for examination shall be served as provided in Section 5050.2 by a peace officer or counsel or in mental health of the county at least one day before the time fixed for the examination. The person shall be permitted to remain in his home or other place of domicile pending the examination, and shall be permitted to be accompanied by one or more of his relatives or friends to the place of examination.

"If it appears to the judge from a certificate of a licensed physician and surgeon dated not more than three (3) days prior to the presentation of the petition and filed with the court, certifying that he has examined the person and is of the opinion the person is mentally ill, and because of his illness is likely to injure himself or others if not immediately hospitalized or detained, or if it otherwise affirmatively appears that said person is likely to injure himself or others, the judge may issue and deliver to a peace officer or counsel or in mental health of the county an order directing that the person be forthwith detained in a place designated in the order for examination and hearing as provided in this chapter. The judge may issue a similar order if the person fails or refuses to appear for examination when notified. [Amended by Stats.1953 ch. 1291 § 1.]"

petition that upon numerous occasions she requested of hospital attendants that she be given an opportunity to communicate with her attorneys; no attention was paid to these requests and she was unable to communicate with them.

On February 7 an order was made fixing 9:30 a. m., February 9, 1955, for hearing and examination in department 54 of the court in the General Hospital and Mrs. Hofmann received notice thereof. At the time set for the hearing Mrs. Hofmann was in a room which had been assigned to her. There appeared at her room a judge of the superior court, two physicians, a person identified as a mental health counselor, the husband and son of Mrs. Hofmann. It was not announced that a hearing was to take place. No witnesses were then sworn; statements of two physicians were received and taken by a court reporter. The physicians signed a certificate, the purport of their statements and certificate being that the patient was confused, illogical, suffering from a delusion she had special powers and evidenced a suspicious nature, all of which indicated a chronic brain syndrome for which treatment in a sanitarium was recommended. Mrs. Hofmann did not then request that she be allowed to have an attorney present but it is clear from the transcript of the proceedings that she at no time was advised and that she did not understand that a hearing was taking place or that there would not be a proceeding in court at a later time. She was not questioned in a manner that would have enabled the court to determine her apparent mental state and when she undertook to express herself was interrupted and prevented from making whatever statements or explanation she desired to make. Although Mr. Hofmann and the son were present they gave no testimony concerning the patient's mental condition. The hearing was terminated abruptly and petitioner was taken to the sanitarium. She was then given shock treatments over her objection, and although she again requested an opportunity to telephone her attorney, permission was refused until 8 days after the hearing.

As previously stated the notice of the hearing was given but 2 days before the time set therefor; this notice would have been sufficient if the hearing had been held in the courtroom, but was insufficient for a hearing held at another place since the statute requires 5 days' notice to the patient of the time and place of such a hearing unless notice be waived by the patient. § 5052, Welf. & Inst. Code.

Under the circumstances of the case, and especially because Mrs. Hofmann did not realize that a hearing was taking place, we think the hearing in question was not in a courtroom, that Mrs. Hofmann did not waive notice of the hearing, and that there was a failure to observe the requirement for 5 days' notice prescribed by § 5052 of the Welf. & Inst. Code. As we read § 5050 of the code, a patient shall be permitted to remain in his home or other place of domicile pending the examination in the absence of a showing that because of his illness he is likely to injure himself or others if not immediately hospitalized or detained, which showing may be made either by certificate of a physician dated not more than 3 days prior to the presentation of the petition or by other affirmative evidence. There was no evidence before the court of the existence of facts which would have warranted the immediate hospitalization or detention of Mrs. Hofmann. She had a right to remain in her home pending the examination. Deprivation of this right affected adversely her interests in all the subsequent proceedings.

The authority of the court in such matters is statutory. Matter of Lambert, 134 Cal. 626, 630, 66 P. 851, 55 L.R.A. 856; In re Crowley, 95 Cal.App. 219, 221, 272 P. 787; Application of Harcourt, 27 Cal.App. 642, 643, 150 P. 1001. The right of the patient to remain at liberty with an opportunity to consult with relatives and friends, to receive legal advice, and in other ways prepare for the examination and hearing, is one that should be scrupulously observed by the authorities. The law not only specifies the conditions under which immediate detention is permitted, but provides that if such conditions are not shown to exist the patient may remain at home with family and friends. It is unnecessary to repeat the particulars in which Mrs. Hofmann's

freedom of action was interfered with as a result of her confinement and her failure to comprehend what was going on. The statute recognizes the right to representation by counsel. Petitioner was deprived of that right. There was, in our opinion, not even substantial compliance with the prescribed procedure; we can only conclude that petitioner's present confinement is illegal.

It is ordered that Mrs. Hofmann be released from confinement.

131 Cal.App.2d 677

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas Corporation, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION of the State of California, George R. Reilly, James H. Quinn, Paul R. Leake, and William G. Bonelli, as members of and constituting the State Board of Equalization of the State of California, and Charles G. Johnson, Treasurer of the State of California, Defendants,

State Board of Equalization of the State of California, Respondent.

Civ. 20547.

District Court of Appeal, Second District, Division 2, California.

March 21, 1955.

Hearing Denied May 18, 1955.

Action to recover use tax paid by taxpayer on repair parts for automatic train control equipment which was brought by taxpayer to California in order to maintain a 90-day supply of such parts used in repairing equipment on its locomotives. From an adverse judgment in the Superior Court, Los Angeles County, McIntyre Faries, J., the taxpayer appealed. The District Court of Appeal, Moore, P. J., held that the repair parts were subject to the use tax.

Judgment affirmed.

McComb, J., dissented.

1. Licenses ⇐15.1(10)

Where repair parts for automatic train control equipment installed on taxpayer's locomotives were brought to California in order to maintain a 90-day supply of such parts used in repairing in California such equipment and when installed became permanent portions of train control equipment of locomotives, stored parts were not exempt from use tax on the theory that they were imported into California to be incorporated in other tangibles to be transported outside the state and thereafter to be used solely outside the state. Revenue and Taxation Code, § 6009.1.

2. Licenses ⇐15.1(10)

Where repair parts for automatic train control equipment were brought into California to maintain a 90-day supply of such parts used in repairing in California such equipment and were installed in taxpayer's locomotives having such equipment, contention of taxpayer, that time and place of the functional use of the parts so stored among its supply should be considered was rejected as giving rise to interminable difficulties in administering the statute. Revenue and Taxation Code, § 6009.1.

3. Licenses ⇐15.1(6)

Where repair parts for automatic train control equipment were purchased from a retailer outside the state for the express purpose of storing them in California to be used to repair such equipment installed on taxpayer's locomotives and they became permanent parts of the locomotives repaired, it was not necessary in order to subject the parts to use tax, that they must have been purchased with the intention of using them in California and that they must have been so used here. Revenue and Taxation Code, § 6201.

4. Taxation ⇐251

Party claiming tax exemption has a burden of showing that it comes clearly within the terms authorizing the exemption.

5. Commerce ⇐63

Where when statute respecting exemption from use tax was later enacted, the exemption was not worded to exempt property subsequently used in interstate commerce but only exempted property "thereafter used solely outside the state" quoted phrase could not mean "within" or "without" the state "in interstate commerce". Revenue and Taxation Code, § 6009.1.

See publication Words and Phrases, for other judicial constructions and definitions of "Thereafter Used Solely Outside the State".

Robert W. Walker, John J. Balluff, Robert B. Curtiss, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Edward Sumner, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant is a Kansas corporation. It operates an immense railway system through many states with terminals and repair shops at Barstow and San Bernardino, in California. Only a comparatively short stretch of its track in Iowa and Illinois is designed and equipped for the purpose of operating automatic control equipment which is installed upon the locomotive for the purpose of signalling the engineer and controlling the speed. The parts constituting such equipment include loop and track receivers, each weighing 200 pounds; the equipment box, weighing three hundred pounds; the steel cab signal, a fixture inside the locomotive cab; governor, and steel cutoff switch. Each of such parts is so installed in the locomotive as to become an integrated part thereof.

In 1950 and 1951, the Union Switch and Signal Company of Swissvale, Pennsylvania, sold at retail to appellant certain train control equipment repair parts for $68,086.11 for the express purpose of bringing them to San Bernardino and Barstow for storage until installed permanently on appellant's locomotives. At that time, it was the practice of appellant to maintain a 90-day supply of such repair parts on hand, in the California cities. During the same two-year period (1950–1951) the parts so stored in California were integrated by appellant into the automatic train control equipment on its locomotives and thereby became permanent parts of such locomotives although such equipment functions only when the locomotive moves upon the limited mileage that is equipped for its use in controlling the speed. Such equipment is not used on locomotives operating solely in California.

The Issues

In making returns to respondent for sales and use taxes for the two years, appellant inadvertently included the purchase of the above described repair parts and paid taxes thereon in the sum of $2,042.58. A demand for refund of the tax was duly made. Having exhausted all administrative remedies, appellant instituted this action on the grounds that (1) the use of the repair parts on locomotives operating in interstate commerce is not subject to the use tax; (2) section 6009.1 of the Revenue and Taxation Code exempts temporary storage and installation of the repair parts from the use tax; (3) the parts were not purchased for use in California, which use is a necessary element to the application of the use tax; (4) the philosophy of the Use Tax Act will not be fostered by applying the tax in this case.

Respondents contend, on the contrary, that (1) nonuser of the equipment in California is immaterial; (2) it was stored in California and was used to make repairs in this state; (3) section 6009.1, supra, is not applicable as a statute pertaining only to property used "thereafter out of the state," it being conceded that the trains return to California. The decision of whether the tax was properly chargeable depends upon whether the equipment is a permanent part of the locomotive. If it is not, there is no *use* in California, hence no *use tax*. The finding is that the equipment is a permanent part of the locomotive repaired, although it was stipulated that the use of train control repair parts on locomotives operating in interstate commerce is not subject to the use tax. Therefore, this discussion will be confined to the

application of the use tax as it applies to the storage and installation of the parts in California prior to the movement of the repaired locomotives in interstate commerce.

The Statutes on Use Tax

Four statutes play an important role. They are sections 6008, 6009, 6009.1 and 6201 as they appeared in the Revenue and Taxation [1] Code in 1950.

Section 6201 made the use tax an excise tax, imposed on "the storage, use, or other consumption in this State of tangible personal property purchased from any retailer * * * for storage, use, or other consumption in this State * * *." There is no dispute that (1) the parts were purchased from a retailer; (2) they were to maintain appellant's 90-day supply in California; (3) they were to be withdrawn from the stored supply and installed in appellant's locomotives in California. While the "storage, use or other consumption" occurred in this state, it is not contended by respondents that there was any *use tax* due from appellant upon the use of the repair parts subsequent to their installation in locomotives engaged in interstate commerce. Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595.

Referring to the first portion of section 6009.1, appellant argues that "if the automatic train control unit into which the repair parts are integrated is treated as separate from the locomotive to which it is attached, it is clear that such unit is used solely outside the State of California after its transportation out of the state." Thereby, appellant disregards the findings as to the purpose for which the parts were shipped.[2] The last cited section does not exempt the storage of repair parts and the use of them from the use tax. The parts that were taxed were not shipped into California for the purpose of subsequently transporting them into sister states to be used only in them. They were brought to California in order to maintain a 90-day supply of such parts used in repairing, in this state, automatic train control equipment. Not only were they stored here to be used in making repairs, but in truth were in California installed in appellant's locomotives having automatic train control equipment. While section 6009.1 permits the importation into California of tangibles to be transported outside for use in other states, or to be processed, incorporated into or attached to other personalty to be used beyond the confines of this state, it is to be observed that in the instant controversy, the court found that the automatic train control parts were

1. California Sales and Use Tax Law.

Section 6008: "'Storage' includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer."

Section 6009: "'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business."

Section 6009.1: "'Storage' and 'use' do not include the keeping, retaining or exercising any right or power over tangible personal property shipped or brought into this State for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State."

Section 6201: "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter."

2. Finding III. The aforesaid automatic train control equipment repair parts were purchased * * * for the express purpose of bringing them to California, namely, to the cities of San Bernardino and Barstow, for storage in those cities until needed * * * to repair automatic train control equipment installed on some of the locomotives employed by plaintiff in its operations.

stored with appellant's 90-day supply, but also were installed in appellant's locomotives in California by attaching them permanently to the automatic train control equipment of such locomotives. Moreover, the locomotives repaired by the parts subjected to the use tax in 1950 and 1951 are used within as well as without the state. Such parts are not removable as an electric bulb from the headlight, but the court found that they became permanent portions of the train control equipment of the locomotives. Not only were they attached by iron anchors and bolts, but the governor is rotated by a spline driven into the axle. To avoid the application of the use tax to the repair parts after they have been stored in California and incorporated into the locomotives, the latter could not have been used inside California.

[1] The repair parts had become permanently incorporated into the locomotives. Therefore, the stored parts cannot be exempt from tax under section 6009.1 on the theory that they were imported into California to be incorporated into other tangibles "to be transported outside the State and thereafter used solely outside the State."

[2] Appellant contends that the time and place of the functional use of the parts so stored among its "90-day" supply and incorporated into its locomotives should be considered. Such interpretation of the taxing statute would require the keeping of records of the time and place of the functional use of each and all of the parts incorporated into and attached to a locomotive and would give rise to interminable difficulties in administering the provisions of section 6009.1.

[3, 4] Appellant contends that in order to make the automatic train control equipment repair parts subject to tax, they must have been purchased with the intention of using them in California and they must be used here. (See sec. 6201.) The findings say nothing to the contrary. They were purchased from a retailer "for the express purpose" of storing them in the California cities to be used "to repair automatic train control equipment installed on some of its locomotives." Subsequently they were so stored and used in California. They became parts of the locomotives, as permanent as the cowcatcher or headlight. Since they became permanent parts of the locomotive repaired, section 6201 does apply. Also, inasmuch as section 6009.1 requires exclusive use outside the state after the parts are attached, the functional use is irrelevant. The party claiming tax exemption has the burden of showing that it comes clearly within the terms authorizing exemption. Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 845, 849, 264 P.2d 539.

[5] The authorities relied upon by the Superior Court, Southern Pacific Co. v. Gallagher, supra; Pacific Telephone & Telegraph Co. v. Gallagher, supra, are not also readily distinguishable as suggested. They held that storage and installation in California is sufficiently a local incident, apart from subsequent interstate commerce, to constitute a taxable use under the Use Tax provisions. When 6009.1 was later enacted, the exemption was not worded to exempt property subsequently used in interstate commerce but only exempted property "thereafter used solely outside the State." These words cannot mean "within" or "without" the State or "in interstate commerce."

Judgment affirmed.

FOX, Justice.

I concur.

McCOMB, Justice.

I dissent.

Hearing denied; SCHAUER, J., dissenting.

131 Cal.App.2d Supp. 889

PEOPLE of the State of California, Plaintiff and Respondent,

v.

LeRoy SMITH, Defendant and Appellant.

No. Cr. A. 3242.

Appellate Department, Superior Court, Los Angeles County, California.

March 9, 1955.

Defendant was convicted of violating ordinance which forbade anyone from making to police department any false, misleading, or unfounded report for purpose of interfering with operation of police department or misleading any police officer. The Municipal Court, Los Angeles Judicial District, Evelle J. Younger, J., entered judgment, and defendant appealed. The Superior Court, Appellate Department, Patrosso, J., held that ordinance, which provided that no one should wilfully make to the city police any false, misleading, or unfounded report for purpose of interfering with operation of police department or to mislead police officers, does not apply to the making, at scene of automobile accident, of false statements in response to inquiries addressed to witnesses by investigating officers as to identity of motorist involved.

Judgment reversed.

1. Municipal Corporations ⇐631(1)

Ordinance, which provided that no one should willfully make to the city police any false, misleading, or unfounded report for purpose of interfering with operation of police department or to mislead police officers, does not apply to the making, at scene of automobile accident, of false statements in response to inquiries addressed to witnesses by investigating officers as to identity of motorist involved.

2. Statutes ⇐241(1)

Where language, which is reasonably susceptible to two constructions, is used in a penal law, ordinarily construction more favorable to offender will be adopted.

3. Statutes ⇐241(1)

In criminal proceeding, defendant is entitled to benefit of every reasonable doubt as to true interpretation of words or construction of language used in a statute.

Edmund I. Read, Wilmington, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

PATROSSO, Judge.

The defendant was charged and convicted of violating section 52.50 of the Los Angeles Municipal Code, which reads as follows: "No person shall wilfully make to the Police Department of this City any false, misleading or unfounded report, for the purpose of interfering with the operation of the Police Department or with the intention of misleading any police officer."

The evidence is that the defendant, with others accused and convicted with him, at the scene of an automobile accident, made false statements in response to inquiries addressed to them by the investigating officers, as to the identity of the driver of one of the cars involved in the accident. Upon this appeal defendant contends that such evidence is insufficient to establish a violation of the section in question.

Neither the research of counsel nor our own has brought to light any authority wherein a similar enactment was considered, and we are therefore confined to an examination and consideration of the language of the ordinance in determining its scope and meaning. Upon behalf of the defendant, it is urged that the word "report" imports something more and different from a false or misleading answer to an inquiry by a police officer although such inquiry may be one made by a police officer in the discharge of his duty in an endeavor to ascertain the identity of one suspected of having been involved in a criminal offense. The People do not undertake to make direct answer to this contention, but content themselves by relying upon the familiar rule that a statute or ordinance is presumptively valid, and if there is a rational doubt as to its validity, its constitutionality must be upheld.

In our view the problem presented is not whether the ordinance is constitutional but rather whether or not, properly construed, it denounces as unlawful conduct such as that disclosed by the evidence here.

[1] While not entirely free from doubt, we have concluded that if it had been the intent of the City Council to proscribe conduct such as that disclosed by the evidence here, it would have used language substantially different from that which it did. It seems reasonable that in such circumstances it would have provided that it should be unlawful for any person to willfully make a false statement to a police officer for the purpose stated—rather than using the word "report," which in its context, at least, seems to connote a statement written or oral made upon the initiative of one who resorts to the police department or a member thereof for the specific purpose of having some action taken with respect thereto rather than by way of response to questions by an officer—such as a missing person report or a report that a particular crime has been committed, like loss of his property as a result of robbery or burglary, or an auto accident. Otherwise, every person who undertook to reply to a question put to him by a police officer would subject himself to the possibility of being charged with a misdemeanor under the section, the not unlikely result of which would be to discourage persons interrogated to make answer, with the result that the detection of crime would be made more difficult rather than facilitated.

[2, 3] In any event, we believe that the instant case calls for the application of the well settled rule that " 'When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted.' " People v. Smith, 1955, 44 Cal.2d 77, 279 P.2d 33, 34. And as is further said in the case last cited: "The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute."

The judgment is reversed.

BISHOP, Acting P. J., and SWAIN, J., concur.

44 Cal.2d 196

Edward J. HILDEBRAND, Plaintiff and Appellant,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, and Los Angeles Junction Railway Company, a corporation, Defendants and Respondents.

L. A. 23341.

Supreme Court of California.
In Bank.

March 29, 1955.

Action against junction railway and another railway for injuries sustained by motorcyclist in nighttime crossing collision. The Superior Court, Los Angeles County, Anthony Brazil, J., assigned by chairman of judicial counsel, entered judgment of nonsuit as to both defendants, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that nonsuit was properly granted as to other railway and that evidence, which revealed that motorcyclist was traveling about 35 miles per hour when motorcycle headlights illuminated locomotive about 100 or 150 feet ahead of him and that motorcycle struck side of locomotive which was traveling about five miles per hour, was not sufficient to compel conclusion, as matter of law, that motorcyclist' speed was excessive or that he was negligent in failing to discover locomotive sooner or in failing to stop in time to avoid accident after seeing locomotive.

Judgment for other railway affirmed, and judgment for junction railway reversed.

Opinion, 272 P.2d 821, vacated.

1. Railroads ⇐350(1)

Where, at time of nighttime crossing collision between motorcycle and locomotive, train was being operated by junction railway, nonsuit was properly granted as to another railway in personal injury action by motorcyclist against junction railway and such other railway, in absence of evidence connecting such other railway with the accident.

2. Appeal and Error ⇐927(3), 989

In determining whether judgment of nonsuit was proper, the Supreme Court would have to disregard all inconsistencies in evidence and draw all reasonable inferences in favor of plaintiff.

3. Railroads ⇐350(13)

Even though, in personal injury action arising from railroad crossing collision, evidence indicated that motorcyclist was traveling at such rate of speed that he could not stop within range of his vision, it would not necessarily follow that motorcyclist was negligent as matter of law.

4. Automobiles ⇐245(40)

Ordinarily, motorist's driving at speed which prevents him from being able to stop within range of his vision does not constitute negligence as a matter of law, but question of motorist's negligence is one of fact.

5. Railroads ⇐350(30)

In action against junction railway for injuries sustained by motorcyclist in nighttime crossing collision, evidence, which revealed that motorcyclist was traveling about 35 miles per hour when motorcycle headlights illuminated locomotive about 100 or 150 feet ahead of him and that motorcycle struck side of locomotive which was traveling about five miles per hour, was not sufficient to compel conclusion, as matter of law, that motorcyclist's speed was excessive or that he was negligent in failing to discover locomotive sooner or in failing to stop in time to avoid accident after seeing locomotive.

S. L. Kurland and Robert H. Green, Los Angeles, for appellant.

Robert W. Walker, Louis M. Welsh and William L. Pemberton, Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff was injured when his motorcycle collided with the locomotive of a train, and he seeks to recover damages from the Los Angeles Junction Railway Company and the Atchison, Topeka and Santa Fe Railway Company. At the con-

clusion of plaintiff's evidence, both defendants moved for a nonsuit. The motions were granted, and judgment was entered accordingly.

[1] The train was operated by defendant Los Angeles Junction Railway Company, and since there is no evidence connecting the Atchison, Topeka and Santa Fe Railway Company with the accident, the nonsuit as to it was properly granted.

The accident occurred about three o'clock in the morning at the intersection of a railroad right-of-way and a four-lane highway. The weather was clear and dry, and there was very little traffic on the road. Plaintiff first realized that he was approaching a railroad crossing when he came over a rise in the road and the headlights of his motorcycle illuminated the locomotive about 100 or 150 feet ahead of him. He was then traveling about 35 miles per hour, and he immediately applied both hand and foot brakes with full force. The motorcycle struck the side of the locomotive, which was moving at a speed of about five miles per hour. There is evidence from which it can be inferred that no warning of the presence of the train was given by bells, whistles or other signals. Plaintiff had been over the route previously, but he was not very familiar with the area and did not know the exact location of the tracks.

It is not disputed that the evidence is sufficient to support a finding that defendant Junction Railway Company was negligent, and the only question presented is whether the evidence compelled the conclusion that plaintiff was guilty of contributory negligence.

[2–5] In disposing of this question we must, of course, disregard all inconsistencies in the evidence and draw all reasonable inferences in favor of plaintiff. Although the evidence indicates that he was traveling at such a rate of speed that he could not stop within the range of his vision, it does not necessarily follow that he was negligent as a matter of law. As stated by the court in Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 127, 137 P.2d 441, 450, "Ordinarily it is not negligence as a matter of law for a motorist to drive at a speed that he cannot stop within the range of his vision; it is a factual question." The record does not disclose any facts which would compel the conclusion as a matter of law that plaintiff's speed was excessive or that he was negligent in failing to discover the presence of the train sooner than he did or in failing to stop after seeing the train in time to avoid the accident. The cases of New York Lubricating Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, and Dolton v. Green, 72 Cal. App.2d 427, 164 P.2d 795, are clearly distinguishable, since in each of them the evidence showed without contradiction that the person injured observed the train a sufficient distance away to permit him to stop and made no effort to avoid the collision.

The judgment in favor of defendant Atchison, Topeka and Santa Fe Railway Company is affirmed. The judgment in favor of defendant Los Angeles Junction Railway Company is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

44 Cal.2d 178

Frank BOMPENSIERO, Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR SAN DIEGO COUNTY, and Judge John A. Hewicker, Respondents.

L. A. 23513.

Supreme Court of California.
In Bank.
March 18, 1955.
Rehearing Denied April 13, 1955.

Prohibition proceeding. The Supreme Court, Edmonds, J., held that person, who was not public official, and who had been charged with asking and agreeing to receive a bribe upon understanding that action of district liquor control administrator

upon matters officially before him would be influenced, could be prosecuted, tried, and punished as principal for criminal act of acceptance of bribe by public official, and, therefore, six year statute of limitations pertaining to crime of "acceptance" would be applicable, rather than three year statute applicable to certain felonies other than such acceptance.

Peremptory writ denied and the alternative writ discharged.

Carter, J., dissented.

1. Judges ⇐49(2)

Where, in criminal prosecution, in which petitioner was only a witness, but in which he had refused to answer question on ground that his testimony might tend to incriminate him, trial judge, without indication that he was singling petitioner out, had stated that liquor licenses of those who were called before body under oath, and refused to testify should be revoked, such statement was not sufficient to show personal bias or prejudice against petitioner on part of judge in subsequent criminal proceeding against petitioner.

2. Judges ⇐51(3)

While petitioner's statement which was made in support of application for removal of trial judge was not verified, it was formally defective and properly stricken. West's Ann.Code Civ.Proc. § 170.

3. Indictment and Information ⇐10.2(1)

In regard to sufficiency of evidence to support an indictment, probable cause exists if man of ordinary caution and prudence would be led by such evidence to believe and conscientiously entertain a strong suspicion of accused's guilt.

4. Indictment and Information ⇐137(1)
Prohibition ⇐5(4)

An indictment will not be set aside or prosecution thereon prohibited if there is some rational ground for assuming possibility that an offense has been committed and that accused is guilty of it.

5. Indictment and Information ⇐10.2(10)

Direct proof of formal understanding between parties to conspiracy is not required as basis of an indictment or information, but extent of assent of minds which are involved in a conspiracy may be inferred by grand jury from proofs of acts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole.

6. Indictment and Information ⇐10.2(10)

In prosecution for conspiracy to commit crime of asking and receiving of bribes of a public officer, evidence was sufficient to sustain grand jury's belief that each of the transactions to which a bribe was accepted was part of a single general conspiracy to invoke a bribe for each new liquor license issued throughout the district.

7. Criminal Law ⇐150

Proof that one of the overt acts in furtherance of the conspiracy occurred after time before which the statute of limitations would be bar is sufficient, and evidence of acts occurring before that time may be received to show the conspiracy.

8. Criminal Law ⇐150

Where, in prosecution for conspiring to commit crime of asking and receiving bribes by public officer, several overt acts are alleged to have occurred within three years prior to date the indictment was returned, prosecution for single, general conspiracy to ask or receive such bribes on behalf of named public official was not barred. Pen.Code, § 800.

9. Conspiracy ⇐40

Where, in prosecution for conspiracy to commit crime of asking and receiving bribes by public officer, general conspiracy could reasonably be supposed to have existed, prosecution under certain count, concerning which there was no direct evidence connecting defendant with the offense charged therein, could proceed upon theory that a criminal offense in furtherance of the conspiracy was charged by such count.

10. Criminal Law ⇐147

In absence of provision which expressly makes punishable the acceptance of a bribe by a public official or employee, six year statute of limitation expressly applicable to acceptance of bribe by public official or employee would be applied to statutes

under which public official who asks, receives, or agrees to receive any bribe could be punished. Pen.Code, §§ 68, 86, 93, 165, 800.

11. Criminal Law ⇐59(2)

Penal Code provision that the distinction between accessory before fact and principal and between principals in the first and second degree, in case of a felony, is abrogated and all persons concerned with commission of felony, whether they directly commit act constituting offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, punished as principals, expresses legislative intent to abolish distinctions made at common law as to various types of participants in commission of crime and to make all subject to same procedural and substantive limitations. Pen.Code, § 971.

12. Criminal Law ⇐147

Person, who was not public official, and who had been charged with asking and agreeing to receive a bribe upon understanding that action of district liquor control administrator upon matters officially before him would be influenced, could be prosecuted, tried, and punished as principal for criminal act of acceptance of bribe by public official, and, therefore, six year statute of limitations pertaining to crime of "acceptance" would be applicable, rather than three year statute applicable to certain felonies other than such acceptance. Pen. Code, §§ 68, 86, 93, 165, 800, 971.

Augustine, Bryans, Ragen & O'Connor, San Diego, and Frank Desimone, Downey, for petitioner.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Barton C. Sheela, and Jack R. Levitt, Deputy Dist. Attys., Los Angeles, for respondents.

EDMONDS, Justice.

By this proceeding in prohibition, Frank Bompensiero challenges the jurisdiction of the superior court to try him upon an indictment which names him as one of several persons who participated in the acceptance of bribes by a public official. He questions the sufficiency of the indictment and of the evidence before the grand jury to establish the crimes charged. He also attacks the trial judge's action in striking from the record a statement disputing the qualification of the judge to rule upon preliminary motions.

According to the evidence before the grand jury, Charles E. Berry was District Liquor Control Administrator of San Diego and Imperial Counties. It was the practice of the Board of Equalization to rely upon the recommendation of the district administrator as to the issuance of a new on-sale liquor license. Berry was the sole official in the district empowered to make such a recommendation.

Several owners of cafes or restaurants in the district testified that they paid substantial sums of money in excess of the statutory fee to obtain a new license. In a typical transaction the owner, having made unsuccessful application to the office of the district administrator, would contact a third party intermediary who assertedly could arrange to have the license issued. Upon payment to that person of several thousand dollars, the owner would be instructed to renew his application with the assurance that a license would be forthcoming. Upon a new application, the license would then be issued through normal channels.

Several persons were named in the indictment with Bompensiero as having acted as intermediary between Berry and the restaurant owners. However, in only one transaction is Bompensiero directly linked with the granting of a license. The evidence in that regard is as follows:

In the winter of 1950, Gillenberg approached Provart, an employee in the district administrator's office, and discussed the possibility of obtaining a seasonal on-sale license. After two or three of such conversations, Provart spoke to Berry about the matter. They agreed that Gillenberg could qualify for a license, but Provart was instructed to tell him it would cost $5,000 to have it issued. A counter proposal of $3,500 was made to Provart and conveyed to Berry. They discussed the ad-

visability of having Bompensiero "talk to" Gillenberg, and Provart was told to tell Gillenberg that "Frank will come and see him."

A man who identified himself as "Frank B." called upon Gillenberg and told him he could get a license but it would cost $5,000. When Gillenberg expressed doubt, he was told to ask Provart if "Frank B. is all right and if I know what I am talking about." Provart assured him that Frank B. could be depended upon.

A short time later, Gillenberg made application for a seasonal license. Two or three weeks passed without action upon it. He then received a telephone call instructing him to meet Frank B. in the lobby of a designated hotel and to have the money with him. There he met the man previously identified to him as Frank B., and they discussed payment. A cashier's check for $5,000 at first was refused, but after further conversation the check, which when presented to the grand jury bore the indorsement "Frank Bompensiero", was accepted. The license was issued in April, 1951, and soon afterwards, Berry gave Provart $400 as his share of the "Gillenberg deal."

Gillenberg had been told by Bompensiero that after a year from the time the seasonal license would be issued, he could re-apply and receive a general license. Such an application was made by Gillenberg in October, 1952. After about three weeks in which no action upon the application was taken, a man identifying himself as Bennett called upon Gillenberg. Bennett told him he could obtain a general license only after payment of $2,500. Gillenberg agreed and paid the amount to Bennett in cash. A few days later he re-applied for the general license, and in a few weeks it was issued.

The indictment was returned on September 1, 1954. In Count I, Bompensiero and several other persons are accused of "Conspiracy to Commit the Crime of Asking and Receiving Bribes by a Public Officer" in that they "within 3 years last past * * * did agree to ask and receive bribes on behalf of Charles Berry." Eight overt acts in furtherance of the alleged conspiracy are asserted, including Bompensiero's instruction to Gillenberg, on February 27, 1951, to apply for a seasonal license and Bennett's demand for $2,500 for a general license made on October 25, 1952.

In Count X, it is alleged that Bompensiero and others on April 3, 1951, "did ask and agree to receive" a bribe from Gillenberg upon an understanding that the vote, opinion or action of Berry upon matters officially before him would be influenced. A similar charge is made in Count XI, in which it is asserted that Bompensiero and others "did ask and agree to receive a bribe" from Gillenberg on October 25, 1952. The indictment also included several other charges against Bompensiero.

When arraigned, Bompensiero moved to quash the indictment and filed a written demurrer to it. All of the counts against him were dismissed except Counts I, X and XI, with regard to which his motion was denied and the demurrer overruled. He then filed an "Affidavit and Application for Removal of Trial Judge." The court ordered the document stricken on the ground that it was frivolous and sham.

As grounds for issuing the writ of prohibition Bompensiero contends that the trial judge exceeded his jurisdiction in striking the "statement and affidavit" from the record. He also argues that the evidence before the grand jury is insufficient to establish probable cause for believing him guilty of the offenses charged in Counts I and XI. Count X, he asserts, on its face shows the bar of the statute of limitations.

The ground of asserted disqualification of the trial judge is "personal bias and prejudice" against Bompensiero, allegedly demonstrated by two statements made by him while presiding over a separate trial of some of the persons named in the indictment. In that proceeding, Bompensiero was called as a witness for the prosecution and refused to answer on the ground that his testimony might tend to incriminate him. Several other witnesses were called and claimed the same privilege. During arguments upon a motion for a new trial, the trial judge remarked that he had "believed the witnesses for the prosecution" and expressed the opinion that "if the

Board of Equalization wants to do their duty, I think what they should do, instead of picking on these fellows that came in here, they should also revoke the licenses of those that were called before a body, under oath, and refused to testify on the ground that whatever testimony they might give would tend to incriminate them." Bompensiero asserts that he holds a liquor license and thus is in the category mentioned in the latter statement.

[1, 2] These remarks, made in a criminal prosecution in which Bompensiero was only indirectly involved and without indication that he was being singled out, show so little basis for claiming personal bias or prejudice against Bompensiero as to justify the conclusion that the charge of disqualification is sham and frivolous. In that circumstance, the trial judge was not in error in striking the statement and affidavit. Cf. People v. Darby, 114 Cal.App.2d 412, 439, 250 P.2d 743; People ex rel. Department of Public Works v. McCullough, 100 Cal.App.2d 101, 111, 223 P.2d 37. There is also another basis for the order. Section 170 of the Code of Civil Procedure requires that, in a court of record, a statement of disqualification of the trial judge "shall be verified by oath in the manner prescribed by Section 446 of this code for the verification of pleadings." Bompensiero's statement was not verified and, upon that ground, is formally defective and was properly stricken out. Cf. People v. Kirk, 98 Cal.App.2d 687, 693, 220 P.2d 976.

With regard to the sufficiency of the evidence to support the indictment, Bompensiero urges that Count I charges only a single, general conspiracy to ask for or receive bribes on behalf of Berry. As he views the evidence before the grand jury, it does not show that he conspired with any of the other persons accused of being intermediaries for Berry, but connects him only with Berry and Provart. The count may not reasonably be construed as charging a series of isolated conspiracies, he argues, but even if it may be so read the only one which includes him terminated more than three years before the indictment was returned and is barred by section 800 of the Penal Code.

[3, 4] Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344. An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. Lorenson v. Superior Court, 35 Cal. 2d 49, 56, 59, 216 P.2d 859; cf. Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713.

The evidence before the grand jury presents a close question as to whether it shows probable cause to believe a general conspiracy existed and that Bompensiero was a part of it. The similarity of manner in which contact was made with the restaurant owners and the bribery accomplished tends strongly to suggest a common plan of participation although that evidence alone probably would not show Bompensiero's connection with it. However, Berry's discussion with Provart concerning the advisability of having Bompensiero "talk to" Gillenberg suggests some reason to suppose he would agree to do so, possibly because he had acted in a similar capacity previously. Bompensiero's statement to Gillenberg in regard to the issuance of a general license after a year implies knowledge of the manner in which Berry and his associates generally operated. Also, in each case the bribe given for a general license was either $7,000 or $7,500; the requirement that Gillenberg pay an additional $2,500 for the general license after paying $5,000 for the seasonal one, was consistent with this pattern.

[5, 6] The rule governing the sufficiency of the evidence to justify a suspicion of a conspiracy has been summarized as follows: "Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. '[I]t was not necessary for the state to prove that the parties actually came together, mutually discussed

their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole.'" Lorenson v. Superior Court, supra, 35 Cal.2d 49, 57–58, 216 P.2d 859, 864. The grand jury was justified in the belief that each of the transactions in which a bribe was accepted was part of a single general conspiracy to invoke a bribe for each new liquor license issued throughout the district.

[7, 8] In this situation, the prosecution of the crime charged in Count I is not barred. Proof that one of the overt acts in furtherance of the conspiracy occurred after the time before which the statute of limitations would be a bar is sufficient, and evidence of acts occurring before that time may be received to show the conspiracy. People v. Gordon, 71 Cal.App.2d 606, 629, 163 P.2d 110. Here, several overt acts are alleged to have occurred within three years prior to the date the indictment was returned.

[9] Bompensiero correctly contends that there is no direct evidence which connects him with the offense charged in Count XI. However, since a general conspiracy reasonably may be supposed to have existed, prosecution under this count may proceed upon the theory that a criminal offense in furtherance of the conspiracy is charged.

Bompensiero argues that under section 800 of the Penal Code[1], the applicable period of limitation for the offense charged in Count X is three years. He points out that it is there alleged that the offense was committed on or about April 3, 1951, more than three years preceding the return of the indictment. The position of the Attorney General is that the six-year period specified for "the acceptance of a bribe by a public official or a public employee" is applicable.

[10] Count X does not charge that he *accepted* a bribe, but only that he "did ask and agree to receive" a bribe. However, the offense charged in that count is in the language of section 68 of the Penal Code, which in turn is similar in wording to other provisions which prescribe punishment for a public official who "asks, receives, or agrees to receive" a bribe. Cf. Pen.Code, §§ 86, 93, 165. There is no provision which expressly makes punishable "the acceptance of a bribe by a public official or a public employee." Reasonably construed, section 800 refers to those statutes under which a public official who "asks, receives, or agrees to receive, any bribe" may be punished.

Another argument is that Bompensiero is not a "public official or a public employee," and is charged only with aiding and abetting a public official to receive a bribe. Construed strictly in his favor, he asserts, section 800 may not be read as prescribing the six year period for one, not a public official, who merely participates in the receipt of a bribe.

In jurisdictions where aiding and abetting the commission of a criminal act is made a distinct offense, the statute of limitations which controls prosecution for the criminal act is held not to apply to the offense of aiding and abetting. The general statute of limitations applicable to "other offenses" is held to control. Dinklage v. State, 135 Tex.Cr.R. 10, 117 S.W.2d 111, 112; State v. Patriarca, 71 R.I. 151, 43 A.2d 54, 58, 160 A.L.R. 387. But in the Patriarca case it was specifically stated that a different rule might apply when the legislature has removed the distinction between one who commits a crime and one who aids in its commission. The court said that it "must follow the common law, as long as our legislature does not abrogate it and de-

1. "An indictment for any other felony than murder, the embezzlement of public money, the acceptance of a bribe by a public official or a public employee, or the falsification of public records, must be found, and information filed, or case certified to the superior court, within three years after its commission. An indictment for the acceptance of a bribe by a public official or a public employee, a felony, must be found, and the information filed, or case certified to the superior court, within six years after its commission."

clare accessories before the fact to be principals." 43 A.2d at page 58. And in State v. Bachmeyer, 247 Wis. 294, 19 N.W.2d 261, it was held that the statute of limitation applicable to the substantive offense applies to one who participates as a principal.

[11] Section 971 of the Penal Code provides in part: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of a felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be *prosecuted, tried, and punished* as principals * * *." (Emphasis added.) Reasonably construed, this section expresses a legislative intent to abolish the distinctions made at common law as to the various types of participants in the commission of a crime and to make all of them subject to the same procedural and substantive limitations.

[12] Section 800 of the Penal Code provides no exception to this rule. Contrary to Bompensiero's position, it does not specify a period of limitation based upon the identity of the offender, but differentiates among the types of criminal acts. It places in one category "any other felony than *murder*, the *embezzlement* of public money, the *acceptance* of a bribe by a public official or a public employee, or the *falsification* of public records." (Emphasis added.) It places in another category the "acceptance of a bribe". Because Bompensiero may be prosecuted, tried and punished as principal for the criminal act of "acceptance of a bribe by a public official", Count X of the indictment is not barred by limitation.

The peremptory writ is denied and the alternative writ discharged.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Count I charges Bompensiero and several other persons with a general conspiracy to commit the crime of asking and receiving bribes by a public officer. Count X charges that Bompensiero and others on April 3, 1951, did ask and agree to receive a bribe. Count XI alleges that Bompensiero and others on October 25, 1952, did ask and agree to receive a bribe.

I do not believe that there was evidence sufficient to support a reasonable belief that Bompensiero was involved in a general conspiracy as alleged in Count I, nor that there was any evidence or inference connecting Bompensiero with the crime alleged in Count XI.

To show that there was sufficient evidence against petitioner the majority opinion states: "The similarity of manner in which contact was made with the restaurant owners and the bribery accomplished tends strongly to suggest a common plan of participation, although that evidence alone *probably would not show Bompensiero's connection with it.* However, Berry's discussion with Provart concerning the advisability of having Bompensiero 'talk to' Gillenberg suggests some reason to suppose he would agree to do so, possibly because he had acted in a similar capacity previously. Bompensiero's statement to Gillenberg in regard to the issuance of a general license after a year implies knowledge of the manner in which Berry and his associates generally operated. Also, in each case the bribe given for a general license was either $7,000 or $7,500; the requirement that Gillenberg pay an additional $2,500 for the general license after paying $5,000 for the seasonal one, was consistent with this pattern." (Emphasis added.)

In other words, it is held that the similarity of the plan of operation of bribery is "probably" not enough to show petitioner's connection with it, then that connection is purportedly shown by reliance on such similarity. The majority points to only two others bits of evidence to fortify the similarity in evidence, namely: (1)

That Berry's discussion with Provart about having petitioner talk to Gillenberg, the person who was to pay the bribe money, indicates petitioner would talk to Gillenberg, and (2) petitioner's statement to Gillenberg that application should be made for a general license by Gillenberg after a year. Those two items of evidence are not sufficient, either separately, together or in conjunction with the admittedly weak similarity of manner of contacting the bribers. It seems unreasonable to say that because Berry and Provart, his assistant, discussed the possibility of having petitioner speak to Gillenberg about the bribe, a conspiracy is proven either between Berry and petitioner or among petitioner and the other persons working for Berry. That a person (Berry) will talk to another person (petitioner) about committing a crime (bribery) may indicate that the former thinks the latter will be receptive to the proposition but it does not show that the latter would in fact be receptive to it or would conspire with him or with other persons in carrying out Berry's orders. If it did it would mean that if one person thinks that another would commit a crime, then there is evidence that the other would agree to commit it. It is not only no proof of the conspiracy but it does not even raise a reasonable suspicion.

Petitioner's statement to Gillenberg that the latter should apply for a general license after operating for one year under the seasonal license does not indicate "knowledge of the manner in which Berry and his associates generally operated." None of the other evidence in this case makes any reference to seasonal licenses. There is not the slightest intimation in the record that it was the *general practice* of Berry and the other defendants to arrange for the issuance of a seasonal license, followed in one year by the issuance of a general license. Indeed, this very fact—that Gillenberg was to get a seasonal license only—is an indication of *dissimilarity* between the acts in which Bompensiero participated and any other acts of bribery to obtain a license. It is evidence tending logically to a belief that there was *no* general conspiracy involving petitioner. Gillenberg testified, " * * * this Frank B. told me that I would get a general license after operating a year. * * * He said that I would *automatically* get a general license and for me to go in and apply after I had operated a year which I did, you see, and, of course, *I found that out not to be true* after I went in to get the license." (Emphasis added.) The logical inferences which could arise from such events would be: (1) That Frank B. thought that the population of Jacumba, the location of Gillenberg's establishment, would be such in one year that he, Gillenberg, could qualify for a general license; or (2) that Frank B. believed that it was the practice of the Board of Equalization to issue a general license after one year's operation under a seasonal license; or (3) that Frank B. believed that the $5,000 payment would satisfy Berry, and that the general license would be issued without the necessity of further bribery, i.e., that Frank B. was in woeful ignornance of "the manner in which Berry and his associates generally operated."

The fact that an additional bribe of $2,500 was obtained before the general license was issued to Gillenberg, bringing the total bribe to $7,500, again lacks any logical reference to petitioner. Not one word of evidence was offered which directly or by inference connected petitioner with this later act of bribery. In one transaction Gillenberg paid $5,000 to obtain a seasonal license. Later, desiring a general license, he paid an additional $2,500. The "going rate" of bribery for a general license was $7,500. These facts illustrate nothing more than the time-worn and probably dubious maxim that there is "Honor even among thieves." They indicate that Berry did not want to charge Gillenberg more than the going rate for a general license, for fear that Gillenberg would complain of the overcharge in too loud a voice. Again, I feel that it should be emphasized that no evidence was offered which in any way connected petitioner with the $2,500 bribe in October, 1952.

Even if it is assumed that there was sufficient evidence to show that petitioner conspired with Berry, there is no evidence

which even remotely connects petitioner with the other persons working for Berry, and thus there is no evidence showing a general conspiracy. It is conceded by the majority that to constitute a general conspiracy, there must have been an agreement not just among Berry, petitioner and Gillenberg, but also among petitioner and the *other persons* working for Berry. It appears that Berry, being in a position to give or refuse licenses had various persons whom he used to solicit bribes from parties desiring licenses. There is no evidence indicating any connection among those persons other than that they occasionally worked for the same person, Berry. The only reasonable inference is that there is no agreement among those persons, since Berry, for his own protection, would keep his various henchmen in ignorance of his operations as between each other.

It seems clear to me, therefore, that the Grand Jury of San Diego County did not have before them sufficient evidence to justify a reasonable belief that petitioner was guilty of the crimes alleged in Counts I and XI of the indictment.

The major point remaining for discussion is whether the prosecution of Bompensiero for the offense charged in Count X is barred by the statute of limitations. Pen.Code, § 800.

The majority opinion points out two specific facts by reason of which it should have held, but did not, that such prosecution *is* barred by the statute of limitation: (1) "Count X does not charge that he [Bompensiero] accepted a bribe"; (2) "* * * Bompensiero is not a 'public official or a public employee.'" Penal Code section 800 imposes a three year limitation on the bringing of an indictment for any other felony than murder, the embezzlement of public money, *the acceptance of a bribe by a public official or a public employee,* or the falsification of public records. A six year limitation is imposed on the bringing of an indictment for the *acceptance of a bribe by a public official or a public employee.*

In its decision on the two points enumerated above, the majority has employed a process of reasoning from one statute to another to arrive in the end at what it describes as a reasonable construction of Penal Code section 800. I do not quarrel with the "reasonableness" of its construction. The point which I desire to emphasize is that this is not the only possible construction of the statute; and, as this court has *repeatedly* held in the past, "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation. * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.'" People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401, 404; People v. Valentine, 28 Cal.2d 121, 143, 169 P.2d 1; In re McVickers, 29 Cal.2d 264, 278, 176 P.2d 40; In re Bramble, 31 Cal.2d 43, 51, 187 P.2d 411; People v. Chessman, 38 Cal.2d 166, 182, 238 P.2d 1001; Ex parte Rosenheim, 83 Cal. 388, 391, 23 P. 372; People v. Sayre, 26 Cal.App.2d Supp. 757, 761, 70 P.2d 546.

The question here presented is one of first impression in this state. Only one case, State v. Bachmeyer, 247 Wis. 294, 19 N.W.2d 261, 263, is cited which reaches the same result as the majority opinion reaches here. We are *not* bound by that case, decided pursuant to the law of a sister state. I feel that we are bound by the long established, eminently just policy set out in the cases decided in our own state, by this very court.

The writ of prohibition sought by petitioner should be granted.

Rehearing denied; CARTER, J., dissenting.

131 Cal.App.2d 762

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Patrick TIERNEY, Defendant and Appellant.

Cr. 2561.

District Court of Appeal, Third District, California.

March 24, 1955.

Defendant was convicted of robbery. The Superior Court, Sacramento County, Raymond T. Coughlin, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that defendant's argument that prosecuting witnesses could not be absolutely certain in their identifications of defendant as perpetrator of crime because of dimly lighted interior of barroom while holdup was in progress therein, was properly addressed to jury, but unavailing on appeal, as appellate court must assume that jury fully considered quality of identifications in view of circumstances under which robbery was conducted.

Judgment affirmed.

Criminal Law ⇐1159(5)

In robbery prosecution, defendant's argument that prosecuting witnesses could not be absolutely certain in their identifications of defendant as perpetrator of crime because of dimly lighted interior of barroom while holdup was in progress therein, was properly addressed to jury, but unavailing on appeal from judgment on conviction, as appellate court must assume that jury fully considered quality of such identifications in view of circumstances under which robbery was conducted.

Reynolds Gualco, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier & Frederick G. Girard, Deputies Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant herein was charged by information with the crime of robbery and after a trial to a jury was convicted. He appeals from the judgment of conviction and the order denying his motion for new trial.

The facts are these: On the night of December 9, 1953, at about 8:30 p. m. two men entered the 26 Club located at 2530 Broadway in Sacramento. One of these men walked up to the bar and called the bartender to him. He then placed a gun against the body of the bartender, told him that the place was being held up and forced the bartender to empty the proceeds of the cash register into a paper bag. The bartender was then forced to accompany the robber to the kitchen of the establishment, where a search for a safe was made. In the meantime the second man informed the customers in the bar that the place was being held up and at gun point forced them into a corner of the barroom. When the search for the safe in the kitchen proved unavailing, the two robbers forced bartender and patrons to lie on their faces behind the bar, while the robbers departed. The entire robbery was accomplished in from three to five minutes. The bartender and three of the patrons who had been in the barroom during the hold-up positively identified the appellant as the man who had held his gun on the bartender and forced him to put the proceeds from the cash register into the paper bag. Appellant's defense was alibi. He testified, as did also the manager of the apartment house where he had resided, and the manager's husband, that at the time of the hold-up he was in the apartment house having dinner with the two others.

The only contention made is that the evidence is insufficient to sustain the jury's verdict and in support of this claim appellant urges that the prosecution witnesses could not be absolutely certain in their identification of appellant as the perpetrator of the crime because of the dimly lighted interior of the barrom during the time the hold-up was in progress. The contention cannot be sustained. The argument is one which was no doubt properly addressed to the jury, but it is unavailing on appeal since here we must assume that the jury fully considered the quality of the identifications made in view of the circum-

stances under which the robbery was conducted, and we cannot say from the record that the jury were wrong in the conclusion that it was the appellant who committed the robbery.

The judgment and the order are affirmed.

PEEK and SCHOTTKY, JJ., concur.

132 Cal.App.2d 18

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert MARSHALL, Myron L. Tracy, Harvey Earl Simpson and Richard Sanchez, Defendants,

Myron L. Tracy and Harvey Earl Simpson, Appellants.

Cr. 5261.

District Court of Appeal, Second District, Division 1, California.

March 29, 1955.

Defendants were convicted of violating Penal Code, § 288a. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and defendants appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Sodomy ⇐6

In prosecution for violation of Penal Code, § 288a, evidence was sufficient to sustain conviction. Pen.Code, § 288a.

2. Sodomy ⇐4

Where defendant charged with violation of Penal Code, § 288a, had been driver of automobile in which crime was committed, had taken part in forcing complaining witness into automobile and had participated in other acts to which she testified, such action on his part constituted aiding and abetting in commission of crime as charged such as would warrant his conviction as principal. Pen.Code, §§ 31, 288a, 971.

3. Indictment and Information ⇐83

Information which charged defendant with aiding and abetting another defendant in commission of offense in violation of Penal Code, § 288a was not subject to objection that it did not charge defendant specifically with violation of such section, as all persons concerned in commission of felony were principals in crime committed. Pen.Code, §§ 31, 288a, 971.

4. Criminal Law ⇐1182

Where defendants were convicted of violating Penal Code, § 288a and proceedings were suspended and probation was granted with first year to be served in county jail and convictions were warranted, judgment was affirmed on the appeal. Pen.Code, §§ 288a, 1237, subd. 1.

Gladys Towles Root, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

The complaining witness in this case, a woman, was going home with her husband in an automobile. They had been partying and drinking, but neither was intoxicated. The time was after midnight.

When about a block away from their home the couple got into an argument whether or not the wife should drive the car. She wanted to try the automatic gear shift. When her husband refused to let her drive she got mad, and started to walk the rest of the way home.

Then four men in another automobile came along. They threatened the husband with bodily harm, forced his wife into their car, and did not bring her home to her husband and two children for hours.

Without going into the bestial details of what was done to this woman, suffice it to say that the four men were charged in an information filed by the District Attorney

with kidnapping, rape, and the commission of the crime denounced in Section 288a of the Penal Code.

Before the case was brought to trial it appeared that one of the men left the party before any harm was done to the woman, and the case was dismissed as to him.

The three others went to trial before a jury, were convicted of violating Penal Code Section 288a, and acquitted of the other charges. Proceedings were suspended, and probation granted with the first year to be served in the county jail.

These three defendants appealed from the conviction.

After the appeal was perfected it was dismissed as to one of them at his request.

So this opinion has to do with two defendants only, Simpson and Tracy.

[1] So far as Simpson is concerned, the evidence substantially supports his conviction, and there was no error in his case.

Tracy admitted an act of sexual intercourse with the complaining witness. She said it was forced; he said she consented. He denied any violation of Penal Code Section 288a. She testified that defendants other than Tracy compelled her to commit this act. So for the purposes of this appeal it may be deemed that Tracy did not actually compel the woman to commit this crime with him.

But he was the driver of the automobile. He took part in forcing the woman into his car. He participated in other acts to which she testified, and he certainly aided and abetted in the commission of the crime of which he was convicted.

[2] His denial is completely disposed of by the rules to be found in People v. Mummert, 57 Cal.App.2d 849, 855, 135 P.2d 665. That was a rape case, but the same rules must be applied in the circumstances in this case.

[3] Tracy further contends that the information is defective, in that he was not specifically charged with violating Penal Code Section 288a. This contention is likewise without merit.

The information charges the specific act by Simpson and that Tracy "aided and abetted the said perpetrator in the commission of said offense."

[4] Our Penal Code provides that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, are principals in any crime so committed. Penal Code Sections 31 and 971.

The judgment is affirmed. Penal Code, § 1237(1).

WHITE, P. J., and DORAN, J., concur.

Lucyle W. PENCOVIC, Plaintiff and Respondent,

v.

Francis H. PENCOVIC, now known as Krishna Venta, Defendant and Appellant.

Civ. 16215.

District Court of Appeal, First District, Division 2, California.

March 28, 1955.

Hearing Granted May 25, 1955.*

Proceeding on divorced wife's petition to increase award for support of children under original divorce decree. The Superior Court, County of Alameda, A. J. Woolsey, J., entered order increasing support award and divorced husband appealed. The District Court of Appeal, Nourse, P. J., held that evidence disclosed no ability to pay the increased award.

Order reversed.

Dooling, J., dissented.

1. Divorce ⇐309

In divorced wife's proceeding to increase award for support of two children under original divorce decree, evidence disclosed no ability to pay the increased award.

* Opinion vacated 287 P.2d 501.

2. Divorce ⇐309

Where divorced husband was leader of religious sect which supported him and his family by a remarriage, but paid him no salary, and where it did not appear that his earning capacity would be greater in another calling, superior court was without power to order divorced husband to forego his religious principles and seek employment elsewhere in order to pay increased support award for children of first marriage.

Gross & Svenson, Van Nuys, for appellant.

Edwards & Friborg, Alan G. Banks, Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a judgment of divorce on March 6, 1944, awarding her custody of her two minor children and directing defendant to pay her $20 a month for each child. The defendant remarried and has six other children by the second marriage whom he is required to support.

At a hearing on December 14, 1953, the superior court amended the original decree by ordering defendant to pay $50 a month for the support of each of plaintiff's children. The appeal from this order is based on the ground that there was no evidence to support it.

The evidence is that plaintiff has been gainfully employed at a salary of $200 a month, though handicapped for some weeks by an accident resulting in some diminishing of income. The children are now sixteen and fourteen years of age and both are attending high school. The parties belonged to a religious sect called "W. K. F. L. Fountain of the World" and during their married life they travelled about the country, with the two children, "hitch hiking", and defendant preaching the gospel according to their beliefs.

This society is a voluntary corporation, duly organized, with a set of officers, the defendant being the spiritual leader, or "master". No salary is paid to any of the members. All are supported at a "home" maintained at Box Canyon, Ventura County, in this state, where about one hundred members reside. Funds for the support of the organization are contributed by both members and friends of the organization. There is evidence that on some occasions the organization advanced defendant moneys with which to gamble in Las Vegas and Reno. [Their theory was that the "master" must be endowed with good luck which would bring more money to the organization, but in no case any profit to defendant personally.] The "master" always lost, both at the wheel and at the "One-armed Bandit."

This is not a case which calls for any religious panegyrics. Religion is not involved in our decision in any sense of the word. The appeal rests solely on the single ground that there is no evidence, oral or documentary, and no presumption or inference which shows an ability to pay the *increased* award.

The motion to increase the award was heard at the same time as the citation for contempt for failure to pay the original award. At the close of the hearings the trial court found that there was no showing of "ability to pay". On that ground the court *discharged* the contempt proceeding—the inability to pay $20 a month for each child—and forthwith ordered defendant to pay the increased sum of $50 a month for each child.

[1] Since the award for the two children had been made the appellant became the father of six more children dependent on him for support. Whether it was on that ground that the trial court discharged the contempt order does not appear. Certainly it is a matter which must be taken into consideration unless we follow the timorous practice of "judicial discretion" which often becomes the failure of judicial responsibility. All the evidence without conflict disclosed that the appellant was without funds and without any visible means of raising money to support the court order.

[2] This is not, therefore, a case of breach of discretion. It is a case of no

discretion at all. There was no power in the superior court to order the appellant to forego his religious principles and to seek employment elsewhere, without some evidence of a possibility that he could earn more at another calling. If all the eight children were entitled to $50 a month for his support that would require the appellant to pay $400 a month with no prospect of his raising any substantial part of it.

Order reversed.

KAUFMAN, J., concurs.

DOOLING, Justice.

I dissent. My associates, while disclaiming that their opinion is based on the ground of the appellant's religious freedom, say: "There was no power in the superior court to order the appellant to forego his religious principles and to seek employment elsewhere, without some evidence of a possibility that he could earn more at another calling."

There is such evidence. The record shows that during the second World War appellant was gainfully employed. He is an able-bodied man who through choice lives a life of poverty without seeking gainful employment.

A father has both a moral and legal duty to support the children whom he has brought into the world. This duty cannot be shirked by a wilful refusal to earn money. The court may take into consideration in fixing the amount to be contributed by the father for his children's support not only his "actual earnings" but "'his ability to earn money'" as well. Webber v. Webber, 33 Cal.2d 153, 160, 199 P.2d 934, 939.

If this appellant can escape his legal obligation to support his children then any father can abandon his children, enter a religious cult wherein all property is owned by the community, and the courts will thereafter be powerless to compel him to contribute anything to his children's support.

I hope that I yield to no one in my support of religious freedom, but there are some limits to all rights and in my opinion the limit is passed when the claim of religious freedom is used to excuse an able-bodied father from supporting his minor children.

131 Cal.App.2d 730

John I. REESE, Plaintiff and Appellant,

v.

Mary DAY, Executrix of the Estate of Anthony H. Day, deceased, and Emile Komstheoft, Defendants and Respondents.

Civ. 16209.

District Court of Appeal, First District, Division 2, California.

March 23, 1955.

Hearing Denied May 18, 1955.

Action by guest against estate of host, who was driving an automobile, and against truck driver for injuries sustained in collision on a three lane highway. From judgments of nonsuit entered by Superior Court, County of Santa Cruz, James L. Atteridge, J., in favor of the estate and the truck driver, the guest appealed. The District Court of Appeal, Kaufman, J., held that evidence was insufficient to establish that host, made left turn into path of approaching truck either with knowledge that it was likely to result in serious injury or with a wanton and reckless disregard of possible consequences, but that evidence was sufficient to give rise to an inference of negligence on part of truck driver, who was driving in center lane just prior to accident, which proximately contributed to happening of accident.

Judgment of nonsuit in favor of estate affirmed and judgment of nonsuit in favor of truck driver reversed.

Dooling, J., dissented in part.

1. Trial ⇐165

All reasonable inferences most favorable to plaintiff must be drawn in passing on motion for nonsuit.

2. Negligence ⇐121(1)

Intent and knowledge of probable injury necessary to constitute wilful misconduct cannot always be inferred from facts showing an act or omission constituting negligence.

3. Automobiles ⇐244(20)

In action by guest against estate of host founded on wilful misconduct under the guest statute, evidence was insufficient to establish that host, who suffered from a heart condition, made left turn into path of approaching truck either with knowledge that it was likely to result in serious injury, or with a wanton and reckless disregard of possible consequences, and court did not err in granting nonsuit.

4. Trial ⇐165

If evidence is insufficient to warrant an instruction on a Vehicle Code section, it is insufficient to warrant an inference of its violation on motion for nonsuit. Vehicle Code, § 526(b).

5. Automobiles ⇐242(3)

In action by guest of automobile driver against driver of pickup truck for injuries sustained in collision on three lane highway, wherein evidence showed that truck driver had been traveling in middle lane immediately before applying his brakes and turning into right lane of traffic, guest had burden of establishing that truck driver was not within exceptions provided in statute prohibiting driving in middle lane of three lane highway. Vehicle Code, § 526(b).

6. Automobiles ⇐242(7), 245(50)

In action by guest of automobile driver against truck driver, who just prior to collision was driving in center lane which was not allocated exclusively to traffic moving in his direction and from which lane he could not make a left turn, for injuries sustained in collision on a three lane highway, evidence was sufficient to give rise to an inference of negligence on part of truck driver proximately contributing to happening of accident, and granting of nonsuit was erroneous.

7. Negligence ⇐136(25)

Question of proximate cause is question to be determined by jury unless it can be said as a matter of law that negligence of defendant in no way contributed to happening of accident.

Stewart Cureton, Lucas, Wyckoff & Miller, Santa Cruz, for appellant.

Ropers & Majeski, Redwood City, for respondent, Emile Komstheoft.

Hoge, Fenton & Jones, Monterey, for respondent, Mary Day, executrix of the estate of Anthony H. Day, deceased.

KAUFMAN, Justice.

This is an appeal from judgments of nonsuit in favor of defendants Mary Day, Executrix of the Estate of Anthony H. Day, deceased, and Emile Komstheoft in an action for personal injuries sustained by plaintiff and appellant John I. Reese in an automobile collision.

Anthony Day was the driver of the car in which appellant Reese was riding as a guest at the time it collided with a pickup truck driven by respondent Komstheoft. Appellant's action against the Day estate was founded on wilful misconduct under the guest statute; the action against Komstheoft, on simple negligence.

The accident occurred on November 5, 1951, shortly before 3:50 p. m. on State Highway No. 17 between Los Gatos and Santa Cruz at a point about five miles northerly of Santa Cruz. The day was clear and the pavement dry. There was testimony that traffic conditions generally were light on that highway at that time of year, but there is no testimony as to whether or not there were any other cars than those involved in the accident in the immediate vicinity when the collision occurred. Appellant Reese suffered from retrograde amnesia as a result of the accident and hence had no recollection of its occurrence or of events for several hours prior thereto. The only eye-witness who had any recollection of the accident was respondent

Komstheoft, who was called to testify under section 2055, Code of Civil Procedure. The only testimony elicited from him was that he saw the driver of the other car sitting upright behind the wheel and that he was not slumped over just prior to the impact.

The highway had three marked traffic lanes, a ten foot center lane and twelve foot outside lanes. There was a slight incline in the grade southward. The highway was straight in the area where the accident occurred, the view being unobstructed for 1,500 feet north and 750 feet south of the point of collision.

Day was driving a 1951 four door Packard sedan in a southerly direction. On Day's left as he approached the point of impact were entrances to two business establishments, an antique shop and an automotive and tractor welding shop, which shops were open for business at the time. There were no habitations of any kind on the west side of highway in that area. Day was accompanied only by appellant Reese who occupied the right front seat of the Packard.

Respondent Komstheoft was driving alone in a 1949 Ford pick up truck. The two vehicles collided head-on in the middle of the most easterly or northbound lane. Skid marks and tire marks of the vehicles leading to the point of impact showed that both had been traveling in the center lane just prior to colliding in the eastern lane. The tire or skid marks of the Day car started at the east line bounding the center lane, and went obliquely across the easterly lane to the point of impact. The skidmarks of respondent Komstheoft's truck were laid down by all four tires for about fifty feet and came from the center lane into the easterly lane at a more gradual angle. Gauge marks and debris indicated the point of impact. More gauge and skid marks extended from that point to the place where the vehicles came to rest on the easterly shoulder of the highway in the antique shop driveway. The Packard was thrown back to a point about 24 feet northerly of the collision point, and the truck came to rest 5 or 8 feet south of the Packard. The photographs introduced in evidence show that the front of the vehicles were demolished, indicating that they came together with terrific violence.

Day was found dead behind the wheel of his car by a member of the California Highway Patrol who was called to the scene of the accident. His right chest was entirely crushed, and his lung and heart were protruding through a hole in his chest. There was a rent five centimeters in length in the right auricle of his heart which was traumatic in origin.

Respondent Komstheoft was very seriously injured. A blood sample taken at the hospital after the accident was chemically analyzed. It showed a concentration of 0.17% of alcohol by weight. Expert testimony was offered to show that a person with such a percentage of alcohol in his system is definitely under the influence of alcohol, that muscular coordination is very likely to be impaired, vision affected, reaction time slowed, and judgment may be affected adversely.

The original complaint was introduced in evidence by defendant Day during the cross-examination of appellant Reese, as an admission. That complaint had alleged wilful misconduct in that Anthony Day knew that he was suffering from a heart condition, knew that it was extremely dangerous for him to drive an automobile, and that at the time of the accident he suffered a heart attack and lost control of his car. The answer denied the misconduct but admitted that deceased had suffered a heart attack and had lost control of his car. The amended complaint, however, although it alleged the preexisting heart condition, alleged that the wilful misconduct consisted of intentionally causing the automobile "under his control to cross from the extreme righthand lane of the said highway into the extreme lefthand lane while traveling at an excessive and unlawful rate of speed."

[1] Appellant contends that the nonsuit was improperly granted against appellant and in favor of respondent Mary Day. Since all reasonable inferences most favorable to the plaintiff must be drawn in passing on a motion for nonsuit, we must

infer that Day was alive and fully conscious just prior to and at the time of the collision, and that his death resulted from his extensive injuries. There is medical testimony to support this inference, and the driver of the other vehicle saw him sitting upright behind the wheel. The skid marks, though showing much lighter than those of the Ford truck in the photographs, might indicate a slight application of the brake by the driver. Appellant argues that there is sufficient showing that a conscious act was done by the driver under circumstances disclosing a knowledge that injuries to his guest would be a probable result, that this is the only inference that can be drawn from the fact that he turned obliquely into the path of an oncoming vehicle on a wide straight three lane highway in broad daylight with a guest beside him in the front seat.

Appellant points out that the trial court stated that Day's conduct could be accounted for upon two theories only, "one, that he had some sort of a seizure that certainly caused him to do this most unusual act, or, secondly, that he intended injury to himself or damage to his property." If there was sufficient evidence of circumstances in the record to support the latter theory, then on motion for a nonsuit, the trial judge would have been bound to deny the nonsuit.

Undoubtedly there is sufficient evidence of circumstances to support an inference that the deceased driver was grossly negligent. But is there sufficient evidence of wilful misconduct in view of the tests laid down by the cases? There is of course no evidence and no possibility of securing any evidence to show that he had an actual intent to injure his guest. Appellant must then show that there are circumstances from which it can be inferred that deceased acted in a wanton and reckless disregard of the safety of his guest. In Wright v. Sellers, 25 Cal.App.2d 603, 613, 78 P.2d 209, 215, it is said that it is "sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result."

In Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, the court stated that " 'Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.' " A recent case, Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 251 P.2d 955, 962, cites Meek v. Fowler, with approval, and quotes from Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447, the definition of "wilfulness" as necessarily involving " 'the performance of a deliberate or intentional act or omission regardless of the consequences.' " It further quotes the Porter case to the effect that wilful misconduct is " 'something much "more than mere negligence, or even gross or culpable negligence" and as involving "conduct of a *qausi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences" * * * To constitute "wilful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.' " See, also Hawaiian Pineapple Co. v. Industrial Accident Comm., 40 Cal.2d 656, 255 P.2d 431.

[2] It is true, as respondent admits, that the most that can be said in the present case, is that Anthony Day, while conscious attempted to turn left off the highway at a time when such movement could not be made with safety because of the approaching vehicle. However, intent and knowledge of probable injury cannot always be inferred from facts showing an act or omission constituting negligence. Robertson v. Brown, 37 Cal.App.2d 189, 194, 99 P.2d 288.

[3] There is no evidence in the record bearing on the conduct of the deceased driver just prior to the making of the left turn which gives any indication of whether he did it intentionally, either with the knowledge that it was likely to result

in serious injury, or with a wanton and reckless disregard of possible consequences. See Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447. In the recent case of Halstead v. Paul, 129 Cal.App.2d 339, 277 P.2d 43, in which a judgment of nonsuit was reversed by this court, in a wilful misconduct case, there was at least some evidence of the driver's conduct and condition for some time prior to the accident. It was held that defendant was guilty of wilful misconduct in driving off the road in his sleep, when he knowingly had gone for a long period with little sleep, and there was evidence of his swerving over the center line of the road at a time shortly before the accident which was evidence from which it could be inferred that he knew it was dangerous for him to drive, but that he nevertheless continued on in reckless disregard of the safety of his guests. In the instant case we have no clew whatever as to the state of mind of the deceased. There is still a line between gross negligence and wilful misconduct. The most that can be reasonably inferred from the circumstances herein, is that the deceased was grossly negligent. The trial court did not err therefore, in granting the nonsuit.

Appellant contends that he was prejudiced by the attitude of the trial judge, in that he demonstrated throughout the proceedings that he was convinced that Day had suffered a heart attack which caused his car to go out of control. However, since the case did not go to the jury, the attitude of the trial judge is of no importance, if he arrived at the correct conclusion on the record before him.

[4, 5] Appellant also contends that error was committed in granting the Komstheoft nonsuit, arguing that there is evidence of negligence on the part of this respondent. The tire marks show that he had been traveling in the middle lane immediately before applying his brakes. Vehicle Code, § 526(b) provides that a vehicle may not be driven in the middle lane of a three lane highway except (1) when overtaking and passing another vehicle, (2) in preparation for a left turn, and (3) when the center lane is allocated exclusively to traffic moving in the direction the vehicle is traveling and is signposted to give notice of such allocation. Respondent maintains that appellant had the burden of establishing that respondent was not within the exceptions of section 526(b). In Adams v. Warren, 11 Cal.App.2d 344, 53 P.2d 780, it was held that an instruction on section 123(c) of the California Vehicle Act which is substantially the same as the present section 526(b) might not be given unless appellant had established that respondent in using the center lane was not overtaking or passing another vehicle, was not preparing for a left turn, and that the center lane of the highway at that point was not allocated to traffic traveling in respondent's direction. If evidence is insufficient to warrant an instruction on a vehicle code section, it is insufficient to warrant an inference of its violation on motion for nonsuit, for instructions must be based on evidence or a reasonable inference from the evidence in the record. Collins v. Jones, 131 Cal.App. 747, 752, 22 P.2d 39.

[6] Appellant correctly replies that there was evidence from which it could be inferred that respondent was not making a left turn and that center lane was not at that point allocated to traffic traveling in his direction. There was testimony that there was no cross-road, intersection or entrance to any habitation where a left turn could possibly be made by respondent. The photographic evidence shows that the center lane was not here allocated to traffic traveling in respondent's direction. But may it also be inferred that he was not engaged in passing or overtaking another car? Appellant argues that the fact that no other car than the two which crashed was involved in the accident is proof of that fact. If respondent were passing a car at the time, then it is certainly reasonable to infer that such car could scarcely avoid colliding with respondent when he switched into the east lane which such car would be occupying, and applied his brakes. No skid or brake marks other than those made by the two cars involved, appear in the photographic evidence of the scene. If he were attempt-

ing to overtake another car at that point, which we will assume, might have passed in the east lane before the deceased's car arrived at that point, then that in itself would seem to be negligence proximately contributing to the happening of the accident, for it would indicate that respondent was not keeping a proper lookout for other cars using that lane coming from the opposite direction, since deceased's car was occupying the center lane just prior to the accident, and the view was unobstructed. That there is evidence from which it may be inferred that respondent was traveling at great speed cannot be doubted. There are the heavy skid marks for 50 feet, and despite this application of the brakes, respondent's pick up truck crashed with such violence that the heavy Packard sedan was thrown 24 feet back from the point of impact. If one driver can see, or should see, another approaching in the middle lane at a point in the highway where there is a reasonable possibility that a left turn may be made, then continuance in that lane to within 50 feet of the point of impact at a high speed could certainly be considered as evidence of negligence. The speed in relation to the circumstances here shown to exist give rise to an inference of negligence which proximately contributed to the happening of the accident. Add to this the evidence that respondent was to some extent under the influence of alcohol from which it may be inferred that his reaction time is slowed, his vision less accurate than normal, and his judgment in some degree impaired.

[7] The question of proximate cause is a question to be determined by the jury unless it can be said as a matter of law that the negligence of respondent in no way contributed to the happening of the accident. 19 Cal.Jur., sec. 139, p. 732. It is only in some cases wherein reasonable minds cannot differ, that the court is justified in taking the question of proximate cause from the jury. Kostouros v. O'Connell, 39 Cal. App.2d 618, 622, 103 P.2d 1028. There appear to be sufficient circumstances in the present case from which conflicting inferences may be drawn as to whether or not the conduct of this respondent proximately contributed to the accident.

It is our view that there is sufficient evidence which when considered in the light most favorable to appellant, gives rise to an inference of negligence on the part of respondent Komstheoft proximately contributing to the happening of the accident. The granting of the nonsuit as to the respondent Komstheoft was therefore erroneous.

Judgment of nonsuit affirmed in favor of Mary Day, executrix of the Estate of Anthony H. Day, deceased. Judgment of nonsuit in favor of Emile Komstheoft reversed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur in the order reversing the judgment as to Komstheoft. I dissent from the order affirming the judgment as to Day. The evidence, including the tire marks left on the highway by the automobile driven by Day, would support a finding that Day in broad daylight with the approaching automobile driven by Komstheoft in full view turned rather sharply across the path of the Komstheoft vehicle at a time when it was obviously impossible to avoid being struck by it. If the jury found these facts, as it reasonably could from the evidence, they would satisfy the definition of wilful misconduct: " 'the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.' " Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194, 197.

The jury could certainly infer from the circumstances that Day's conduct was intentional. Wright v. Sellers, 25 Cal.App. 2d 603, 613, 78 P.2d 209. One who intentionally turns into the path of an oncoming vehicle has been held guilty of wilful misconduct where the probability of serious injury is or should be apparent. Hoffart v. Southern Pac. Co., 33 Cal.App.2d 591, 92 P.2d 436; Hagglund v. Nelson, 23 Cal. App.2d 348, 73 P.2d 265; Francesconi v. Belluomini, 28 Cal.App.2d 701, 83 P.2d 298.

Hearing denied; CARTER, J., dissenting.

131 Cal.App.2d 700

John Maria MONICA, Plaintiff and Respondent,

v.

Manuel PELICAS, Defendant,

and

Arminda Pelicas, also known as Irma Pelicas and Mrs. Irma Pelicas, Defendant and Appellant.

No. 16205.

District Court of Appeal, First District, Division 1, California.

March 22, 1955.

Rehearing Denied April 21, 1955.

Action seeking to have the plaintiff declared an equitable owner of an undivided fractional interest in a house and lot which defendants acquired as joint tenants. From a judgment for plaintiff in the Superior court, County of Alameda, Ralph E. Hoyt, J., the defendant appeals. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported judgment for the plaintiff, and that where defendant obtained money from joint bank account of plaintiff without consideration and applied it to an unauthorized use in violation of trust which plaintiff had reposed in them, defendants were involuntary trustees of the house and lot for the benefit of plaintiff, and that plaintiff's interest therein was determined by the ratio which amount of his money used bore to amount of entire purchase price.

Judgment affirmed.

1. Trusts ⇐371(2)

In action to declare plaintiff the equitable owner of an undivided fractional interest in a house and lot on ground that money of plaintiff in a joint account was used in the purchase thereof by one of the defendants pleading was sufficient to allege a constructive trust.

2. Trusts ⇐110

In action to recover an undivided fractional interest in a house and lot which defendants acquired on the ground that part of the purchase price was the proceeds of a joint bank account of plaintiff and one of defendants, evidence supported finding that plaintiff did not give defendant permission to use funds in the bank account and that the money was drawn therefrom without plaintiff's knowledge and consent.

3. Witnesses ⇐379(1), 397

Inconsistencies in testimony only affect the credibility of the witness or reduce the weight of his testimony and it is for the trier of facts to weigh the evidence and determine credibility.

4. Trusts ⇐362

That plaintiff allegedly was informed that money in joint bank account with a defendant had been used to buy a home title to which was taken in the name of defendant and another and that he made no objection to it, did not necessarily amount to a ratification of the transaction, or show that he had previously authorized such transaction so as to preclude enforcement of trust, where plaintiff was not informed that title was taken by defendant and another as joint tenants instead of solely in name of defendant.

5. Trusts ⇐93

Where plaintiff had authorized the use of money in a joint bank account to buy a home for defendant only and not for defendant and another, and money was used to purchase property, title to which was taken in name of both defendants in violation of trust plaintiff had reposed in them, transaction if not actually a fraud, was at least a "mistake" making defendants involuntary trustees of house and lot purchased for benefit of plaintiff. West's Ann. Civ.Code, § 2224.

See publication Words and Phrases, for other judicial constructions and definitions of "Mistake".

6. Trusts ⇐375(1)

Where plaintiff's money in a joint bank account was used in violation of trust to purchase a house and lot and title taken in joint names of defendants, amount of plaintiff's fractional interest thus created in the property was determined by ratio that amount of his money used, bore to amount of entire purchase price.

7. Trusts ⇐91

Theory of the constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled to another. West's Ann.Civ. Code, § 2224.

8. Trusts ⇐91

A constructive trust is imposed, not because of intention of parties, but because person holding title to the property, would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. West's Ann.Civ.Code, § 2224.

9. Evidence ⇐462

Evidence concerning the making of a note and the purpose thereof was not inadmissible as varying the terms of writing where the evidence showed that the writing never took effect as the embodiment of an obligation.

Standley Walter, San Francisco, for appellant.

Wagener & Brailsford, Oakland, for respondents.

FRED B. WOOD, Justice.

The judgment declares that plaintiff is and ever since February 27, 1948, has been the equitable owner of an undivided fractional interest in a house and lot which defendants Manuel and Arminda Pelicas as joint tenants acquired on that date.

Defendant-appellant Arminda Pelicas claims the evidence does not support the findings of fact and conclusions of law upon which the judgment is based.

The principal findings are these: Plaintiff can neither read nor write. He speaks English only slightly and with considerable difficulty. He and Arminda opened a savings account in joint tenancy. At all times the money deposited was the sole money of plaintiff. The account stood in their names for purposes of convenience only, without intention at any time of passing ownership or title thereto to Arminda. Plaintiff at no time gave Arminda permission to use the funds on deposit in the account for the purpose of purchasing a house and lot in the name of herself and her former husband, defendant Manuel Pelicas; nor to take title in her name alone. On February 24, 1948, the sum of $6,448 was withdrawn from the account, without plaintiff's knowledge or consent, and immediately applied by Manuel and Arminda to the $15,125 purchase price of a house and lot, Manuel and Arminda taking title as grantees in joint tenancy. Later, Manuel and Arminda were divorced and the divorce decree awarded the house and lot to Arminda as her sole and separate property, whereupon Arminda filed a declaration of homestead upon the property. On July 9, 1948, Manuel and Arminda executed and delivered to plaintiff a promissory note in the principal sum of $6,000 with interest at one percent per annum. The note was made at the suggestion of the defendants in order that plaintiff might have some written evidence of their obligation to him. It is not true that the parties reached an agreement whereby it was determined that the defendants owed plaintiff the sum of $6,000 evidenced by said promissory note.

The trial court concluded that plaintiff was entitled to a judgment declaring that he is equitable owner of an undivided $6448/15125$ths interest in the house and lot.

[1] Defendant Arminda Pelicas[1] challenges (1) the finding that plaintiff at no time gave her permission to use the funds in the bank account for the purpose of purchasing a house and lot in her name alone or in her name and that of her former husband Manuel, (2) the finding that the money was withdrawn from the account without plaintiff's knowledge and consent; and (3) the finding concerning the $6,000 note.[2]

1. Defendant Manuel Pelicas filed a general denial. He did not testify, nor did he appeal.

2. Upon oral argument defendant's counsel advanced the view that plaintiff had not adequately pleaded a constructive trust. That point is not well taken. The facts pleaded in the second count of the amended complaint clearly support a constructive trust as proved by the evidence and found by the trial court.

[2] We have examined the record and are convinced that all of the findings, including the challenged findings, are amply supported by the evidence. A summary of some of the significant portions of the supporting testimony follows. Plaintiff testified that he told Manuel that Manuel could use the money to buy a house; that if Manuel ever saw a house that he liked and wanted Manuel could use the money in this account. Asked if he had not told Arminda's father that Arminda could use the money in the savings account whenever she needed it, plaintiff said: "No, sir, Manuel Pelicas is all" and "I said I told Manuel Pelicas that he could use my money to buy a house whenever he saw fit, but no one else." Asked if he ever told Arminda Pelicas she could withdraw $6,448 on February 24, 1948, plaintiff replied: "To her, no * * * I never gave her the authority to take the money, but I did tell her husband he could take the money." Asked if Arminda was to use the money in this account to buy a house in plaintiff's name, plaintiff replied: "I did not say my name, just to help him buy a house." Arminda's mother said plaintiff discussed this savings account with her many times. Asked why plaintiff would speak about his account, the mother said: "I told you he got so much money in the bank, to help Manuel Pelicas." Asked what plaintiff said, she replied: "Mr. Monica say he like to help Mr. Pelicas to buy the home for himself."

Arminda testified that her husband told her to withdraw the money and that the whole $6,448 went into the house.

The $6,448 was withdrawn February 24, 1948, while plaintiff was at sea. He went to sea January 26 and returned June 27, 1948.

When plaintiff returned from sea, Manuel informed him they had taken the money from the bank to buy a house. Asked if there was any conversation between plaintiff and Manuel as to how Manuel was to withdraw the money, plaintiff said: "No. All he said to me was that he went and got the money to buy the house."

Manuel told plaintiff he was going to make out a paper to show that he owed plaintiff the money; in case Manuel ever had an accident he wanted plaintiff to know that his money was secure; plaintiff did not ask Manuel for the note; it was Manuel's idea. Arminda also testified the giving of the note was Manuel's wish.

[3, 4] It is true that plaintiff seemed a little uncertain whether, upon his return from the sea, Manuel told plaintiff that "I" (Manuel) or "we" (Manuel and Arminda) had used the money to buy a home, but, whichever way Manuel said it, plaintiff was not thereby informed that title was taken as joint tenants instead of solely in the name of Manuel. Accordingly, plaintiff's acquiescence in the transaction at that time (he had said it was all right, he had no objection to it) did not necessarily amount to ratification of the transaction, nor did it necessarily indicate that he had previously authorized such a transaction. That, doubtless, is the way the trial judge viewed it, considered in the light of the findings which he made. As held in Stromerson v. Averill, 22 Cal.2d 808, 814–815, 141 P.2d 732, 736: "Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony and it was for the trier of the fact to weigh the evidence and determine his credibility. 10 Cal.Jur. p. 1146, § 364. Furthermore, it is the duty of the court in support of a judgment on appeal to harmonize apparent inconsistencies wherever possible. 2 Cal.Jur. p. 938, § 551."

Thus it is clear that the evidence supports the findings of fact.

The legal conclusions which the trial court drew seem logically to follow.

[5, 6] Plaintiff's money was taken and used for a purpose different from that which he authorized. He authorized its use to buy a home for Manuel, not for Arminda, not for Manuel and Arminda. Arminda testified that the money in the bank belonged to plaintiff. She and Manuel obtained the money from plaintiff without consideration and applied it to a use unauthorized by the plaintiff and in violation of the trust and confidence which he had reposed in them. This, if not actually fraud, was at least a "mistake, * * * the violation of a trust, or other wrongful act" within the meaning of those terms as used in

section 2224 of the Civil Code and thus constituted Manuel and Arminda "involuntary trustee[s] of the thing gained [the house and lot purchased], for the benefit of the person [plaintiff] who would otherwise have had it." The amount of plaintiff's fractional interest thus created in the property is determined by the ratio which the amount of his money thus used, $6,448, bears to the amount of the entire purchase price, $15,125. See Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 490–491, 111 P. 360.

[7, 8] "The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer, which might have to be shared with other creditors; he is given the right to a restoration of the property itself. The title holder is, therefore, said to be a constructive trustee holding title to the property for the benefit of the rightful owner, but he is not charged with responsibility based upon either the actual or presumed intention of the parties. (Sec. 2224, Civ.Code; Burns v. Ross, 190 Cal. 269, 212 P. 17; Restatement Restitution, sec. 160.)" Bainbridge v. Stoner, 16 Cal.2d 423, 428–429, 106 P.2d 423, 427. "A constructive trust is imposed not because of the intention of the parties but because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property." Sampson v. Bruder, 47 Cal.App.2d 431, 435, 118 P.2d 28, 30. "A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship." Mazzera v. Wolf, 30 Cal.2d 531, 535, 183 P.2d 649, 651. See also Heinrich v. Heinrich, 2 Cal.App. 479, 482–484, 84 P. 326; 25 Cal.Jur. 145–148, Trusts § 19.

[9] The evidence concerning the making of the note and the purpose of the note was competent and relevant. It did not vary the terms of the writing. It showed that the writing never took effect as the embodiment of an obligation, upon the familiar principle that evidence is admissible to show that the parties never intended a writing to constitute a contract. See Spade v. Cossett, 110 Cal.App.2d 782, 784, 243 P.2d 799, and authorities there cited; also, Foster v. Keating, 120 Cal.App.2d 435, 453, 261 P.2d 529. Accordingly, the trial court correctly awarded plaintiff no monetary recovery except his costs of suit.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

131 Cal.App.2d 816

Audrel PINK, Plaintiff and Appellant,

v.

Dr. Wilfred W. SLATER, Defendant and Respondent.

Civ. 20697.

District Court of Appeal, Second District, Division 1, California.

March 28, 1955.

Hearing Denied May 25, 1955.

Malpractice action. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to support trial court's judgment that infection occurring subsequent to facial operation was not due to negligence of defendant doctor and that he had used recognized and approved method of practice.

Judgment affirmed.

1. Physicians and Surgeons ⇐18(8)

In malpractice action, evidence was sufficient to show that infection occurring subsequent to facial operation was not due to negligence of defendant doctor and that he had used recognized and approved method of practice.

2. Physicians and Surgeons ⇐18(8)

Propriety or impropriety of particular medical treatment can be established only by expert medical testimony.

3. Jury ⇐28(5)

Where jury in malpractice action had been called at defendant doctor's request, where during trial the doctor notified court that he did not desire further attendance of jury, and where plaintiff was then offered right to assume jury, but waived such right there was sufficient waiver by plaintiff of right to jury trial. West's Ann.Code Civ.Proc. § 631.

4. Jury ⇐25(2)

A party cannot without objection try his case before court without jury, lose it, and then complain that it was not tried by jury.

5. Witnesses ⇐2(1)

Section of Code of Civil Procedure permitting appointment of court's expert in proper cases does not create absolute right to appointment of expert witness, and such appointment is committed to discretion of trial court. West's Ann.Code Civ.Proc. § 1871.

6. Physicians and Surgeons ⇐18(6)

In malpractice actions, res ipsa loquitur applies only when it follows as matter of common knowledge from nature of injury that result would not have happened without carelessness or negligence.

Aaron Sapiro and Charles M. Arak, Los Angeles, for appellant.

DeForrest Home, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff employed defendant, a medical doctor, to remove scars from her face and nose. When she got through with the plastic surgery her appearance was worse than when she started. Infection followed the operation to remove one of the scars. Hence this action for malpractice.

Plaintiff appeals from a judgment for defendant, based upon findings by the trial judge.

Plaintiff contends that there was substantial evidence to support her case.

[1] But it may be inferred from the testimony of the defendant doctor that the infection was not due to negligence, and that he used a recognized and approved method of practice. And there was no testimony of any medical witness that there was negligence. Therefore, the record supports the findings and the judgment.

[2] Generally the propriety or impropriety of particular medical treatment can be established only by expert medical testimony. Moore v. Belt, 34 Cal.2d 525, 212 P.2d 509; Church v. Bloch, 80 Cal. App.2d 542, 182 P.2d 241.

Plaintiff argues that it was error to discharge the jury after the trial had begun.

[3, 4] The jury had been called at defendant's request. During the trial he notified the court that he did not desire the further attendance of the jury. Plaintiff was then offered the right to assume the jury, which she waived.

This was a sufficient waiver of the jury, under Section 631 of the Code of Civil Procedure. Glogau v. Hagan, 107 Cal.App. 2d 313, 237 P.2d 329. Moreover, a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury. Smith v. Brannan, 13 Cal. 107.

Plaintiff further argues that it was error for the court to refuse to appoint an independent medical expert to testify and present expert evidence at the trial.

[5] There is nothing in our law which makes it mandatory for a trial court to appoint a medical expert in any case. Generally Section 1871 of the Code of Civil Procedure permits the appointment of a court's expert in proper cases; but the law does not create an absolute right to the appointment of an expert witness. Sig-

nificantly the section uses the word "may," and the cases hold that the appointment of an expert is committed to the discretion of the court. People v. Rickson, 112 Cal. App.2d 475, 246 P.2d 700; Laguna, etc., School Dist. v. Pacific Development Co., 119 Cal.App.2d 470, 259 P.2d 498. No abuse of discretion appears here.

[6] Plaintiff finally argues that the court should have applied the doctrine of res ipsa loquitur. For all that this Court can tell from the record it may be that the trial court did take that presumption into consideration, along with the facts. However, in this case res ipsa loquitur is not applicable. In malpractice actions res ipsa loquitur applies only when it follows as a matter of common knowledge from the nature of the injury that the result would not have happened without carelessness or negligence. Moore v. Belt, supra, 34 Cal. 2d 525, 212 P.2d 509.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

131 Cal.App.2d 764

Montana F. SMITH, Plaintiff and Respondent,

v.

Norton A. SMITH, Defendant and Appellant.

Civ. 4939.

District Court of Appeal, Fourth District, California.

March 24, 1955.

Rehearing Denied April 21, 1955.

Hearing Denied May 18, 1955.

Proceeding by divorced wife under Uniform Reciprocal Enforcement of Support Act for decree ordering divorced husband to pay for support of their minor children. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Barnard, P. J., held that fact that Colorado version of Uniform Reciprocal Enforcement of Support Act did not contain provisions for criminal enforcement found in California version of such act could not destroy effect of reciprocal provisions with respect to civil enforcement of duty of father to support his minor children.

Order affirmed.

1. Constitutional Law ⇐197

Constitutional prohibition against ex post facto laws relates to penal and criminal legislation. U.S.C.A. Const. art. 1, § 10.

2. Constitutional Law ⇐197
Parent and Child ⇐17(1)

Uniform Reciprocal Enforcement of Support Acts were not enacted to make failure to support one's children a crime, and do not create new offenses, but are merely procedural steps that relate only to current duty to support, and are therefore not violative of constitutional prohibition against ex post facto laws. U.S.C.A. Const. art. 1, § 10; West's Ann.Code Civ.Proc. § 1650 et seq.

3. Divorce ⇐403(1)

Decree of divorce obtained by wife in Colorado, which contained no provision for support for minor children, did not constitute contract which relieved divorced husband from duty to support such children, and order of California court, under Reciprocal Enforcement of Support Act, ordering divorced husband to pay support for such minor children would not be impairment of obligation of contract in violation of federal Constitution. U.S.C.A. Const. art. 1, § 10; West's Ann.Code Civ. Proc. § 1650 et seq.

4. Divorce ⇐323

Divorced husband and wife cannot, by contract, free husband from his legal responsibility for support of minor children to extent of depriving courts of jurisdiction to subsequently order making of payments for such support.

5. Parent and Child ⇐17(1)

Provision of Colorado statute making it felony for man to fail to support his

children under sixteen years of age does not relieve father of duty to support his children when they attain age of sixteen years, and such statute does not impose new duty upon husband, but merely makes his failure to support felony under certain conditions. '35 C.S.A. c. 83, § 1.

6. Parent and Child ⇐3(3)

Fact that Colorado version of Uniform Reciprocal Enforcement of Support Act did not contain provisions for criminal enforcement found in California version of such act could not destroy effect of reciprocal provisions with respect to civil enforcement of duty of father to support his minor children. West's Ann.Code Civ.Proc. §§ 1660, 1661, 1672.

7. Parent and Child ⇐3(3)

Uniform Reciprocal Enforcement of Support Acts are not limited to cases where obligor flees jurisdiction of initiating state, and are based upon failure to provide needed support for dependents, and flight of obligor is in no way made controlling factor. West's Ann.Code Civ.Proc. § 1660.

8. Divorce ⇐403(1)

Where wife obtained decree of divorce in Colorado on ground of desertion and where, in such suit, husband was presumably served with process, admitted he knew about decree before it became final, and accepted it and relied upon decree when he later remarried, such judgment was res judicata and destroyed effect of husband's contention in subsequent California proceeding by divorced wife for decree of support for their minor children, that wife had duty of supporting children because of alleged fact that she had deserted husband, rather than he deserting her. West's Ann.Code Civ.Proc. §§ 1650–1690.

Baker, Palmer & Wall, H. E. McCombie, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order in a proceeding brought under the Uniform Reciprocal Enforcement of Support Act, Code Civ.Proc. §§ 1650–1690.

The plaintiff and defendant were married in Bakersfield on March 6, 1937. Twin sons were born to them on August 29, 1938. The family went to Colorado sometime in 1940 and the wife and children have remained in that state. On July 13, 1948, the plaintiff secured an interlocutory decree of divorce from the defendant on the ground of desertion, in the District Court of the City & County of Denver, Colorado. This decree became final on January 13, 1949. It awarded custody of the minors to the plaintiff, until the further order of the court, but made no provision for their support.

On December 10, 1953, the plaintiff filed a complaint in the District Court of the City & County of Denver under the "Uniform Reciprocal Enforcement of Support Act" of that state, Chapter 151, Session Laws of Colorado, 1951. The complaint alleged the marriage of the parties in Bakersfield; the birth of the twin sons, who were then 15 years of age; the entry of the divorce decree which had become final, a copy of the decree being attached to the complaint; that no provision for the support of the minors was made in that decree because the defendant was then and has ever since remained outside of the jurisdiction of the state of Colorado; that the plaintiff has been a resident of Denver for more than three years and the minors now reside there with her; that the Uniform Reciprocal Enforcement of Support Act is likewise a law of the state of California; that the plaintiff is in need of, and entitled to, support from the defendant under the provisions of the Colorado Act for herself and the minors; that the defendant has neglected and refused to support plaintiff and the minors since prior to the date of the divorce decree; that the defendant is able to provide such support as contemplated by the Support Act; and that the defendant resides at a certain address in Bakersfield within the jurisdiction of the superior court of Kern County, California. The prayer was that it be determined that the defendant owes a duty of support to the plaintiff and the minors; that the superior

court of Kern County, California, acting as a court of a reciprocal state under the Reciprocal Enforcement Act may have jurisdiction over the defendant and his property; that a support order should be entered and enforced where the defendant resides; that moneys collected thereunder shall be transmitted as provided for in the Support Act; and that it be ordered that copies of the complaint and an authenticated copy of the Uniform Reciprocal Enforcement of Support Act of Colorado, with other pertinent data, be transmitted to the superior court of Kern County, California.

On December 21, 1953, an order was entered in the District Court in the City & County of Denver, finding that these two minors were in need of support, that the superior court of Kern County, California, acting as a court of a reciprocal state under the Uniform Reciprocal Enforcement of Support Act, may obtain jurisdiction over the defendant and his property; that the plaintiff is in need of and is entitled to $114 per month from the defendant for the support of these minors; that the defendant has failed to support said dependents; and that a support order should be entered and enforced where the defendant now resides, in Bakersfield, California. The clerk was ordered to certify copies of the complaint and transmit the same, with an authenticated copy of the Colorado Act and other pertinent data, to the superior court of Kern County, California, for appropriate action. These documents were forwarded to the superior court of Kern County and filed there on December 31, 1953. The Colorado Act is substantially identical with the California Act, except that it does not contain the criminal enforcement provisions found in Sections 1660 and 1661 of our Act.

An order by the superior court of Kern County was issued on January 6, 1954, requiring the defendant to show cause why he should not be made to pay such sums as the court might determine for the support of these minors. The defendant filed affidavits and was present with his counsel at the hearing which was held on February 11, 1954. Evidence was taken and the matter submitted on briefs. An order was entered on April 13, 1954, in which after finding that these minors are in need of, and are entitled to, support from the defendant as alleged in the verified complaint, and that the defendant is chargeable with such support and able to furnish the same, the court ordered the defendant to pay $60 per month for each child until the further order of the court.

In his affidavits the defendant alleged that he was born and raised in California, and never acquired a residence or domicile in Colorado; that he was a member of the Officers' Reserve Corps of the U. S. Army; that during 1940 he requested a year of active duty; that upon making this request he took his wife to Colorado so she could stay with her relatives during his absence; that this stay in Colorado was intended to be temporary only; that he began his tour of active duty on April 24, 1941, and it would have concluded a year later if World War II had not occurred; that he returned from his war service and was discharged on April 6, 1946, at a point near Denver; that he requested his wife to return to California with the children but she refused; that he then returned to California and procured employment; that again in 1947 she refused to come to California and bring the children; and that he did not learn that a divorce action was brought against him until shortly before the decree became final.

With respect to his ability to pay, the defendant further alleged that he is now married to another woman; that his wife is expecting a baby; that he expects shortly to receive about $4,000 from the estate of his father; that he has agreed to turn this over to his wife to assist her in purchasing a portion of the estate's interest in a certain copartnership; that he received certain property from his deceased father as surviving joint-tenant; that he had converted this property into cash and used all the proceeds in the purchase of a lot and the construction of a home for himself and family; that this house, with its furnishings, had cost him a total of $46,000; that he would have to pay certain taxes and attorneys' fees; that his income is $564.50

per month; and that he requires that entire amount for the support of himself and his family, and the upkeep of this home.

[1, 2] The appellant first contends that the California Uniform Reciprocal Enforcement of Support Act, if applied under the facts here involved and to the extent that punishment might be imposed upon him, is an *ex post facto* law and prohibited by Article I, Section 10 of the Constitution of the United States. It is argued that the respondent was the deserting party since she refused to return to California; that the appellant was released from any obligation of support by the decree which contained no order that he support the children; and that the Uniform Reciprocal Acts in question were not adopted until a much later time. This contention is without merit. The constitutional prohibition in question relates to penal and criminal legislation, and these Uniform Reciprocal Enforcement of Support Acts were not enacted to make the failure to support one's children a crime, and do not create new offenses. They are procedural steps, they relate only to a current duty to support, and they apply prospectively and not retroactively.

[3, 4] It is next contended that this divorce decree constituted a contract which relieved the appellant from any duty of support; that these Reciprocal Acts, if applied to this case, would impair the obligation of this contract; and that any such impairment is prohibited by Article I, Section 10 of the federal constitution. The divorce decree, with its order for custody, was not a contract within the meaning of this constitutional provision. Moreover, these parties could not, by contract, free the appellant from his legal responsibility for support of these children to the extent of depriving the courts of jurisdiction to subsequently order the making of payments for such support. Smith v. Smith, 125 Cal.App.2d 154, 270 P.2d 613; Laws v. People, 59 Colo. 562, 151 P. 433.

[5] It is next contended that appellant's duty of support, if any exists, is that imposed by the law of Colorado; that it must be presumed that the respondent, by bringing this action, elected to have those laws apply; and that under Colorado law a father's duty of support ceases when his child attains the age of 16 years. In support of this contention the appellant cites Chap. 83, § 1 of the Colorado Statutes Annotated. This is a penal provision making it a felony for a man to fail to support children under sixteen. The Colorado courts have held that this criminal section does not impose a new duty upon the husband, but merely makes his failure to support a felony under certain conditions. People v. Driscoll, 72 Colo. 115, 209 P. 869. Under the law of Colorado, any person under the age of 21 years is defined as a minor. Ch. 176, § 82, Colo.Stats.Ann. In Desch v. Desch, 55 Colo. 79, 132 P. 60, it was held that the law imposes upon the father the duty to support his minor children to the extent that they are not capable of earning their own livelihood. If it be assumed that there is any difference between the laws of Colorado and those of California, in this respect, the purpose of section 1670 of our statute is to give the dependent an election in the event of conflicting laws. Smith v. Smith, 125 Cal.App.2d 154, 270 P.2d 613. By bringing this action the respondent did not elect to rely on the criminal law of Colorado, but sought the benefit of the reciprocal laws as adopted by both states. A further consideration is that these minors were under the age of 16 years when this proceeding was started and also when the order was made from which this appeal was taken.

[6] It is next contended that the trial court had no jurisdiction to make the order in question because the Colorado Act and the California Act are not reciprocal. It is argued that they are not reciprocal because a father's duty to support his child extends only to the age of 16 years under Colorado law; and because the Colorado act does not contain the provisions for criminal enforcement found in section 1660 and 1661 of our Code of Civil Procedure. Citing In re Susman, 116 Cal.App.2d 698, 254 P.2d 161. With respect to the age limitation, in addition to what has already been said, jurisdiction in this state is provided for in

section 1672 of our Code of Civil Procedure and it is not provided therein that the laws of an initiating state and a responding state must be identical. The fact that there would be no reciprocal legislation with respect to the provisions for criminal enforcement, as involved in the Susman case, would not and could not destroy the effect of the reciprocal provisions with respect to civil enforcement of the duties in question, with its detailed procedure. We find no merit in this contention.

[7] It is next contended that the Uniform Reciprocal Enforcement Acts are not applicable under the facts of this case for the reason that the appellant did not flee from the state of Colorado to avoid any duty of support. It is argued that the appellant's sojourn in Colorado was intended to be temporary; that it is the respondent and not the defendant who is in the role of a deserter or fugitive; that these Uniform Reciprocal Enforcement Acts were intended to apply only to deserting fathers who fled from the state; and that these Acts are not broad enough to apply to cases where the obligee deserts the obligor without just cause. The Acts in question are not limited to cases where an obligor flees the jurisdiction of an initiating state. They are based upon the failure to provide needed support for dependents, and the flight of the obligor is in no way made the controlling fact. Even in connection with criminal enforcement, section 1660 of our statute provides that the demanding state need not show that the obligor fled.

[8] Finally, it is contended that the appellant has not at any time since the desertion by his wife had any duty to support his children, either under California law or Colorado law. It is argued that the divorce decree giving the respondent custody, without a support order, made her primarily liable for the support of the children; that this relieved the appellant of any duty of support under Colorado law; and that, since the respondent has the duty of supporting the children, no obligation to do so existed or could be created under California law. These contentions are based on the claims that the respondent was the deserting party, and that the form of the divorce decree she received entirely relieved the appellant from all obligation to support the minors. The respondent obtained the divorce on the ground of desertion. The appellant was presumably served with process, he admits he knew about the decree before it became final, and he accepted and relied upon that decree when he remarried. That judgment is res judicata and destroys the effect of the appellant's basic contention in this regard. Smith v. Smith, 125 Cal.App.2d 154, 270 P.2d 613. No order for support of the minors was made in that decree because the appellant was not then within the jurisdiction of the Colorado court, and the respondent had no choice in that matter. The appellant may not now rely upon any claim of desertion by his wife as destroying the effect of these reciprocal enforcement laws.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Jessie SENERIS and Jesus Seneris, husband and wife, Plaintiffs and Appellants,

v.

Dr. George S. HAAS, Dr. James S. West, and Methodist Hospital of Southern California, a corporation, Defendants and Respondents.

Civ. 20219.

District Court of Appeal, Second District, Division 1, California.

March 21, 1955.

Hearing Granted May 18, 1955.*

Hearing Granted May 18, 1955.

Action by a husband and wife against an obstetrician, an anesthetist, and a hospital corporation for malpractice in the anesthetist's alleged negligent administration of a spinal anesthetic given plaintiff wife, with the obstetrician's permission, in defendant corporation's hospital, before birth of such plaintiff's child.

* Opinion vacated 291 P.2d 915.

From orders and a judgment of nonsuit by the Superior Court of Los Angeles County, Henry M. Willis, J., plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that a consulting neurologist's statement in hospital records after plaintiff wife's admission to hospital for second time that there were a sensory loss, motor weakness, and reflex changes in her left leg, indicating spinal cord damage on the left in lumbar region, was insufficient to raise inference, warranting submission of case to jury, that damage was connected with spinal anesthetic, that there was substantial evidence warranting inference that injury was not caused by the physicians' negligence, but by some condition in wife's system, and that the physician met inference of their negligence by their testimony in explanation of what occurred.

Orders and judgment affirmed.

Doran, J., dissented.

1. Physicians and Surgeons ⇐18(9)

In action against obstetrician, anesthetist and hospital corporation for malpractice in alleged negligent administration of spinal anesthetic before birth of plaintiff's child, a consulting neurologist's statement in hospital records that there were sensory loss, motor weakness and reflex changes in plaintiff's left leg, indicating spinal cord damage on left in lumbar region, was insufficient to raise such an inference that damage was connected with spinal anesthetic as would warrant submission of case to jury.

2. Physicians and Surgeons ⇐14(4)

A physician or surgeon is not liable for every untoward result in his medical practice, but is only required to have degree of learning and skill ordinarily possessed by medical practitioners in his locality and to exercise ordinary care in applying such learning and skill to treatment of patient.

3. Physicians and Surgeons ⇐15(7)

No different or higher degree of responsibility is imposed on physician or surgeon in making diagnosis than in prescribing treatment of patient.

4. Physicians and Surgeons ⇐18(8)

A doctor's failure to possess or exercise requisite learning or skill in particular case is generally a question for experts and can be established only by their testimony.

5. Evidence ⇐570

Expert evidence as to matter within knowledge of experts only and not within common knowledge of laymen is conclusive.

6. Evidence ⇐571(3)

Expert testimony ascribing cause of injuries to patient by injection of anesthetic drug into her spinal column to toxic quality of drug, as distinguished from anesthetist's negligence, is binding on court, and jury will not be permitted to speculate to contrary.

7. Physicians and Surgeons ⇐18(6)

Negligence of physician or surgeon will not be presumed, but must be affirmatively proved, in malpractice suit.

8. Hospitals ⇐7

Where hospital corporation's medical staff was separate independent organization composed solely of physicians, corporation was not liable for injuries to patient in its hospital as alleged result of malpractice by two members of staff, in absence of evidence that corporation attempted to direct or control such physicians' activities in manner justifying application of respondeat superior doctrine.

9. Physicians and Surgeons ⇐18(6)

In spouses' action against two physicians and hospital corporation for malpractice in alleged negligent administration of spinal anesthetic given plaintiff wife before birth of her child, plaintiffs could not invoke res ipsa loquitur doctrine.

10. Physicians and Surgeons ⇐18(6)

The res ipsa loquitur doctrine applies in malpractice action only where a layman can say, as matter of common knowledge and observation, that consequences

of professional treatment of plaintiff by defendant physicians were not such as ordinarily would have followed had due care been exercised.

11. Physicians and Surgeons ⇐18(9)

In spouses' action against obstetrician and anesthetist for malpractice in alleged negligent administration of spinal anesthetic given plaintiff wife before birth of her child, substantial evidence warranted inference that resulting injury to her spinal cord was not caused by defendants' negligence, but by some condition in wife's system, and defendants met inference of their negligence by their testimony in explanation of what occurred, so that court properly rendered judgment and orders of nonsuit. West's Ann.Code Civ.Proc. § 2055.

12. Evidence ⇐538

In action against obstetrician and anesthetist for malpractice in alleged negligent administration of spinal anesthetic given plaintiff before birth of her child, deposition of physician who had never administered a spinal anesthetic or seen one administered and had not treated a patient for paralysis of lower extremities, from which plaintiff suffered, for at least 34 years, was properly excluded by trial court because of deponent's lack of qualifications to testify as expert.

Pollock & Pollock, Edward I. Pollock, David Pollock and William Jerome Pollack, Los Angeles, for appellants.

DeForrest Home, Los Angeles, for Dr. West.

Hunter & Liljestrom, Los Angeles, for Dr. Haas.

Reed & Kirtland and Henry E. Kappler, Los Angeles, for Methodist Hospital.

DRAPEAU, Justice.

Plaintiff Jessie Seneris, aged 37 years, entered the Methodist Hospital in the early morning hours of March 22, 1951, as a routine obstetrical case. She was in good health and the mother of four children. About nineteen hours after her admission to the hospital, she was taken to the delivery room. A few whiffs of ether were administered. And she was given a spinal anesthetic by defendant James Spencer West, doctor of medicine and a specialist in anesthesiology. The birth of the child followed spontaneously within a few minutes. Dr. George Shepherd Haas was the delivering obstetrician.

On the following morning (March 23rd), plaintiff complained of pain in both legs and difficulty in moving them. In her own words: "I was paralyzed from my waist down. I couldn't move my legs." She had pain in her back, neck and head; also in her arms and wrists. Before the end of that day, she could move the toes of her right foot. She could not move her left leg.

On the second day she was suffering backache, headache, her wrists hurt and she had pain in her right leg and heel, and pain in her left hip. By the 26th of March she could flex her right leg and walk on the right foot. She tried to use her left foot but had no control over it.

She left the hospital for her home on the 27th. Within two or three months thereafter, she regained the use of her right leg. In the meanwhile, Dr. John B. Armstrong examined her and she returned to the Methodist Hospital. There she was X-rayed, had a back brace fitted to her torso and was given crutches. Later a leg brace was prescribed, which she started to wear on May 26th. At the time of trial, she still had pain in her left hip. However, she was able to bear some weight on her bent left ankle, and could get around much better.

The instant action for damages for malpractice directed against the obstetrician, the anesthetist and the hospital followed.

The case was tried on the following theories of liability:

1. Dr. West for negligence in administering the spinal anesthetic;

2. Dr. Haas for knowingly permitting Dr. West to so administer it;

3. The hospital on the doctrine of *respondeat superior;*

4. All three defendants under the doctrine of res ipsa loquitur; as joint ven-

turers, and for failure to call in a neurosurgeon and to arrange for a laminectomy.

At the conclusion of plaintiffs' case, the trial court granted the motions of defendants Haas and West for nonsuit, and also granted the motion of defendant Methodist Hospital for a judgment of nonsuit.

From the orders and judgment of nonsuit which followed, plaintiffs appeal.

[1] Appellants here assert that it was circumstantially established by the evidence that Mrs. Seneris' spinal cord was injured; that such injury occurred in connection with the administration of the spinal anesthetic, and was the proximate causes of her paralysis.

In support of this contention, appellants rely strongly on a statement appearing in the hospital records as of April 20, 1951, after Mrs. Seneris had been admitted to the hospital for the second time. This statement made by consultant Dr. Nathan E. Carl, a neurologist, follows:

"The patient's subjective complaints are seemingly warranted on the basis of positive neurological findings. There is sensory loss, motor weakness, and reflex changes in the left leg, *indicating cord damage on the left in the lumbar region.* Patient's responses are constant and are not indicative of functional disorder." (Emphasis added.)

These few lines taken from the hospital record do not purport to state what caused the indicated cord damage. It could as well have been caused by something in the patient's physical or chemical make-up, as from the negligent insertion of the anesthetic needle. The statement is clearly insufficient to raise an inference that the damage was connected in any way with the spinal anesthetic.

Respondent James S. West was examined exhaustively by appellants' counsel under section 2055, Code of Civil Procedure. This witness testified that he had specialized in anesthesiology for ten years and had been practicing in that field at the Methodist Hospital for five years. All told he had given four or five thousand spinal punctures.

He stated that a group of doctors, who limit their medical practice to anesthesia alone, have an "on call arrangement at the hospital. It is a voluntary coverage as far as the hospital is concerned, maintained for the benefit of patients requiring such service. In obstetrical cases the delivering obstetrician is free to call on one of this group or any other doctor he pleases to give an anesthetic.

On the day in question, Dr. West was on first call at the hospital and was available for anesthesia for a period of twenty-four hours. He was called by a nurse to give a spinal to Mrs. Seneris. He met Dr. Haas, the delivering obstetrician, in the delivery room shortly after nine o'clock in the evening of March 22, 1951. He had just completed the spinal.

In the course of his examination, Dr. West made a sketch representing the lower portion of a spinal column and the spinal cord in cross-section. This showed the 11th and 12th thoracic and the five lumbar vertebrae. He testified that the spinal cord extends downward from the head or brain through the 11th and 12th thoracic vertebrae and usually terminates at the lower border of the first lumbar vertebra.

He stated that a needle inserted into the space between the 12th thoracic and the first lumbar vertebrae was in danger of coming into contact with the spinal cord. Therefore, he tried to stay below the first lumbar vertebra when inserting his anesthetic needle in the spinal canal to avoid striking the cord or a nerve. He also stated that good medical practice does not demand that the needle be inserted at any certain space, but as a matter of safety and convenience he would choose the lumbar area. He explained that a low saddle block is the type of anesthesia usually given in obstetrical cases. That term roughly describes the area of a patient that would contact a saddle. That type of anesthesia is usually done through lumbars four and five. First, for convenience, because the space between these vertebrae is one of the large openings in the spinal column, and it is usually easy to insert the needle in this space. Second, for safety, because at that level it is extremely unlikely that the needle would strike the spinal cord. Dr. West unequivocally testified that he inserted his anesthetic

needle in Mrs. Seneris' spine at the interspace between the fourth and fifth lumbar vertebrae. Also that he used the standard accepted kind and amount of anesthetic normally used in obstetrical cases, and that there was no contraindication to the use of a spinal in this case.

Because he knew this was going to be a premature birth, he then connected Mrs. Seneris to an oxygen machine. He observed her for about forty minutes and was present when her child was born.

He saw her the following morning when she complained of pain in both legs and difficulty in moving them. He examined her as she was lying flat on her back. "I asked her to move her left leg, and she flexed her leg on the thigh and also bent her knee. That is, she brought her heel toward her pelvis." The motion was somewhat limited but she was able to move it. She could also move the right leg but to a lesser degree owing to greater pain in that area. He also found some sensory anesthesia on both of her lower extremities, i. e., dullness to skin prick. He found a normal sensory response beginning at the inguinal ligaments where the legs join the torso. The witness was asked: "And where a person has a paralysis, a motor weakness or a sensory impairment such as you found with Mrs. Seneris, is a laminectomy indicated?" to which he replied: "On the basis of my knowledge at that time, no."

A laminectomy is the removal of bone in the spinal column in order that the spinal cord can be examined under direct vision.

At the start of cross-examination by his own counsel, respondent West was asked: "Doctor, after this some two days on the witness stand, nobody has yet asked you, do you now have an opinion as to the cause of this woman's condition?" Dr. West replied: "My opinion is that the cause of this condition is a combination of two things, an unusual or altered reaction to the drugs she received—Q. The anesthetic, you mean? A. The anesthetic drugs that she received, plus a factor of functional overlay, psychic overlay. Q. So that, Doctor, tell us whether it is or is not true that in a certain small percentage of cases you do find a person who is sensitive to spinal anesthesia? * * * A. Yes. * * * Q. Does that happen, Doctor, in this small percentage of cases entirely without regard to any negligence on the part of the doctor? A. Yes. Q. Now, Doctor, one other question toward the last of this examination: You said in this case you did not consider or recommend the doing of a laminectomy. Will you explain that answer to us, please?

"A. Well, it was my feeling that, in view of the condition as it developed, there was no indication of any cord damage being present in this patient; that in the absence of cord damage, there would be no indication at all for doing a laminectomy."

He further stated that he had a definite opinion that there was no cord damage in this case. In arriving at this conclusion, he explained that he took into consideration, among others, the following factors:

The lower portion of the spinal column is filled with nerve trunks and nerve roots that have their origin in the spinal cord. These come out at various levels to supply the lower extremities. A nerve or nerve root which has left the cord has the ability to regenerate itself if injured. The tissue in the spinal cord does not have that ability. If that tissue is damaged it cannot regenerate. And a paralysis caused by such damage is permanent. The fact that Mrs. Seneris' condition improved is positive evidence that the cord could not have been involved; that it must have been a nerve and that there had been regeneration.

He stated that the first indication he had that this could not be cord damage but was probably nerve root damage, was the fact that the patient could move her legs. With cord damage this would not be possible. In addition, the patient complained of pain. In cord damage there is a total loss of sensation, and she would have been unable to feel any pain.

Based upon his own knowledge, the patient's history and the findings made on her second admission to the hospital, Dr. West gave as his final opinion that Mrs. Seneris' condition was due to an altered reaction or a sensitivity to the anesthetic drug.

In addition there was also a contributing factor of functional or psychic overlay. This latter was based on his consultations with Dr. Haas regarding "a tremendous emotional problem present in this (the patient's) household."

Defendant Dr. George Shepherd Haas was also examined under section 2055, Code of Civ.Proc. He testified that because Mrs. Seneris' history showed that she had had bilateral phlebitis of both legs with a previous pregnancy which was also complicated by eclampsia, he consulted with the chief anesthetist at the hospital regarding the type of anesthesia which should be used. As a result of such consultation, it was decided that a spinal anesthesia was especially indicated. She had had a spinal previously without ill effects.

This witness did not enter the delivery room until after the spinal anesthetic had been given by Dr. West.

Appellants' own doctor, John B. Armstrong, testified that he first met Mrs. Seneris at his office on April 17, 1951. Upon examination he found "there was essentially normal orthopedic status of her trunk and arms and right lower extremity, but she had some loss of sensation and functional ability, or motor strength, in her left leg. Also, pain in her low back." At his suggestion she reentered the Methodist Hospital for observation and rest.

On direct examination he was asked: "Now, from the history that you got and from your various examinations, were you able to form an opinion as to what the cause of this woman's difficulty is?" He answered: "I really don't know the answer to that."

On cross-examination, he testified that he had numerous consultations with other doctors regarding appellant's condition. He included their reports and impressions in his diagnosis and opinion because they were neurologists and neurosurgeons. One of his consultants found that there was a functional overlay in appellant's case. With this, Dr. Armstrong agreed. He then described a functional overlay in general as an exaggerated response from the normal that could be expected from certain stimulus, substantially the same as a neurosis.

[2–5] In Huffman v. Lindquist, 37 Cal. 2d 465, 473, 234 P.2d 34, 39, 29 A.L.R.2d 485, a malpractice case in which judgments of nonsuit were affirmed, our Supreme Court laid down the general principles to be noted in this type of case: "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' (Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695, 997; Lashley v. Koerber, supra, 26 Cal.2d 83, 88–89, 156 P.2d 441, 444) but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient.' Lawless v. Calaway, supra, 24 Cal.2d 81, 86, 147 P.2d 604, 606. No different or 'higher degree of resonsibility' is imposed 'in making a diagnosis than in prescribing treatment.' Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222, 223; see, also, Ries v. Reinard, 47 Cal.App.2d 116, 119, 117 P.2d 386. A doctor's failure to possess or exercise the requisite learning or skill 'in a particular case is generally a question for experts and can be established only by their testimony' (Trindle v. Wheeler, 23 Cal.2d 330, 333, 143 P.2d 932; also Church v. Bloch, 80 Cal.App.2d 542, 547, 182 P.2d 241), which 'expert evidence is conclusive' where it appears that the 'matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen.' Engelking v. Carlson, supra, 13 Cal.2d 216, 221, 88 P.2d 695, 697. Application of these principles in this case sustains defendant doctor's position that plaintiff's charge of malpractice is not supported by the record."

[6] And as stated in Ayers v. Parry, 3 Cir., 192 F.2d 181, 185, a case decided by the U. S. Cir. Court of Appeals, involving application of New Jersey law:

"We think it is beyond dispute that the nerve roots which were damaged in the process of producing anesthesia by injecting the drug into the spinal column are within the region of treatment and that the

cause of this injury to the nerve roots and its effect on the leg and adjacent organs must be explained by experts. When the expert testimony offered by the plaintiff ascribes the cause to the toxic quality of the injected drug as distinguished from the negligence of the anesthetist, that evidence is binding upon the court and the jury would not be permitted to speculate to the contrary."

Likewise here. Defendant West met the qualifications required of an expert. His testimony established that the spinal anesthetic was administered in accord with accepted medical standards in the community. Moreover, believing that the damage here was to the nerve roots and not to the spinal cord, his diagnosis that a laminectomy was not indicated was also in accord with good medical practice.

[7] Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695.

The record before this court fails to disclose any evidence tending to establish negligence on the part of either Dr. West or Dr. Haas in their care or treatment of Mrs. Seneris.

[8] Both of these doctors were members of the medical staff of defendant hospital, a separate, independent organization composed solely and exclusively of doctors. There is no evidence that the Methodist Hospital attempted to direct or control the activities of either Dr. West or Dr. Haas in such manner as would justify the application of the doctrine of *respondeat superior*.

[9] It further appears that the doctrine of res ipsa loquitur may not be invoked by appellants.

[10] As stated by our Supreme Court in Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695, 698: "It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. For example, it has been applied where a sponge was left in the body of a patient after closing an operative incision. (Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409 * * *); where the patient was burned by the application of hot compresses or heating apparatus (Timbrell v. Suburban Hospital, 4 Cal.2d 68, 47 P.2d 737 * *); where the patient was burned through the operation of an X-ray machine (Moore v. Steen, 102 Cal.App. 723, 283 P. 833 * *); and where the patient sustained an infection through the use of an unsterilized hypodermic needle. Barham v. Widing, 210 Cal. 206, 291 P. 173. In each one of these situations the rule was applied because common knowledge and experience teaches that the result was one which would not have occurred if due care had been exercised.

"But the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience. Medical evidence is required to show not only what occurred but how and why it occurred. That evidence establishes beyond question not only that the peroneal nerve may be injured even where due care is used but that this unfortunate result invariably occurs in a limited number of cases."

[11] In the instant case, an inference may be drawn from substantial evidence in the record that the injury to Mrs. Seneris was not caused by negligence but was caused by some condition existing in the patient's system.

Appellants rely upon the case of Ybarra v. Spangard, 25 Cal.2d 486, 487, 154 P.2d 687, 688, 162 A.L.R. 1258. There the plaintiff was in the hospital for an appendectomy. The anesthetist adjusted him for the operation, "pulling his body to the head of the operating table and * * * laying him back against two hard objects at the top of his shoulders, about an inch below his neck." The anesthetic was then administered and he lost consciousness. When he awoke he felt a sharp pain in his shoulder; this spread down his arm which developed paralysis.

As stated in the opinion in 25 Cal.2d at pages 492, 494, 154 P.2d at page 690, this

was "an injury resulting from an external force applied while he lay unconscious in the hospital * * *.

"We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of res ipsa loquitur is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

In the instant case, the respondents have met the inference of negligence by their explanation of what occurred hereinbefore recited.

[12] Nor is there any merit to appellants' challenge of the propriety of the trial court in excluding the deposition of Dr. Frank Webb because of lack of qualifications to testify as an expert. Dr. Webb had never administered a spinal anesthetic nor had he ever seen one administered. He had never treated a patient for paralysis of the lower extremities at least for a period of some 34 years.

Speaking to this same contention in Huffman v. Lindquist, 37 Cal.2d 465, 478, 234 P.2d 34, 42, 29 A.L.R.2d 485, the court stated:

"By his own testimony Dr. Webb established the questionable sufficiency of his medical background and knowledge to permit his testifying on the requisite skill and care here concerned because of (1) his lack of active practice in California within the last 25 years, and (2) his lack of occupational experience in the treatment of living patients suffering comparable brain injuries and complications resulting in pulmonary embolisms."

For the reasons stated the orders and judgment of nonsuit are, and each of them is, affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

131 Cal.App.2d 841

Sherlie BENNETT, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for PLACER COUNTY, Respondent.

Civ. 8778.

District Court of Appeal, Third District, California.

March 28, 1955.

Proceeding on a petition for writ of mandate compelling respondent Superior Court to consider on its merits petitioner's application for probation. The District Court of Appeals, Peek, J., held, inter alia, that even though petitioner, a public official, had been charged only with crime of falsification of public records, if it appeared in fact that she had also embezzled public funds, she was thereby precluded from obtaining probation.

Writ denied.

1. Criminal Law ⇐982

Clerk of the Roseville Judicial District Court was a "public official" within meaning of Penal Code section prohibiting grant of probation to public official who has embezzled public money. Pen.Code, §§ 424, subd. 3, 1203.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Official".

2. Constitutional Law ⇐70(3)

Legislative branch of government has power to declare that in certain criminal cases probation may not be granted, and it is not province of court to question wisdom of policy behind enactment of such statute. Pen.Code, §§ 424, subd. 3, 1203.

3. Criminal Law ⇐982

Even though public official had been charged only with crime of falsification of public records, if it appeared in fact that she had also embezzled public funds, she was thereby precluded from obtaining probation. Pen.Code, §§ 424, subd. 3, 1203; West's Ann.Const. art. 6, § 11; West's Ann.Code Civ.Proc. § 103a; Pen.Code,

§ 1463; Government Code, §§ 71000 et seq., 71040, 71600.

Srednik & Gibson, Roseville, for petitioner.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Petitioner seeks a writ of mandate compelling the respondent superior court to consider her application for probation on its merits, said court having refused to do so on the ground that petitioner is ineligible for probation under the provisions of section 1203 of the Penal Code.

By an information filed by the District Attorney of Placer County, petitioner was charged with a violation of section 424, subd. 3, of the Penal Code, in that she "did willfully, unlawfully, feloniously and knowingly keep false accounts relating to the receipt, safekeeping, transfer and disbursement of public money, and she, the said Sherlie Bennett, was then and there the Clerk of the Roseville Judicial District Court, County of Placer, State of California." To the crime charged she entered her plea of guilty and made a formal motion for probation. The probation officer's report recommended probation subject to certain stated conditions "providing the defendant is eligible for release upon probation." At the hearing on her application the court stated that were it not for the provisions of section 1203 of the Penal Code, it would "entertain her motion for probation and accept the recommendation of the Probation Officer."

The pertinent portions of Penal Code, section 1203, provide in part,

> "[P]robation shall not be granted * * * to any public official or peace officer of the State, county, city, city and county, or other political subdivision who, in the discharge of the duties of his public office or employment, accepted or gave or offered to accept or give any bribe or embezzled public money or was guilty of extortion. * * *"

Petitioner makes two main contentions: (1) That she is not a public official within the meaning of said section, but merely an employee; (2) that she was not convicted of the crime of embezzlement, and hence did not come within the ineligibility provisions of said section.

Some states have endeavored by statute to define public office. Here, however, the statute neither defines the words "public official" nor does it specify the positions which are deemed to be public offices. Apropos of the question posed, the court in Patton v. Board of Health, 127 Cal. 388, 397, 59 P. 702, 705, after discussing numerous cases observed that "the definitions of the term 'office,' while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases." And that the disagreement is not so much as to definitions as it is in their application to the circumstances of particular cases.

In the case of People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388, the court had before it for consideration a question as to the right of defendant to hold the office of city attorney and city judge in a city of the sixth class. In discussing the definition of the term "public office" the court quoted approvingly from the earlier case of Patton v. Board of Health, supra, wherein it was said,

> "It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed

to be an office." 127 Cal. at page 398, 59 P. at page 706.

In the later case of Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858, the court quoted with approval from volume 21, California Jurisprudence, pages 819 and 820, (the same was also approved in People ex rel. Chapman v. Rapsey) that—

> "'The words "public office" are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit.
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> * * * * * *
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> "'Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.'" 105 Cal. App. at page 697, 288 P. at page 859.

The California Constitution provides, under article 6, section 11, that justice courts are made a part of the judicial system of the State, and the Legislature is authorized to prescribe the manner in which the number, qualification and compensation of the judges, officers and attaches of justice courts shall be fixed. Pursuant to this provision, the Legislature, by section 71040 of the Government Code, has authorized the board of supervisors to divide respective counties into judicial districts, and by section 71600 of the same code, has authorized such board to regulate the compensation of judges and constables of such courts and "prescribe the number, qualifications, and compensation of such clerks, deputies, and other attaches of justice courts * * *." By the provisions of section 103a of the Code of Civil Procedure—

> "Clerks of justice courts, in addition to the other powers conferred upon them by law, shall have power to administer and certify oaths to affidavits, and all papers, documents or instruments used in, or in connection with, the civil actions or proceedings in such justice courts and to issue summons and other writs and notices in civil actions in said courts in the name of the judge before whom the same is pending or out of whose court the same is issued."

Further provisions relative to the disposition of fines, forfeitures and deposits by such clerks are found in section 1463 of the Penal Code, and the Government Code, section 71000 et seq., contains numerous other provisions relative to the status of officers of justice and municipal courts.

[1] Applying the rules enunciated in the above-cited cases to the constitutional and statutory provisions previously noted, it would seem to follow that petitioner, as Clerk of the Roseville Judicial District Court, occupied a public office under the laws of this State.

Petitioner next contends that she does not come within the quoted provisions of section 1203 for the further reason that the crime with which she was charged, and to which she pleaded guilty, involved the falsification of public records, Penal Code,

section 424, subsection 3; hence she is not one who has "embezzled public money" within the meaning of the code.

As originally enacted in 1872, section 1203 contained no restrictions on the power of the courts to grant probation. From time to time during the intervening years restrictions have been placed upon courts with regard to persons eligible for probation. Such restrictive amendments material here appear to be in accordance with the general policy of the Legislature which the Supreme Court, in People v. Dillon, 199 Cal. 1, noted at page 12, 248 P. 230, at page 234, with this comment:

> "The safe-keeping of public moneys has, from the first, been safeguarded and hedged in by legislation most strict and severe in its exactitudes."

At the present time section 1203 in effect contains eight separate groupings, all of which relate to particular facts or circumstances which would preclude a defendant who comes within one such group from obtaining probation, and in each instance, except the one relating to public officials, when mention is made of a specific act which would be a bar to probation, the word "conviction" is used. Therefore petitioner argues that the phrase in question "embezzled public money" must mean either *convicted* of embezzling public money, or at least "guilty" of that crime since that is the word used in relation to the final restriction as to the crime of extortion.

[2] It is not the province of this court to question the wisdom or policy behind the enactment of the particular provisions of that section. As noted in People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65, the right to enact laws making certain actions criminal and to designate the punishment for such crimes is vested exclusively in the Legislature. "Clothed with the power to prescribe penalties for violations of criminal statutes, it necessarily follows that the legislative branch of the government has the power to declare that in certain of these cases, probation may not be granted." 104 Cal.App.2d at page 685, 234 P.2d at page 93.

Pursuant to that authority, the Legislature has provided the procedure to be followed by the courts on application for probation, such as reference to the probation officer who must make an investigation and report to the court at a specified time concerning the circumstances surrounding the crime and concerning the defendant and his prior record and history. At the date so fixed, the court must hear and determine such application.

[3] As noted in the case of People v. Leach, 22 Cal.App.2d 525, 71 P.2d 594, such provisions, of necessity, involve bringing before the court matters not formally pleaded. Thus in the present case, although defendant was charged with the specific crime of falsification of public records, if it appeared in fact that she had also embezzled public funds, she was thereby precluded from obtaining probation. Here the record shows that at the hearing on her application for probation she was personally in attendance and represented by counsel. The court had before it the facts as stated in the probation officer's report—that she had admittedly, in the discharge of her duties as a clerk of the court, "taken various amounts of money from the Court funds from time to time for her own personal use" and that she had "admittedly misappropriated from official Court funds for her own personal use" a substantial amount. These facts were noted by the trial court in its order denying probation. They were not challenged in any way by petitioner, but were apparently accepted by her as a true statement of her conduct.

The writ is denied.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

132 Cal.App.2d 20

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Richard RANDAZZO, Defendant and Appellant.

Cr. 5264.

District Court of Appeal, Second District, Division 1, California.

March 29, 1955.

Rehearing Denied April 11, 1955.

Hearing Denied April 27, 1955.

Defendant was convicted of robbery and kidnapping for purpose of robbery. The Court, Kenneth C. Newell, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain jury's conclusion that the kidnapping was related to and associated with the robbery.

Judgment and order affirmed.

1. Criminal Law ⇐1166½(1)

Where, in criminal proceeding, clerk's minutes showed that defendant's counsel was not present during return of verdicts but that counsel had stated to court, by telephone that it was agreeable with counsel that verdicts be returned in his absence, receipt of verdicts in absence of defendant's counsel was not prejudicial error. U.S.C.A.Const. Amend. 14.

2. Kidnapping ⇐1

Where kidnapping takes place after actual perpetration of robbery, the kidnapping may be a kidnapping for purpose of robbery if it may reasonably be inferred that transportation of victim was to effect escape of robber or to remove victim to another place where he might less easily sound an alarm. Pen.Code, § 209.

3. Kidnapping ⇐5

In prosecution for robbery and for kidnapping for purpose of robbery, evidence was sufficient to sustain jury's conclusion that the kidnapping was related to and associated with the robbery.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information with robbery in Count I and in Count II with kidnapping for the purpose of robbery. The jury found defendant guilty on both counts and on the second count recommended life imprisonment without possibility of parole. A motion for a new trial was denied and the appeal is from the judgment and order denying motion for a new trial.

It is contended on appeal that,

"I

"The court erred in receiving the verdicts of the jury in the absence of counsel for the defendant. The receipt of a verdict for an eighteen year old boy in the absence of his counsel, in effect, denied the appellant due process of law guaranteed by the fourteenth amendment to the Constitution of the United States.

"II

"The verdicts are contrary to the law and the evidence, particularly as to Count Two.

"III

"The defendant was denied due process of law guaranteed by the fourteenth amendment to the Constitution of the United States in the receipt in admission of the alleged confessions including: (a) the written confession; (b) the tape recording; (c) the motion picture reenactment.

"IV

"The court erred in its rulings throughout the trial of the case.

"(A)

"The court erred in refusing to compel the recall of Ed Hallmark, the alleged victim in the case, and in refusing to issue and order compulsory processes for that purpose.

"(B)

"The court erred in refusing to permit the defense to read Hallmark's

testimony at the preliminary hearing in view of the fact that he was not permitted to be recalled.

"V

"The court erred in instructions given and refused.

"(A)

"The evidence did not support an instruction, or instructions, on the law of kidnapping.

"(B)

"The court erred in giving an instruction that kidnapping for the purpose of robbery may be found after the actual perpetration of a robbery.

"VI

"The court erred in pronouncing judgment in view of the objections to the procedural denial of due process of law under the fourteenth amendment to the Constitution of the United States. The court refused to permit the defendant to cross examine witnesses or to bring Ed Hallmark into court for further proceedings and further testimony.

"VII

"The court erred in pronouncing judgment on both offenses."

The record reveals, as recited in respondent's brief that,

"About 1:00 p. m. on Sunday, September 13, 1953 the appellant picked Joseph Perez up at his home. They went to El Monte and El Sereno, where they picked up three other boys and drove around drinking beer. They let the other three boys off about 10:30. The appellant then asked Perez if he wanted to help him rob a place, and Perez said that he did not want to. The appellant took Perez home and left him there about 11:30. Perez gave him seventy-five cents for taking him home. Then the appellant went away.

"About 2:00 o'clock Monday morning, September 14, 1953, the appellant drove into Ward's Acre Service Station in Alhambra in a Mercury car. Mr. Hallmark, the 73 year old service station attendant on duty, went to the appellant. Mr. Hallmark had a flashlight in his pocket. The appellant said that he wanted some gas and oil. Mr. Hallmark gave him the gas and went to give him the oil. The appellant hit Mr. Hallmark with something on the top and sides of his head. It sickened him and knocked him down. He started to call for help. The appellant got Mr. Hallmark up and pushed him toward the cash box, telling him that he would put a bullet through him if he didn't stop the noise. Mr. Hallmark opened the cash box and the appellant threw his arms around him. Then he hit Mr. Hallmark with something on top of his head. There was blood on his head. Then Mr. Hallmark got another blow and that was the last he remembered until he was in the hospital.

"About 4:30 that morning Joseph Perez's cousin woke him up and told him that the appellant was outside. Perez started to put on his clothes, and the appellant walked into the front room. He had on a blue shirt, which Perez had lent him, and gray trousers. They had blood on them. Perez asked what he was doing there so early, and the appellant said that he had robbed Ward's Acre and had brought the old man to Perez's house, where he had put him in the bathroom. Perez asked him why he did it, and the appellant said he didn't know. He showed Perez a wallet full of money, which he said he had got from Ward's Acre. Perez told the appellant to take Mr. Hallmark back to Ward's Acre or to a hospital; that he didn't want to get involved in trouble. After Perez had argued with the appellant for about ten minutes, the appellant left, taking Mr. Hallmark with him. Mr. Hallmark had blood on the back of his head and he seemed to be in a daze."

Defendant was arrested on the night of September 22nd. A complete confession followed the arrest which was recorded.

Defendant was taken to the hospital where the victim stated, "Yes, that is the old man I slugged". Other evidence relating to defendant's guilt need not be detailed.

With regard to the first contention the record reveals that the minutes of the clerk show that,

"* * * Counsel for defendant is not present during the return of the verdicts, said counsel having stated to the Clerk by telephone that is was agreeable with counsel that the verdicts be returned in his absence due to his being in the City of Los Angeles and not feeling too well at the time of the return."

[1] No prejudicial error resulted from the incident. See People v. Bennett, 65 Cal. 267, 3 P. 868. Also People v. Wissenfeld, 36 Cal.2d 758, 227 P.2d 833; also 53 American Jurisprudence, 708.

Appellant argues, with regard to the second contention that, "The testimony in this case is that the gasoline station was robbed and not Ed Hallmark. There was nothing taken from his person and the robbery was completed when the money was taken from the cash box. There is nothing shown that his subsequent carrying away, or ride in the automobile, was to commit robbery or that any robbery was committed on him. The testimony of Mr. Hallmark ends with his being struck; he does not know what happened after that time. Whatever occurred comes from the lips of others, but there is no testimony that any robbery occurred thereafter.

"Under these circumstances, under Section 209, Penal Code, as amended in 1951, the defendant was not guilty of kidnapping to commit robbery.

* * * * * *

"The examination of the evidence shows:

"(1) There was no kidnapping to commit robbery;

"(2) There was no bodily harm in the course of any transportation of Mr. Hallmark.

"It appears that he was transported to take care of him rather than do any bodily harm."

Section 209 of the Penal Code provides that "Every person who seizes, confines, * * * kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery * * * is guilty of a felony * * *".

There is no question as to the applicability of the law. The only question was one of fact and as pointed out by respondent,

[2] "Where a kidnaping takes place after the actual perpetration of a robbery such kidnaping may be a kidnaping for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm. People v. Kristy, 4 Cal.2d 504, 507–508 [50 P.2d 798]. People v. Raucho, 8 Cal.App. 2d 655, 665–666 [47 P.2d 1108]. People v. Bean, 88 Cal.App.2d 34, 40–41 [198 P.2d 379]."

[3] That the evidence supports the jury's conclusion that the kidnapping was related to and associated with the robbery, there can be no question.

It would serve no useful purpose to detail the arguments relating to appellant's other contentions. It is sufficient to note that no prejudicial errors were committed by the trial judge. The instructions were not erroneous and due process of law was not denied the defendant. Other contentions are without merit.

Judgment and order affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

131 Cal.App.2d 751

Richard HARRIS, a minor, by Mary Shearon, his guardian ad litem, and William Shearon, Plaintiffs and Respondent,

v.

Seymour LAMPERT and Donald Cohn, individually, and doing business under the fictitious firm name and style of Popular Home Furniture, Defendants and Appellants.

Civ. 20558.

District Court of Appeal, Second District, Division 2, California.

March 23, 1955.

Hearing Denied May 18, 1955.

Action was brought by motorcyclist against owners of truck to recover for injuries sustained in intersectional collision. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment against owners of truck, and they appealed. The District Court of Appeal, Fox, J., held that award of $47,369 to seventeen year old boy for injuries resulting in permanent brain injury was not excessive.

Judgment affirmed.

1. Damages ⇐208(1)

Determination of amount of damages to be awarded to injured party is primarily a question for jury.

2. New Trial ⇐162(1)

If trial judge deems amount of judgment for injuries to be excessive, he may reduce the amount by granting new trial unless plaintiff agrees to reduction.

3. Appeal and Error ⇐1004(3)

Where jury has fixed amount of damages for injuries, and trial judge has impliedly approved award by denying motion for new trial, reviewing court may interfere only in event it appears from record, as a matter of law, that verdict was result of passion or prejudice.

4. Appeal and Error ⇐1004(1)

Test to be applied by reviewing court in determining whether damages in personal injury action are excessive is a comparison of amount of verdict with evidence before trial court, for purpose of determining whether award is so far out of line as to show passion or prejudice on part of jury.

5. Appeal and Error ⇐1004(4)

Test to be applied by reviewing court in determining whether damages in personal injury action are excessive is not what reviewing court would award, but whether award shows passion or prejudice on part of jury.

6. Appeal and Error ⇐1004(3)

Generally, if there is substantial evidence in record supporting damages awarded by jury in personal injury action, and award is inferentially approved by trial judge by his denial of motion for new trial without reducing damages, reviewing court is powerless to reduce award or hold award excessive.

7. Evidence ⇐18

It is common knowledge that purchasing power of the dollar has decreased.

8. Damages ⇐132(3)

Award of $47,369 to seventeen year old boy for injuries resulting in permament brain injury was not excessive.

W. P. Smith, Los Angeles, for appellants.

Harry Aides, and Robert H. Green, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from the judgment on the ground that the award of damages for personal injuries is excessive.

The accident occurred on October 11, 1952, at the intersection of North Figueroa Street and Avenue 43 in the city of Los Angeles. The operator of defendants' truck drove through a red traffic signal and collided with plaintiff, Richard Harris, who was on his motorcycle, seriously injuring him. The case was tried before a jury in February, 1954, resulting in a unanimous verdict of $47,369 in favor of plaintiff. A motion for a new trial, on the ground that the damages were excessive, was made and in due course denied.

[1–7] The determination of the amount of damages to be awarded to an injured party is primarily a question for the jury. The trial judge, however, may reduce the amount of the judgment if he deems it to be excessive by granting a new trial unless the plaintiff agrees to such reduction. But when a jury has fixed the amount of damages, and where, as here, the trial judge has impliedly approved the award by denying a motion for a new trial an appellate court may interfere only in the event it appears from the record, as a matter of law, that the verdict was the result of passion or prejudice. Roedder v. Lindsley, 28 Cal. 2d 820, 823, 172 P.2d 353; Duvall v. T. W.A., 98 Cal.App.2d 106, 111–112, 219 P. 2d 463. The test to be applied in such cases is "a comparison of the amount of the verdict with the evidence before the trial court". Buswell v. City and County of San Francisco, 89 Cal.App.2d 123, 127, 200 P.2d 115, 117; Gluckstein v. Lipsett, 93 Cal.App.2d 391, 400, 209 P.2d 98, for the purpose of determining whether the award is so far out of line as to show passion or prejudice on the part of the jury. Duvall v. T.W.A., supra. "It is not a question of what we would award, Nason v. Leth-Nissen, 82 Cal.App.2d 70, 185 P.2d 880, but whether we can hold that it indicates that type of action by the jury. 'Generally speaking, * * * if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive.' Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 52, 177 P.2d 32, 37. In considering the amount of the verdict, we must bear in mind the present day situation as expressed in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 187, 195 P.2d 427, 431: 'It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral.'" Duvall v. T.W.A., supra, 98 Cal.App.2d at page 112, 219 P.2d at page 468. When these rules are applied to the facts of this case it is clear it cannot be held that the verdict is excessive as a matter of law.

The injuries were serious, painful, and certain of them are permanent in character. The record shows the following: The injured plaintiff[1] was a young man 17 years of age when the accident occurred; his average life expectancy was 48.35 years; he was employed by Beckman Instruments in South Pasadena and earning $50 per week. He remembered nothing about the collision, having been rendered unconscious thereby. He was removed to the General Hospital where restraints were placed on his hands and feet and attached to the sides of the bed. He was not able to carry on an intelligible conversation for approximately ten days. Examinations and X-rays disclosed that he had suffered a severe basal skull fracture so deep that it caused some spinal fluid to leave the brain through the left ear canal. The eardrum had been lacerated as a result of the linear type skull fracture so that one can see right into the middle ear. The skull fracture also caused injury to the brain. Plaintiff received a chip fracture of a bone in his left foot which resulted in a bruise of a sensory nerve, and a severe sprain of his left shoulder. Plaintiff suffered severe pain from these injuries and developed a throbbing headache and a constant buzzing in his left ear. When he left the hospital on November 4 he dressed but could not get his left shoe on because his foot was swollen. His ear was stuffed with cotton and his head was bandaged. He went down to his mother's car at the ambulance entrance in a wheelchair.

Upon his return home Richard was placed under the professional care of Dr. John D. Abbey, a specialist in the field of otolarynology and Dr. Mark T. Steele, a specialist in orthopedics and traumatic injuries.

Plaintiff was under the care and treatment of Dr. Abbey until in April, 1953,

1. For convenience hereinafter, the plaintiffs will be referred to in the singular.

and Dr. Steele throughout that year. The doctors examined plaintiff a number of times during these respective periods. Both doctors re-examined him in February, 1954, just prior to the trial.

Following his return home from the hospital plaintiff had severe, throbbing headaches three or four times a week in the front and top portions of his head; the rest of the time he had a constant, tight band-like ache as though some one were squeezing the front part of his head. He was also still bothered with a humming, doorbell-like noise in his left ear. He had become somewhat deaf in that ear. During these recuperative months he not only suffered considerable pain from these sources but also from his injured foot and shoulder.

At the end of March, 1953, plaintiff returned to work, running a punch press. He kept the job for two or three months, being compelled to quit because of throbbing and pounding headaches. After resting for awhile at home, plaintiff got work at the Luther Engineering Company, in Los Angeles, operating an hydraulic press; he became ill, however, after about two weeks and had to give up this employment. While on this job, plaintiff continued to have headaches and his ear still buzzed, but the drainage had stopped. After leaving the Luther Engineering Company, plaintiff rested and went to Bakersfield, in July, where his family was then living. About the middle of July, 1953, plaintiff went to work for Crown Motor Rebuilding, driving a truck; he worked there until the end of August, when he took a leave of absence for a week. He returned to this job and remained with it until November, when he went back to Bakersfield to live with his family. He worked on a ranch in that locality for some seven weeks, returning to Los Angeles in January, 1954, where he was employed by Barnett's Chevrolet, detailing cars that came in for lubrication and doing other work around the place. He was discharged after two or three weeks because of absences. He was not employed at the time of trial, in February, 1954. During all this time he continued to have both kinds of headaches, and the buzzing noise in his ear was constant. There was no improvement in any of these conditions; also, the injury to his shoulder interferred with any work that required lifting.

Before the accident plaintiff played baseball, football, and basketball and engaged in other sports. Since then he has not participated in any such activities. He had quit school because of financial difficulties.

The testimony of Dr. Abbey and Dr. Steele, whose last examinations of plaintiff was some 16 months after the accident, discloses the following: (a) A permanent brain injury; (b) persistent headaches, which will probably continue for the balance of his life; (c) personality change; (d) tinnitus, or a constant ringing in the ear, for which there is no cure; (e) a deafness in the ear as to high tones, which will become worse as plaintiff grows older; and (f) restrictions as to the type of work in which plaintiff can participate in view of his injuries.

The testimony reveals that this was a severe basal skull fracture and produced "a permanent injury of the brain in the middle as well as in the frontal part, but more particularly in the frontal lobe." In this connection, Dr. Steele was asked: "Is there a certain portion of the brain that is more persistent and where the damage lasts longer than any other portion?" His answer was, "Yes, the frontal lobe. The frontal lobe does not recover as well and these basal skull fractures are at a point where the principal functions of the brain are located."

The headaches were related to the brain injury. In response to a question from the court, Dr. Steele testified that plaintiff "had a permanent condition there in the frontal lobe, which causes persistent permanent headaches." It was his opinion that these will probably continue for the remainder of his life.

On the question of a personality change in the plaintiff as a result of the accident, the following evidence was given by Dr. Steele in response to the court's interrogation:

"Q. Did I understand you to say that you observed and found a personality change?[2] A. Yes.

"Q. That was a finding? A. Yes, it was. I noticed that myself.

"Q. By the Court: And that was an objective finding? A. Yes.

"Q. Have you given us all the permanent residuals? A. Well, this ear condition is probably permanent, but I would have to depend upon Dr. Abbey's report on that.

"Q. Outside of that, you would adopt his report if you answered that question? A. Yes.

"Q. So far as your field is concerned, you have given us the residuals you feel are there? A. Yes.

"Q. As to the prognosis of those in the future, have you given us that? A. Yes, I said as long as they have persisted for a period of a year, these headaches particularly, and these personality changes, they would be permanent."

With reference to tinnitus, or the ringing in plaintiff's left ear, Dr. Abbey testified: "There is no cure for tinnitus where you have the damage that is there." He further stated: "As far as the ringing in the ear is concerned, I feel he will have that with him always."

As to plaintiff's ability to hear high tones with the injured ear and his prognosis of that condition, Dr. Abbey testified: "I believe his [sic] chances of his having high-tones deafness, which he shows on his audiometric, is inevitable. It will not improve. The ringing and the audiometric are enough to prove that to my mind. With that much refraction of the eardrum, he may lose another 20 decibles of hearing as he grows older, * * *."

As to the restrictions on the type of work, Dr. Steele testified that heavy work or manual labor was not desirable, particularly if its performance required bending or stooping, since these movements have a tendency to cause the blood to go to the brain and this would serve to aggravate the result of the injury, particularly his "persistent headaches." The doctor was also of the opinion that plaintiff should not work in a machine shop with hydraulic presses or drills, nor as a mechanic in a garage, which required crawling under cars, nor should he do pick and shovel work, for all of these required bending and stooping, and such changes of position would tend to increase the severity of his headaches. He could, however, hold a desk job where there would not be too much mental effort, or he could drive a light truck where he did not have to do any heavy lifting.

Special damages amounting to a little more than $4,000 were established. These consisted of loss of wages; hospital, X-rays, prescriptions and doctor bills (including $300 for future services); and damages to his motorcycle.

[8] Taking together everything shown by the evidence, including the nature and extent of the injuries; the permanent character of certain of them; the pain and suffering which plaintiff has undergone, some of which very likely will continue for an indefinite time; the restrictions upon the type of his future employment, and the depressed value of the dollar today, we cannot say that the verdict is in such an

2. Dr. Abbey gave the following testimony on this subject:

"Q. * * * In giving the prognosis, guarded as to brain damage, did you take into account other factors that develop from a brain injury? A. Yes.

"Q. What are they? A. Well, of course, you would consider such things as personality changes.

"Q. Let me stop you for a minute, by personality changes, what do you mean by that? A. Personality changes are more or less of—well, the frontal lobe is the section of the brain that has to do with our personality, and if we have a damage up there we get changes, irritability and dizziness. Headaches are a different mechanism, and the way we get along with people, the way we respond to our work, and the way we adjust ourselves to society, Those are all what we call personality changes.

"Q. Do personality changes follow basal skull fractures in the frontal lobe? A. Yes, they can, absolutely."

amount as to indicate passion or prejudice on the part of the jury, or that it is not sufficiently supported by the evidence. Risley v. Lenwell, 129 Cal.App.2d 608, 277 P.2d 897; Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645.

Defendants have cited a number of personal injury cases in which verdicts of juries have been reduced. It would serve no useful purpose, however, to discuss them as each must be decided upon its own facts. Duvall v. T.W.A., 98 Cal.App.2d 106, 114, 219 P.2d 463; Risley v. Lenwell, supra, 129 Cal.App.2d 608, 277 P.2d 897.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

132 Cal.App.2d 56

Magnetta McGuire ZELLERS, Plaintiff and Appellant,

v.

STATE of California et al., Defendants,

S. L. Chowning, Oscar Oberg and Seth A. Oberg, d/b/a Oberg Bros. Construction Company, Respondents.

Civ. 20784.

District Court of Appeal, Second District, Division 1, California.

March 30, 1955.

Action for injunctive relief and damages. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment against one of several defendants, and plaintiff appealed, and two other defendants, held not liable, but not mentioned in judgment, filed motion to dismiss appeal as to them or to defer determination of appeal until entry of proper judgment. The District Court of Appeal, White, P. J., held that appeal should not be dismissed as to defendants who failed to see that judgment in their favor was properly entered, but that trial court should amend judgment nunc pro tunc.

Motion to dismiss denied and amendment of judgment nunc pro tunc ordered.

1. Judgment ⇐237(1)

Where findings of fact and conclusions of law were that two of several defendants were not liable to plaintiff, the duty devolved upon such defendants to see that judgment in their favor was properly entered.

2. Appeal and Error ⇐1106(5)

Where judgment was entered against one of several defendants and two defendants, held not liable, neglected to see that judgment in their favor was properly entered, appeal by plaintiff should not be dismissed as to such defendants, lest such dismissal bar subsequent appeal after entry of proper judgment, and in the interest of justice, order should issue to trial court to amend judgment nunc pro tunc by adding to judgment that such defendants have judgment against plaintiff.

3. Appeal and Error ⇐428(2)

Where reviewing court, after appeal had been taken by plaintiff from judgment against only one of several defendants, ordered trial court to amend judgment nunc pro tunc by adding thereto that two other named defendants, held not liable, have judgment against plaintiff, under Rules on Appeal reviewing court could then treat notice of appeal as being filed immediately after entry of judgment as so amended. Rules on Appeal, rule 2(c).

J. P. Bradley, Glen A. Duke, Los Angeles, for appellant.

Moss, Lyon & Dunn, Arvin H. Brown, Jr., Henry F. Walker, Los Angeles, for respondents Oscar Oberg and Seth A. Oberg, d/b/a Oberg Bros. Const. Co.

WHITE, Presiding Justice.

Respondents Oscar and Seth A. Oberg move to dismiss this appeal insofar as it concerns them, or for an order directing that the determination of the appeal taken

as against respondent Chowning be deferred until entry of judgment has been made in the trial court against appellant and in favor of the moving respondents.

The record reveals that appellant instituted an action against the State of California and respondents herein, seeking injunctive relief and damages for a fill made on appellant's property which changed the flow of water.

Respondents Chowning and Oberg answered separately. The findings of fact and conclusions of law were that respondent Chowning was liable and that a mandatory injunction should issue as to him, requiring that he do certain things, but damages were denied. Respondents Oberg were held not liable to appellant.

However, when the judgment was entered it ran only as to respondent Chowning and no mention whatever was made therein as to respondents Oberg. Appellant then appealed from the "judgment" in favor of respondents Oberg and from a portion of the judgment as to respondent Chowning, but no judgment in favor of respondents Oberg has ever been entered. Appellant has filed her opening brief.

We are now asked by respondents Oberg to either dismiss the appeal as to them or to direct that hearing and determination thereof be postponed until entry of judgment in favor of respondents Oberg has been effected in the trial court, and an appeal taken therefrom.

Appellant opposes the motion and contends that the error is clerical, can be corrected by the trial court *nunc pro tunc*, and further, that such correction is not necessary since the judgment makes no mention of respondents Oberg and therefore is necessarily in their favor.

[1] It should be noted that the situation with which we are here concerned arose by reason of the neglect of respondents Oberg, who make the present motion. The duty devolved upon them to see that a judgment in their favor was properly entered.

[2, 3] We are satisfied that the appeal herein should not be dismissed lest such dismissal might prove a bar to a subsequent appeal after a proper judgment was entered as to respondents Oberg. We are satisfied that, in the interest of justice, an order should issue to the trial court to amend the judgment *nunc pro tunc* in accordance with the findings of fact and conclusions of law, by adding to the judgment that respondents Oberg have judgment against appellant. Then, under Rule 2(c) of Rules on Appeal, the reviewing court can treat the notice of appeal as being filed immediately after entry of the judgment as so amended.

It is so ordered.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 1

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walter Otto SCHROEDER, Defendant and Appellant.

Cr. 1017.

District Court of Appeal, Fourth District, California.

March 28, 1955.

Rehearing Denied April 11, 1955.

Hearing Denied April 27, 1955.

Defendant was found guilty of attempted grand theft. His application for probation was granted. The Superior Court of San Diego County, Hewicker, J., entered order denying new trial, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence was insufficient to sustain conviction for attempted grand theft against a defendant who had accepted money which was voluntarily and actively tendered to him by state investigator who was uninfluenced by false or fraudulent representations, in exchange for machines which defendant had constructed and designed to analyze and cure illnesses.

Order reversed.

1. Criminal Law ⇐1023(10)

Where court did not pronounce judgment in criminal prosecution but suspended proceedings and granted probation, purported appeal from judgment would be dismissed.

2. False Pretenses ⇐49(5)

Evidence was insufficient to sustain conviction for attempted grand theft against a defendant who had accepted money which was voluntarily and actively tendered to him by state investigator who was uninfluenced by false or fraudulent representations, in exchange for machines which defendant had constructed and designed to analyze and cure illnesses.

John Barry, Beverly Hills, Virgil H. Roick, Escondido, and Davies & Burch, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

[1] Defendant was charged with attempted grand theft and it is alleged in the information filed by the district attorney of San Diego county that on or about March 30, 1954, defendant "did wilfully, unlawfully and feloniously attempt to take the personal property of the California State Department of Public Health, consisting of the sum of Four Hundred Twenty-five ($425) lawful money of the United States of America." A jury trial resulted in a verdict finding the defendant guilty as charged. His application for probation was granted and his motion for a new trial was denied. Since no judgment was entered, the purported appeal from the judgment will be dismissed. People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353.

On March 30, 1954, inspectors Leake and Worley of the State Department of Public Health visited appellant's workshop in Escondido where appellant was employed by an electrical contractor. The inspectors represented to appellant that they were naturopaths from San Jose. They told him they had heard he had a device that was effective in the treatment of a good many diseases and that they had heard of this device through another naturopath in San Jose. Appellant stated that he had "devices" but that he was not "pushing" them due to a lawsuit pending in San Francisco. Appellant then exhibited a machine called an "analyzer" and explained its use. He stated that it was a combination diagnostic and treatment machine for use by the practitioner in his office. He further stated that the device was very effective in treating cancer, tumor, gallstones, ulcers, heart, vascular and other diseases and that the machine sold for $350. One of the inspectors then stated to appellant that if the machine did everything that it was represented to do, it would be an excellent piece of equipment in his office. He then asked appellant if he could explain how they could operate the machine provided they purchased it that day. After further explaining the use of the "analyzer" appellant exhibited another machine called an "energizer" and explained that it was a home treatment device which would give all the treatments as previously determined for the patient by the use of the "analyzer". Inspector Worley stated to Leake in the presence of appellant that he had a "patient that, if this machine is what it says it will do, will certainly warrant us purchasing it." During the discussion about the price of these machines Worley said "Well it would be too bad to be down here without * * * if these machines would do everything they said they would do, without taking one back." The inspectors then discussed the possibility of their taking two of the devices for $250 and paying the balance in ten days. Appellant agreed to this procedure and the inspectors handed him $250 in marked money belonging to the State Department of Public Health. Appellant took the money, counted it, placed it on the table and gave the inspector a receipt therefor. Inspector Leake then identified himself and placed appellant under arrest. One of the inspectors then picked up the money and counted it and a search of appellant's premises was made by the inspectors and other officers.

Appellant stated to the officers that he had sold around five hundred machines

within a period of five years; that he had sold the "analyzer" and "energizer" to chiropractors; that he had a present existing arrangement with a chiropractor in Escondido and supplied him with these devices, which he either rented or sold.

At the trial several expert witnesses who were called by the prosecution testified at length concerning the construction of these devices and the results of experiments with them. A physician and medical officer of the Federal Food and Drug Administration gave his opinion as an expert and stated that there was no value to the "analyzer" in the diagnosis of diseases and that the "energizer" had no value in the treatment of any disease. A like opinion was given by an expert in internal medicine.

There was evidence that during and prior to 1953 appellant used devices similar to the "analyzer" in evidence on various individuals; that the person to be diagnosed held in his hands a plate which was attached by a wire to the device and appellant then operated the machine; that appellant diagnosed these individuals as suffering from ulcers, cysts, trichinosis, tumors, heart condition, inactive thyroid, sluggish liver, infections in the head and toxicosis; that appellant told the patients that if they used his "energizer" it could cure all of these conditions.

Appellant produced character witnesses who testified as to his good reputation and several witnesses who had been diagnosed by him testified they had used the device and believed they had been benefited therefrom.

Two botanists testified that they had performed experiments with an "energizer" and concluded that the "energizer" had a definite effect on living organisms, particularly paramoecia; they also testified that they used the machine and were helped by it.

Appellant testified that he first became interested in electronic devices in 1943 or 1944 and had spent his spare time since then working with them; that he built the "energizer" and tried the device on himself and family; that they obtained relief from their ailments and that he had built four or five hundred machines. He denied telling any of his patients that the machines would cure anything and stated that he told them to take the machine and try it; that the cure would come from the body itself, all he was trying to do was correct the cause. Appellant further testified that he did not tell the inspectors anything that he did not believe was true and that he had no intention of deceiving them and did not make any statements about the devices on which he intended them to rely. In this connection inspector Leake testified that he did not rely in any way on any of the statements made by appellant about what the "analyzer" and "energizer" would do and that he never intended that appellant could keep the marked money. Inspector Worley testified that he and Leake had planned to represent themselves as naturopathic doctors and attempt to purchase the devices from appellant; that from information they had received from complainants he did not think there was any value in the "energizer" and that at the time of his visit to appellant's place of business he did not change his opinion; that he made a list of the serial numbers of the money before he left San Bernardino in order to identify the money and that he did not intend to let appellant get the money away from him "permanently".

Appellant first contends that he received the money on the insistence and with the consent of the prosecuting witnesses and pursuant to their scheme and plan; that their counsel, inducement and cooperation constituted entrapment; that theft and attempt to commit theft being individual personal wrongs, no crime was proven. We do not deem it necessary to pass upon the question of whether the acts and conduct of the inspectors herein amounted to entrapment since we conclude, on the basis of the decision in People v. Werner, 16 Cal.2d 216, 105 P.2d 927, 931, that the evidence herein will not support the conviction of appellant upon the charge of attempted grand theft.

In the Werner case, as here, the offense charged was attempted grand theft. Wer-

ner and his wife were convicted and Werner appealed from the order denying his motion for a new trial. This order was reversed on appeal. McNeil, the prosecuting witness therein, was charged with grand theft and bound over to the superior court. Werner represented to McNeil that for about $2,500 he could get a deputy district attorney to "kick this case out of the district attorney's office", provided that some settlement be made with a Mrs. Bovell, the complaining witness in the McNeil case. McNeil called at the office of the deputy district attorney and arrangements were made to install a dictaphone in McNeil's home to listen to future conversations between McNeil and the Werners. Mrs. Werner told McNeil that she would handle the money and arranged a meeting with him without the knowledge of Werner and it was agreed at this meeting that McNeil would "slip" Mrs. Werner $10,000 in an envelope in the absence of Werner. Subsequently the Werners called on McNeil and during Werner's absence from the room Mrs. Werner asked McNeil to give her the money. He then gave her an envelope purportedly containing the money and she pinned the envelope inside her dress. This envelope, however, did not contain anything except two $1.00 bills and eight pieces of paper cut to the size of $1.00 bills. It was not McNeil's money but had been handed to him by the district attorney's office investigator for the purpose. The Werners then left the McNeil home and as they walked out in the yard they were arrested by deputies from the district attorney's office and upon threat of search, Mrs. Werner produced the envelope from her dress. The court, in discussing the elements of attempt to commit a crime and the difference between preparation and the actual attempt said:

> "It is settled that an attempt to commit a crime is compounded of two elements, viz., intent and a direct ineffectual act done toward its commission. It is equally well settled that there is a material difference between the preparation antecedent to an offense and the actual attempt to commit it. The preparation consists of devising or arranging the means or measures necessary for the commission of the offense, while the attempt is the direct movement toward its commission after the preparations are made. In other words, to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. People v. Anderson, 1 Cal.2d 687, 37 P.2d 67; People v. Mann, 113 Cal. 76, 45 P. 182; People v. Lombard, 131 Cal.App. 525, 530, 21 P.2d 955; 14 Am.Jur. 813–818."

These rules are again set forth in People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, 35, where the court said: "In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished. People v. Buffum, 40 Cal.2d 709, 716, 256 P.2d 317; People v. Werner, 16 Cal.2d 216, 221–222, 105 P.2d 927; People v. Miller, 2 Cal.2d 527, 530–532, 42 P.2d 308, 98 A.L.R. 913." See also People v. Wallace, 78 Cal.App.2d 726, 742, 178 P.2d 771.

In the Werner case the court held that the record did not disclose any direct, ineffectual act on the part of Werner whereby but for extraneous circumstances he would have perpetrated the offense of grand theft, and further said:

> "However, even if we were to concede, without deciding, that the record sufficiently discloses both an intent and a direct ineffectual overt act by appellant toward the commission of a theft of the $2,500, the evidence still would not warrant his conviction either of theft or attempted theft for the reason that the prosecuting witness not only consented to the taking or attempted taking but actually delivered the property or money into the hands of the alleged offender. In so declaring, we are not unmindful that it often becomes

necessary to resort to artifice in order to enforce the law and punish its violation. We have no quarrel with the settled rule that if the criminal intent originates in the mind of the accused and the criminal offense or attempt thereat is perpetrated, the fact that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him constitutes no defense. The cited rule is without application here. We do not regard this as a case of improper entrapment but rather as one involving an offense or an attempt to perpetrate an offense the commission of which to be punishable must be without the consent of the owner of the property. The pertinent rule is stated, with citation of supporting authorities, in 15 American Jurisprudence, 26, section 336, as follows: 'In the case of those crimes into which enters as an essential element the violation of individual rights of persons, the entrapment must not be under such circumstances as will amount to the consent of the person affected, or a necessary ingredient of legal guilt, the want of such consent, will be lacking, and the crime will not have been committed.' In other words, when a person knows or suspects that a crime affecting him is about to be committed, he may, without being deemed to have consented thereto, remain passive and make no effort to prevent its commission, to the end that the criminal may be apprehended, but he may not actively participate, as here, to the extent of personally delivering his property or what purports to be his property to the offender and upon a prosecution for the theft or attempted theft thereof urge that it was taken or attempted to be taken without his consent—an element essential to a conviction therefor. * * *

"We are satisfied that there cannot be a theft or an attempted theft of a person's property when voluntarily and without compulsion of any sort and uninfluenced by any false or fraudulent representations, he actively hands it over to the alleged thief for the purpose of apprehending him as a thief or as an attempted thief—however reprehensible the latter's intent may be—for under such circumstances the essential elements of lack of consent is missing. As already stated, the prosecuting witness herein was not induced by any trick or device or false representation upon which he had placed reliance to part with his property. Instead as shown, he had concluded that the Werners were not sincere or honest in their motives and for the purpose of securing their conviction he went far beyond the passive assistance that is permitted under the authorities to apprehend a potential offender, going to the extent of actively delivering or handing over his property or what purported to be his property, thereby depriving the offense, if any, of the essential element of lack of consent of the owner. Surely, it could not be held, all the other circumstances remaining the same, that appellant would be guilty of theft of the $2,500 if McNeil, the prosecuting witness, actually had placed that amount of money in an envelope and actively handed it over to the appellant for the purpose of apprehending him as he left the house. Under the cited circumstances, the money would have been voluntarily delivered to the appellant with the consent of the owner uninfluenced by artifice, device or false representation, precluding any theft thereof. The same is equally true as to the charge of attempted theft thereof based on the owner's substitution and delivery of something other than the $2,500. We are of the opinion that the evidence will not support appellant's conviction."

[2] In the instant case it clearly appears that one of the inspectors voluntarily, actively and uninfluenced by any false or fraudulent representations handed the appellant $250 in marked bills for the purpose of apprehending him as an attempted thief. Under the circumstances and in view of the holding in the Werner case, we conclude that the evidence is insufficient to sustain a

conviction herein of the crime of attempted grand theft. In view of this conclusion it is unnecessary to pass upon the other points raised by the appellant.

The order denying appellant's motion for a new trial is reversed and his purported appeal from the "judgment" is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

132 Cal.App.2d 109

RIDGWAY AUDIT, Inc., Plaintiff and Appellant,

v.

OBERLIN, Inc., et al., Defendants and Respondents.

Civ. 4922.

District Court of Appeal, Fourth District, California.

April 1, 1955.

Action was brought to recover half of amount received by defendant from bonding company pursuant to indemnity contract for thefts of defendant's employee, on ground that payment to defendant by bonding company constituted a "recovery" within meaning of contract between plaintiff and defendant whereby plaintiff was to carry out audits at defendant's stores, and whereby plaintiff was to receive 50 per cent of all "recoveries" made. The Superior Court of Fresno County, Arthur C. Shepard, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that where defendant informed plaintiff of the thefts before thefts were discovered by the plaintiff, payment by bonding company was not a "recovery" within meaning of contract.

Judgment affirmed.

1. Contracts ⇐229(2)

Where plaintiff and defendant entered into contract authorizing plaintiff to make audits at defendant's stores, and providing that defendant would pay plaintiff 50 per cent of "recoveries" made, and plaintiff was informed by defendant that one of defendant's employees was dishonest, and meeting was held, and employee admitted theft, and bonding company, from which defendant had purchased fidelity insurance, paid defendant amount of thefts, plaintiff was not entitled to half of amount received from bonding company.

See publication Words and Phrases, for other judicial constructions and definitions of "Recovery".

2. Contracts ⇐175(3)

In action to recover half of amount received by defendant from bonding company for thefts of defendant's employee, on ground that amount received was a "recovery" within meaning of contract between plaintiff and defendant for audits of defendant's stores by plaintiff, and providing for payment by defendant to plaintiff of 50 per cent of all "recoveries" made, evidence was insufficient to require finding that parties intended payment by bonding company as a "recovery" within meaning of contract.

Ralph Robinson, Fresno, for appellant.

Rowell, Lamberson & Thomas, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action to recover a payment alleged to be due under a written contract. On May 8, 1951, the plaintiff and defendant signed a contract authorizing the plaintiff to make certain "audits" at two stores operated by the defendant. These so-called audits were to consist of sending in shoppers to make pretended purchases for the purpose of testing the efficiency and honesty of defendant's employees. So far as material here, the contract provided that the plaintiff agreed to investigate and report on the conditions found with respect to the efficiency and honesty of the employees, to talk in a proper manner "to any person

shown to be dishonest", and to return the merchandise thus purchased. The defendant agreed to refund the purchase price of such merchandise, and "Upon the completion of service, pay Ridgway Audit, Inc., a fee of $100 per audit per store and fifty percent of all recoveries made; whether recovery is made at time of audit or at a later date."

This action was brought on January 23, 1953. A copy of the contract was attached to the complaint, and it was alleged that "the plaintiff entered into the performance of its duties in accordance therewith, and did discover thefts on the part of one employee in an amount admitted by said employee to be in the sum of $8736.00"; that said sum "has been recovered or recaptured by the defendant"; and that the defendant is indebted to the plaintiff in the sum of $4,368. These allegations were denied by the defendant.

At the trial it developed that the defendant had purchased a policy of fidelity insurance, under the terms of which a bonding company had guaranteed it against loss by theft on the part of its employees; that a series of thefts by one employee had occurred; and that late in 1952 the bonding company paid $8,432.80 to the defendant in payment of its liability under the bond. The plaintiff completed an audit on April 28, 1952, and a day or two later submitted a report to the defendant. This report contained no suggestion of dishonesty or theft on the part of any employee.

On May 1, 1952, Mr. Oberlin had a conversation with Mr. Sans, a member of plaintiff's organization, in which he told Sans that he had definite information of the dishonesty of one of his employees and asked Sans to interrogate this employee with reference thereto. Oberlin had acquired this information from the manager of one of defendant's stores, and prior to that time the defendant had received no information from the plaintiff that they had discovered this employee to be dishonest or voicing any suspicion of such a fact. Later that day, a meeting was held at which Mr. Sans, Mr. Oberlin, the defendant's accountant, and the employee in question were present. Mr. Sans questioned this employee, who confessed, and a representative of the bonding company was called in. The employee signed a written statement admitting that during the preceding 728 days he had stolen a total amount of $8,736. Mr. Sans later went with Mr. Oberlin to the district attorney's office, where Mr. Oberlin made a complaint charging this employee with grand theft. The employee fled and went to Mexico, and the bonding company later paid the defendant $8,432.80. The district attorney's office recovered $200 in merchandise from this employee's home, and the defendant retained $200 of pay which would otherwise have been due to this employee. Mr. Oberlin testified that he had told a representative of the plaintiff that the matter of paying them half of whatever was recovered from the bonding company "would be presented to my directors and that he would be paid." This evidence was offered and admitted solely "as evidence of the interpretation placed upon the contract by this witness," and not as evidence of "an independent obligation." The only other evidence in this connection was Oberlin's further testimony that when the contract was signed they discussed this provision and he was told that "any thefts that they have discovered, anything like that, that they would have 50 percent title to it."

The court found that it was not true that the plaintiff discovered that an employee of the defendant was committing thefts from the defendant; that it was not true that the $8,432.80 paid by the bonding company, or any part thereof, was a recovery within the meaning of the contract entered into by the parties; and that it is not true that the defendant is indebted to the plaintiff in any sum except the sum of $200, being one-half of the amount actually recovered from the defaulting employee. Judgment was accordingly entered in favor of the plaintiff for $200, without costs, and the plaintiff has appealed from that judgment. As the appellant states, the entire question presented is as to the interpretation of this contract with respect to the meaning of the clause above quoted.

The appellant contends that the court erred in holding that a recovery, within the meaning of the contract, was limited to

what was regained from the defaulting employee; that while the word "recovery" commonly means the regaining of that which has been lost or taken away, it does not necessarily imply that the person had previously owned or been in possession of that particular property; that the payment by the bonding company was a recovery within the meaning of this contract; that the contract was so interpreted by the parties; and that the respondent, by accepting the funds from the bonding company, and in effect having sold its claim against the employee to the bonding company, has made it impossible for appellant to recover from the employee. The cases cited, American Surety Company of New York **v.** Meadville Lodge, 114 Pa.Super. 451, 174 A. 591; Cordes v. Harding, 27 Cal.App. 474, 150 P. 650; In re Estate of Stockton, 97 Cal.App. 157, 274 P. 1022; and Monterey County v. Cushing, 83 Cal. 507, 23 P. 700, do not support these contentions as applied to the facts of this case.

This contract provides for certain services to be performed by the appellant, including a report of any dishonesty on the part of an employee which might be found. It further provided for the payment of a fixed fee upon the completion of the audit, plus 50% of all recoveries made. This clearly indicates an intention that the 50% should relate to recoveries made by the appellant and resulting from its discovery of any such dishonesty, and its success in getting some form of restitution from the dishonest employee. That this was the intention is confirmed by the clause which follows: "whether recovery is made at time of audit or at a later date." This strongly implies that the recoveries referred to are those resulting from the services of the appellant even though they may actually be made after the audit is completed. This meaning of the contract was largely recognized in the complaint, which alleged that in performing its duties in accordance with the contract the appellant discovered thefts on the part of the employee in question.

[1] There was a failure to prove the allegation that the appellant discovered these thefts, and there was no proof that the payment made by the bonding company resulted from any services rendered by the appellant. While the appellant did talk to the employee shown to be dishonest, as required by the contract, the payment by the bonding company resulted from its separate contract with the respondent and not from this conversation. This payment by the bonding company was not a recovery within the meaning of the contract, but was a reimbursement for the loss suffered by the respondent, which was made pursuant to a contract of indemnity between the bonding company and the respondent, and paid for by the respondent. It would be unreasonable to interpret the agreement here in question as entitling the appellant to share in the benefits of this separate indemnity contract, to which it was not a party, and where it had nothing to do with the discovery of the thefts covered thereby. The trial court's interpretation of this contract is not only a reasonable one, but it appears to us to be more reasonable than the interpretation for which the appellant contends. We see nothing in the fact that the bonding company may now have a right of subrogation, with respect to any rights the respondent would have had against the defaulting employee, which would require a reversal of this judgment.

[2] If it be assumed that there is any ambiguity in this contract, the result is the same. The evidence was not sufficient to require a finding that it was the intent of the parties, at the time the contract was entered into, that such a payment by the bonding company was to be considered as a recovery within the meaning of the contract. The only direct evidence, with respect to the original intention of the parties, was to the effect that the appellant was to have 50% of any recoveries it made from thefts which it discovered. The other testimony, to the effect that there was a subsequent provisional promise to pay, was merely conflicting at best. In any event, the evidence supports the findings and judgment.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

131 Cal.App.2d 771

Robert O. HARPER, Plaintiff and Respondent,

v.

Lousander MARKARIAN and Madeline Markarian, his wife, Defendants and Appellants.

Civ. 4940.

District Court of Appeal, Fourth District, California.

March 24, 1955.

Action for damages for defendants' alleged breach of contract by terminating, and refusing to permit plaintiff to continue performance of his part of, contract to build and deliver to defendants millwork for installation in home being built by defendants on their land and on quantum meruit for services and material furnished by plaintiff to defendants, who filed a cross-complaint for plaintiff's alleged breach of such contract and a supplemental agreement prescribing definite time limits for installation of millwork. From a judgment of the Superior Court of Fresno County, Edward L. Kellas, J., for plaintiff, defendants appealed. The District Court of Appeal, Griffin, J., held that defendant's promise in the supplemental agreement to pay plaintiff an additional sum for completion of all millwork within time limit and other obligations assumed by defendants constituted sufficient consideration to support such agreement, and that the judgment, awarding plaintiff $1,950 as the reasonable value of work performed and material furnished, was not excessive as matter of law or without evidentiary support.

Judgment affirmed.

1. Sales ⇐89

Landowners' promise, in supplemental agreement with millwork contractor, to pay him additional sum for completion of all millwork, contemplated by original contract, for installation in home being built by such owners on their land, within time limit prescribed by supplemental agreement, constituted, with other obligations assumed by landowners, sufficient consideration to support such agreement. West's Ann.Civ. Code, §§ 1609, 1610, 1614, 1615.

2. Trial ⇐398

Slight or inadvertent contradictions in trial court's findings on formal or immaterial matters are not fatal.

3. Trial ⇐404(1)

Trial court's findings should be liberally construed in support of its judgment.

4. Trial ⇐398

Inconsistencies in trial court's findings are immaterial, where evidence supports its judgment on either of theories on which findings are based.

5. Trial ⇐398

Trial court's findings must be read and considered together and reconciled so as to prevent any conflict on material points, if possible.

6. Appeal and Error ⇐1071(1)

A judgment will not be reversed on ground of conflict in trial court's findings, unless conflict is clear and findings are incapable of being harmoniously construed.

7. Appeal and Error ⇐1071(1)

Where judgment is obtained on one of two theories stated in separate causes of action and evidence would support recovery on either theory, trial court's finding on one particular inconsistent theory may be disregarded.

8. Sales ⇐360(3)

In action for breach of contract by defendant's wrongful termination thereof and refusal to permit plaintiff to continue to perform his agreement therein to build and deliver to defendants millwork to be installed in home being built by defendants on their land and on quantum meruit for services and material furnished defendants by plaintiff, judgment awarding plaintiff $1,950 on quantum meruit cause of action was not excessive as matter of law or without evidentiary support.

9. Appeal and Error ⇐1011(1)

Where testimony in trial court on fact question involves substantial conflict, court's judgment will not be disturbed on appeal; presumption being that trial judge

reconciled and accounted for any and all inconsistencies in testimony to his own satisfaction.

10. Appeal and Error ⇐1012(2)

A jury's or trial judge's finding, supported by fair and reasonable amount of evidence, will not be disturbed by appellate court, though, in its opinion, finding is against preponderance of evidence.

Iener W. Nielsen, Mikio Uchiyama, Harold V. Thompson, Fresno, for appellants.

Ralph Robinson, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent, a small mill work contractor, brought this action against defendants and appellants in two causes of action. One was for damages predicated upon an alleged breach of contract by defendants in the construction and delivery of mill work to plaintiff to be installed by defendants' carpenters in a home being built by defendants on their property. The second cause of action is upon quantum meruit for services and material furnished them in the sum of $3,722.21. Defendants filed a cross-complaint seeking damages for $775. The court awarded judgment to plaintiff for $1,950, and denied judgment to defendants on their cross-complaint. It is not indicated therein whether the judgment for plaintiff was based upon the first or second cause of action.

The findings were that there was a written agreement entered into on August 19, 1952, between the parties whereby plaintiff, as party of the second part, agreed to build and deliver mill work in accordance with certain plans and specifications; that plaintiff entered into the performance of the agreement and performed according to its provisions until March 1st, 1953, when defendants wrongfully and without right, terminated it and refused to permit plaintiff to continue to perform; that plaintiff performed his part, save and except such performance as was prohibited by the actions of defendants; that plaintiff demanded payment, which was refused by defendants; that plaintiff rendered services and furnished material to defendants at their special instance and that there remains $1,950 due thereon.

The court further found that about March 19, 1953, plaintiff entered into a supplemental written agreement, upon which defendants relied as a basis for their claim that plaintiff breached that supplemental agreement and the original agreement, and that plaintiff was therefore not entitled to recover under either cause of action. As to this supplemental agreement, the court held that there was "no consideration delivered or paid" to plaintiff for its execution. No specific finding is made as to whether plaintiff or defendants breached this supplemental agreement pleaded by defendants in their answer and cross-complaint.

The original agreement also provided that defendants had advanced $500 to plaintiff on said contract. At the time of its execution defendants exacted a chattel mortgage of $500 on plaintiff's tools etc. as security for "faithful performance of certain specific work" under the agreement mentioned, and "for the repayment of sums that may be advanced" up to $2000.

The contract price was $5,672.21, and was to be satisfied by defendants paying all bills up to that amount for materials and labor furnished, as said bills accrued during the progress of the work, the payments to be made directly to plaintiff upon receipt by defendants from plaintiff of itemized bills. It was then agreed that defendants had employed certain contractors, subcontractors and other workmen in the construction of the home, and that plaintiff agreed to perform the mill work in such a manner as not to hinder or delay the other workmen, but if such delay occurred plaintiff agreed to pay defendants $25 per day for each day of such delay; that in the event of plaintiff's "ceasing work on said house for a period of 3 days, or not diligently prosecuted", defendants "may enter and cause said work to be completed", and any excess over $5,672.21 in cost to be repaid by plaintiff. Time is made the essence of the contract.

It appears that certain delays were occasioned in the work and in making payments under that agreement. Accordingly, a supplemental agreement was executed. Therein, a definite prescribed time limit was set for each installation of the mill work. They further agreed that time was the essence thereof; that should plaintiff fail to deliver and complete any such particular installation on the hour and date indicated, plaintiff would be considered in violation of the supplemental agreement, as well as the original agreement, and defendants could terminate them; that all penalties therein set forth were to be in full force and effect; and that defendants were then to have the right to obtain the services of some other person of their choice to complete the work with "no further payment to" plaintiff than that advanced and made to plaintiff. It then provided that defendants "shall pay to plaintiff an additional consideration of $100" for the completion of all mill work, as contemplated, within the time limit prescribed to be paid on or before April 9, 1953.

Defendants' claims on this appeal are: (1) That the finding that there was no consideration for the supplemental agreement is not supported by the evidence. (2) That the findings are inconsistent and irreconcilably contradictory. (3) That the amount awarded is excessive.

[1] As to the first claim, it appears from the written opinion on file that the trial judge, apparently, premised his belief that there was no consideration for the supplemental agreement upon the theory that no consideration was, at the time, "paid by the defendants" but was made subject to the conditions of fulfillment of the agreement by plaintiff within the time prescribed. It appears to us that this is a false premise. Had the plaintiff performed according to the agreement, he would have a cause of action against defendants for the $100 excess agreed upon. This consideration, with the other obligations assumed by defendants, would be sufficient to support the supplemental contract. Secs. 1609, 1610, 1614, and 1615, Civ.Code; Vickrey v. Maier, 164 Cal. 384, 129 P. 273.

[2–4] As to the second claim the court did, in one finding pertaining to the first cause of action, state that *defendants* had breached their original contract of August 19, 1952, with plaintiff, and that *plaintiff* had fully performed the contract, except as prevented from performing by defendants' acts in violation of the agreement. Apparently no judgment for damages was rendered under that claimed breach. No similar finding was made as to the supplemental agreement. The court then found that plaintiff was entitled to $1,950 by reason of work and materials furnished. Apparently this was under the second cause of action. It is contended by defendants that if plaintiff's judgment is to stand upon the basis of breach of the contract by defendants, his damages are measured upon an entirely different theory than if the money is recoverable under the theory of quantum meruit, citing Sec. 3300, Civ.Code; O'Connell v. Main and Tenth Streets Hotel Co., 90 Cal. 515, 27 P. 373; and Lacy Manufacturing Co. v. Los Angeles Gas & Electric Co., 12 Cal.App. 37, 106 P. 413. It is further contended that it is impossible to reconcile the contract and findings, citing Fanta v. Maddex, 80 Cal.App. 513, 252 P. 630; and Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11. There appears to be some merit to this contention. Counsel for plaintiff, in effect, concedes that the findings are as stated, but contends that they are not contradictory. He argues that although the court found a breach of the contract by defendants, no judgment was awarded on this basis; that there was a clear finding that material and services were furnished; that the judgment was rendered against defendants upon the theory of quantum meruit; that accordingly, the finding that defendants breached the original contract and plaintiff did not, is "more or less surplusage" and may be disregarded; and that this court on appeal may strike it and affirm the judgment, citing Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 118, 53 P.2d 929. It is further argued that slight or inadvertent contradictions on formal or immaterial matters will not be fatal; that

findings should be liberally construed in support of the judgment; and that inconsistencies are immaterial where the evidence would support the judgment on either theory, citing Haight v. Haight, 151 Cal. 90, 92, 90 P. 197; and Martinez v. Martinez, 41 Cal.2d 704, 263 P.2d 617.

A close question arises as to whether plaintiff has brought himself within these rules. The evidence as to the breach of the original and supplemental contracts by both plaintiff and defendants is in sharp conflict. In reference to the delivery, according to the schedule, of the materials indicated in the contract, and the making of timely payments therefor by defendants, the excuses for nondelivery of the mill work were that defendants' contractors were not ready for delivery when it was ready and plaintiff was compelled to store it in his garage and work shop; that defendants' contractors installed the fireplace out of line and it had to be done over in certain respects before the mill work was installed; that defendants changed the plans as to certain fixtures after the contract was signed; that defendants' workmen were found to be incapable of installing the cabinet work and a delay was occasioned by defendants in seeking other carpenters; that certain mahogany wood was not obtainable by plaintiff and delay was occasioned thereby; and that defendants' attorney authorized delay in delivery of such mill work, and authorized plaintiff to work on other articles where the wood was obtainable. It appears from plaintiff's testimony that although considerable mill work was completed and stored by plaintiff, defendants refused to accept delivery of it and refused to make payments upon it at that time because they insisted that their carpenters install it before they would accept it, which was not a part of the agreement; that plaintiff demanded payment for fixtures already delivered on many occasions but defendants refused payment and as a result plaintiff was obliged to purchase articles at defendants' furniture store and reimburse his help with such merchandise; that when plaintiff was notified that the agreement was terminated he had considerable material on hand which he had ordered for this particular job.

It is defendants' testimony that payments were made on all fixtures delivered up to the time of the service of notice of breach of the contract; that it became necessary to invoke the provisions of the agreement to engage other means to have the mill work finished; that their carpenters were laid off for over one month because of delay in delivery of the mill work; that plaintiff failed in all particulars in reference to delivery of mill work, as provided in the supplemental agreement; and that accordingly by the terms of the agreement defendants were authorized to pursue the course they did in engaging others to do the work. Defendants also contend that plaintiff never furnished them itemized statements of labor and material furnished by him, and accordingly there was no obligation on their part to make payments. It is plaintiff's argument that defendants waived this right because they made payments on the contract without the formality of the presentation of an itemized bill. There is no direct finding as to the truth of these statements in respect to the claimed breach of the supplemental agreement.

However, in the memorandum opinion filed by the trial judge he noted the fact that a mortgage was exacted of plaintiff in the amount referred to but made no disposition of this item in the findings. Whether or not the mortgage is still effective is not determined. He noted that the original contract did not specify a particular day or date upon which the work or any part thereof should be completed. He noted that one clause provided a penalty of $25 per day for delay caused by plaintiff to the contractors which must be paid by plaintiff, and the right of defendants to enter upon the premises and cause the work to be completed by third parties at the expense of plaintiff if work ceased on the dwelling house for a period of three days. The court remarked that the evidence disclosed that plaintiff was not equipped to process a contract of this size in the first instance with the same regularity that could be expected of a larger mill; that he was under-

financed and could not perform unless periodic payments were promptly made to meet the current payroll and bills; and that all of this was known to the defendants; that the work of the plaintiff was held up by reason of the fact that the house was not in a condition to receive the mill work; and that demands for payment were objected to by defendants for one reason or another, and in some instances because itemized statements had not been furnished as required by the agreement. He also stated that one substantial payment was made to a planing mill because plaintiff's credit was not good and defendants agreed to pay for this material on account; that the arrangement under the original agreement was unsatisfactory to both parties and a controversy arose as to the cause of the delay and the supplemental agreement was prepared by defendants' attorney, which the court found had no consideration because it "was not paid by the defendants". Then follows a general citation of authorities regarding the fact that the courts do not ordinarily favor forfeitures; and that before one can prove a forfeiture he must clearly prove that he himself is without fault. He concluded that in the instant case he was justified in seizing upon any reasonable grounds to either prevent the exercise of the forfeiture or to relieve it; that defendants themselves were in default and were in no position to take advantage of the forfeiture clause; that plaintiff is "therefore, entitled under the *quantum meruit* action to recover the reasonable value of the work performed and the Court is entitled to take the written contract as the evidence of the value of that work"; that the figure lies somewhere between $1,587.09 and $2,209.30; and accordingly he believed that the amount had been reasonably established at $1,950. How the trial court arrived at these figures is not readily ascertainable.

[5, 6] From an examination of the pleadings, the written memorandum of the court, the findings made, and judgment entered, it becomes apparent that the trial court never intended to base the judgment upon a cause of action for damages for breach of the contract, although conflicting evidence, interpreted most favorably toward plaintiff, might have justified the judgment. A charitable construction of the findings would be that the court believed, and the evidence strongly indicates, that both parties breached the original, as well as the supplemental agreement, and upon this theory, the court rendered judgment upon the second cause of action. Findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on material points. Unless the conflict is clear and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings. Haight v. Haight, 151 Cal. 90, 90 P. 197.

[7] Assuming, therefore, that there is a sufficient finding to support the second cause of action, there still arises the question whether the proper measure of recovery was applied and whether the evidence, in this respect, supports the judgment. All of the findings made in the instant case are in favor of the plaintiff. There is a line of cases holding that where a judgment is obtained upon one of two theories stated in separate causes of action, and the evidence would support a recovery on either theory, the finding on one particular inconsistent theory may be disregarded. Martinez v. Martinez, supra; Epstein v. Gradowitz, 76 Cal.App. 29, 243 P. 877; Baird v. Ocequeda, 8 Cal.2d 700, 67 P.2d 1055; Nunneley v. Edgar Hotel, 36 Cal.2d 493, 500, 225 P.2d 497; Wells v. Brown, 97 Cal.App.2d 361, 217 P.2d 995; Singleton v. Fuller, 118 Cal.App.2d 733, 259 P.2d 687.

[8–10] Apparently, in fixing the reasonable value of the work performed and material furnished the trial court, as a basis for the judgment, has used the contract price of $5,672.21 as the reasonable value of the entire services to be performed and of the cost of materials furnished. Defendants admittedly paid $2,459.59 on the contract price, by check advancements or by merchandise. $100 of this sum was for the payment of a cupola installed by plaintiff, for which provision was not made in the written agreement. The amount of

the judgment, $1,950, plus $2,359.59, the amount paid on the contract, would equal $4309.59, which would indicate that there was approximately $1,362.62 of the work remaining undone when the original and supplemental contracts were cancelled. Plaintiff testified that about $1,500 to $1,600 was the fair market value of the work yet to be performed by him and of the material to be furnished.

Defendants claim this figure is excessive because, by subsequent bid of another contractor, they were compelled to pay an additional $3,050 to complete the work according to the plans and specifications, and that amount was the fair and reasonable value of such cost. This figure is not necessarily binding on the trial court and would not be conclusive because the evidence shows that the same contractor formally entered a competitive bid with plaintiff for the entire job for $7,000, which he testified was a reasonable figure for such service. Plaintiff testified that he consulted with this contractor after the cancellation of the contract and asked him how much he was charging to finish the job for defendants, and that contractor told him he did not want the job but he "hiked" the price up a thousand dollars and defendants, nevertheless, accepted the bid. The contractor denied such a conversation. There is evidence that plaintiff had considerable stock on hand which he had ordered for this particular job and defendants did not use, and that it had no resale value. There was no testimony as to the actual value or cost of the material. The evidence on the entire subject matter is not too clear and is highly conflicting. Apparently the trial court was confronted with some difficulty in establishing the value of the services performed and yet to be performed and the value of the material ordered for defendants' use and not used by them. The trial court had all the facts and figures before it and was entitled to weigh the testimony in relation to the results obtained. It cannot be said that the amount found due is excessive as a matter of law, or that it does not have some evidentiary support. This court, on appeal, is bound by certain fundamental rules. It is a cardinal doctrine often enunciated that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the trial court will not be disturbed. It is to be presumed that the trial judge reconciled and accounted for, to his own satisfaction, any and all inconsistencies which might be made to appear in the testimony. Wherever there is a fair and reasonable amount of evidence to support the finding of a jury it will not be disturbed by the appellate court though, in its opinion, it is against the preponderance of the evidence. (10 Cal.Jur. 1172, sec. 383.) The judgment rendered has evidentiary support.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

131 Cal.App.2d 831

In the Matter of Christy Ann JONES, a person who should be declared free from the custody and control of her mother.

Merle H. JONES, Petitioner and Appellant,

v.

Peggy B. JONES, Citee and Respondent.

Civ. 20531.

District Court of Appeal, Second District, Division 3, California.

March 28, 1955.

Husband's petition for declaration that divorced wife had abandoned child of marriage, who had been placed in custody of husband by decree. The Superior Court, Los Angeles County, Georgia P. Bullock, J., dismissed petition, and husband appealed. The District Court of Appeal, Vallée, J., held that evidence whether wife had had intent to abandon for period of year was

sufficient to support conclusion that there had been no abandonment.

Affirmed.

1. Appeal and Error ⇐690(1)

Record on appeal from denial of divorced husband's petition for declaration that divorced wife had abandoned child of marriage did not support husband's contentions that trial court had erred in limiting introduction of evidence to matters within the previous year. Welfare & Institutions Code, § 701.

2. Parent and Child ⇐2(3.7)

To constitute "abandonment" there must be an actual desertion, accompanied by an intention entirely to sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of same, and it is not established by acts of relinquishment committed under circumstances of coercion.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

3. Parent and Child ⇐2(3.7)

Whether an intent to abandon child has existed for a period of year, as it is necessary for a termination of abandonment under statute, is a question of fact for trial court. Welfare & Institutions Code, § 701(a).

4. Declaratory Judgment ⇐345

In proceeding on divorced husband's petition for declaration that divorced wife had abandoned child of marriage, who had been placed in husband's custody by decree, evidence whether wife had had intent to abandon for period of year was sufficient to support conclusion that there had been no abandonment. Welfare & Institutions Code, § 701(a).

Brinton N. Bowles, Los Angeles, for appellant.

J. O. Reavis, Delano, and Michael Lavelle, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a judgment which dismissed a petition denominated "Petition for Freedom from Custody" whereby Merle H. Jones, father of Christy Ann Jones, sought under section 701(a) of the Welfare and Institutions Code to have it declared that Peggy B. Jones, mother of Christy Ann, had abandoned her.

Merle H. Jones and Peggy B. Jones were formerly husband and wife. On July 1, 1949 Peggy obtained an interlocutory decree of divorce from Merle. She was awarded custody of Christy Ann. On July 14, 1950 a final decree was entered. On November 8, 1951 the decree was modified and custody of Christy Ann was awarded to Merle subject to Peggy's right of reasonable visitation "in the home of defendant." On May 29, 1952 Merle remarried a woman with two children. Peggy has not remarried. Christy Ann is 10 years of age. Since Merle was awarded custody he has lived in Los Angeles County; Peggy in Delano.

The petition charged that Peggy had abandoned Christy Ann and alleged that the acts of abandonment were that Peggy "has failed and neglected to communicate with said minor child for more than one year last past and is of a deteriorating mental condition, making it inadvisable that said child be contacted by such parent. That it is for the best interest of said child to be declared free of said parent due to lack of interest and obvious bad mental condition of said minor person's mother, the said Peggy B. Jones." The prayer was that Christy Ann be declared free from the custody and control of Peggy.

The court found that Peggy had not abandoned Christy Ann and dismissed the petition. Merle appeals.

Section 701 of the Welfare and Institutions Code, a part of the juvenile court law, in pertinent part provides:

> "The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes

within any of the following descriptions:

"(a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

[1] It is urged that the court erred in refusing to permit appellant to go beyond a one-year period. The claim is based on the erroneous premise that the court limited petitioner's evidence to one year prior to the filing of the petition. We find no such limitation. Since the order awarding Merle custody of Christy Ann, she has lived with him. Since he remarried she has lived with him and his new wife. The court had before it a report of the probation officer which gave an extended history of the parties and their relations going back many years. It contains a statement by Merle to the effect that for a period of two years Peggy had failed to take any interest in Christy Ann. Merle testified that Peggy had only communicated with Christy Ann on two occasions since he was awarded custody—one in January 1952, another in January 1953. There was evidence that since at least 1946 Peggy has been mentally ill. The contention that the court refused to permit appellant to go beyond the one-year period is without substance.

The next point urged by appellant is that the court erred in refusing to let him show that since July 1, 1949 Peggy has made no effort to visit with the child, nor has she visited with said child, nor has she communicated in any manner whatsoever with the child during said four-and-one-half-year period except for approximately three short thank-you notes. We have examined the record and find no basis for this contention. Peggy had custody of Christy Ann until November 8, 1951; Merle thereafter. Peggy's interest in Christy Ann after November 8, 1951 was fully explored.

Appellant next contends that he satisfied the requirement of section 701(a) that Peggy "failed and neglected to communicate with said minor child for more than one year last past" by showing without contradiction that Peggy communicated with Christy Ann only once within the one-year period and consequently the court erred in not granting the petition. The core of the argument is that the evidence conclusively established an intent on the part of Peggy to abandon Christy Ann.

[2] Appellant overlooks the fact that section 701(a) applies only if the minor *"has been left"* by the parent *"in the care and custody of another"* without communication from such parent for the period of one year with the intent on the part of such parent to abandon the minor. (Italics added.) One of the things necessary to be shown to constitute abandonment is intent on the part of the parent to abandon the child. In re Cordy, 169 Cal. 150, 151, 146 P. 532, 534. In order to constitute abandonment there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same. Abandonment is not established by acts of relinquishment committed under circumstances of coercion. In re Guardianship of Marshall, 124 Cal.App.2d 807, 810, 269 P.2d 160, 936.

Construing former Civil Code section 224, which did not differ in material respect from section 701(a) of the Welfare and Institutions Code, the court in Matter of Cozza, 163 Cal. 514, at page 528, 126 P. 161, at page 167, stated:

"To constitute abandonment, there must be an intention to do so, express or implied, from the conduct of the parent respecting the child. This is the character of abandonment contemplated by the very terms of section 224 as far as they are applicable or are relied on in this proceeding. It

contemplates a case where a child has been voluntarily surrendered or left for a year in the care and custody of another without any agreement or provision for its support. This is not the situation here. The care and custody of this child was not so left by the mother with either Mrs. Merriman or the petitioners for adoption. It was taken away from her and placed in the custody of the former by order of the juvenile court (whether valid or not is immaterial to this inquiry), without the consent of the mother and against her wishes and desire. It was taken from her under process of court—by force of law—invoked or, at least, employed for the very purpose of depriving her of the custody of the child".

Construing the same statute, the court in the Cordy case, 169 Cal. 150, at page 154, 146 P. 532, at page 533, said:

"[T]hat the meaning of the word 'abandoned,' as above given, was intended by the makers of the law to dominate the section, and to cause to be read into every part and provision of it the idea that the acts of the parent in relation to the child enumerated in the statute must have been done with an intent to abandon the child. She must have left it to the care and custody of others with that intention, and a like intent must be shown to underlie her failure, if she has failed, to make provision for its support."

In re Edwards, 117 Cal.App. 667, 4 P.2d 560, specifically holds that the word "abandon" must be given the same meaning when used in the juvenile court law that it was designed to convey in former Civil Code section 224.

Referring to section 701(a), Mr. Justice Peek, writing for the court, in In re Cattalini, 72 Cal.App.2d 662, at page 665, 165 P. 2d 250, at page 253, said:

"It is readily apparent from a reading of the quoted portion thereof of said section that it is composed of three main elements: (1) the child must have been left with another; (2) without provision for support or without communication from either or both of his parents for a period of one year; and (3) all of such acts are subject to the qualification that they must have been done 'with the intent on the part of such parent or parents to abandon such person.'

"We turn then to the first question to be resolved; Were the children 'left' by appellant in the custody and care of the mother, within the meaning of said section when they were placed in her custody by a court order? According to Webster's International Dictionary, 'leave' means 'to put, deposit, deliver, or the like, so as to allow to remain;—with a sense of withdrawing oneself from; as *leave* your hat in the hall; we *left* our cards.' Thus the term appears to connote voluntary action. Therefore, it may not be said that appellant left his children in the care and custody of the respondent when, by an order of the court, they were taken from the joint control of their parents and placed in the sole care and custody of the mother."

[3] Whether an intent to abandon has existed for a period of a year is a question of fact for the trial court. In re Sanders, 88 Cal.App.2d 251, 254, 198 P.2d 523.

[4] Peggy did not voluntarily leave Christy Ann in the care and custody of Merle. The care and custody was taken away from her and placed with Merle by order of court. The evidence supports the conclusion of the trial court that Peggy had not abandoned Christy Ann.

Appellant's other points are trivia and do not require discussion.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

131 Cal.App.2d 621

Harry LINDER, Plaintiff,

v.

RUSSIAN HEALTH BATHS, Max Goldman, Michael J. DeBernardi and Paul Fundulis, Defendants, Cross-Complainants and Appellants.

Underwriters at Lloyds, London, Cross-Defendants and Respondents.

Civ. 16140.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Action for damages wherein defendants cross-complained against their liability insurer. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., with cross-complainants' consent, sustained insurer's demurrer, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that defendants' liability insurer could not be made a cross-defendant in plaintiff's action against defendants.

Judgment affirmed.

1. Appeal and Error ⇐125

A party may not appeal from a judgment entered with his consent.

2. Pleading ⇐149

Defendants' liability insurer could not be made a cross-defendant in plaintiff's action against defendants.

3. Pleading ⇐149

When a party plaintiff is not a party to an agreement between some defendants and a stranger, controversy between latter two parties cannot be made subject of a cross-complaint in main action.

4. Judgment ⇐572(2)

Judgment sustaining liability insurer's demurrer against insureds' cross-complaint in action against insureds was not a bar to any subsequent action by insureds against insurer.

W. M. Pinney, Jr., San Francisco, for appellants

Lamb, Hoge & Killion, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued the Baths and four individuals for damages for injuries. The Russian Health Baths cross-complained against Lloyds seeking recovery on policies of insurance covering the operation of the baths. The demand was for the full sum claimed by plaintiff as damages, together with costs of defending the action and attorney's fees. Lloyds' demurrer to the cross-complaint was sustained without leave to amend upon the consent of these cross-complainants. The appeal from this judgment is clearly frivolous.

[1] A party may not appeal from a judgment entered with his consent. Adams v. Southern Pac. Co., 109 Cal.App. 728, 731, 293 P. 681; 3 Cal.Jur.2d p. 590.

[2] The issue of insurance was foreign to the pending cause of action for personal injuries. Judgment went to the Russian Health Baths on the main action for damages. Hence the plaintiff in that action was not, and could not have been made, a cross-defendant.

[3, 4] When a party plaintiff is not a party to an agreement between some of the defendants and a stranger to the action the controversy between the latter two parties cannot be made the subject of a cross-complaint in the main action. See Alpers v. Bliss, 145 Cal. 565, 570, 79 P. 171; Metropolitan Casualty Ins. Co. of New York v. Margulis, 38 Cal.App.2d 711, at page 716, 102 P.2d 459, at page 462, the court, in holding that a cross-complaint may not be filed against a stranger to the controversy, said: "The ruling striking the cross-complaint works no prejudice upon cross-complainants, for the reason that it does not operate as a bar to any future action on their part. They are not precluded from proceeding in an independent suit against the named cross-defendants for breach of the contract allegedly existing between them and cross-complainants."

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

132 Cal.App.2d 8

The PEOPLE of the State of California, Respondent,

v.

Johnny VACCA, Appellant.

Cr. 3078.

District Court of Appeal, First District, Division 1, California.

March 29, 1955.

Defendant was convicted of grand theft. The Superior Court, City and County of San Francisco, Thomas Maul, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Peters, P. J., held that, where prior information, which charged grand theft, and which involved one of charges involved in subsequent prosecution for grand theft, had been dismissed for failure to prosecute within time permitted by law, the later indictment, which was not barred by statute of limitations, but which was based in part on same offense, was not void.

Judgment and order affirmed.

1. Criminal Law ⇐178

Where prior information, which charged grand theft, and which involved one of charges involved in subsequent prosecution for grand theft, had been dismissed for failure to prosecute within time permitted by law, the later indictment, which was not barred by Statute of Limitations, and which was based in part on same offense, was not void. Pen.Code, § 1387.

2. Criminal Law ⇐178

Under statute providing that order for dismissal of action is bar to another prosecution for same offense if it is a misdemeanor but not if it is a felony, accused is protected from having criminal charges pending against him for undue length of time, but the dismissal does not bar subsequent prosecution for same offense if subsequent charge is a felony and is filed within period of the statute of limitations. Pen.Code, § 1387.

Henry J. Kleefisch, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] Appellant was convicted of three counts of grand theft. He appeals from the judgment of conviction and from the order denying his motion for a new trial. His sole contention is that, because a prior information charging grand theft, involving one of the charges here involved, was dismissed for failure to prosecute within the time permitted by law, In re Vacca, 125 Cal.App.2d 751, 271 P.2d 162, the later indictment based in part on the same offense, was illegal and void. There is no merit to the contention.

The record is incomplete. Based largely upon the facts set forth in the opinion in the case of In re Vacca, 125 Cal.App.2d 751, 271 P.2d 162, it appears that an information was filed against appellant on January 14, 1954, charging him with grand theft and three prior felony convictions. On June 4, 1954, the appellate court granted Vacca a writ of habeas corpus discharging him from custody on the ground that he had not been brought to trial within the time provided by law. In re Vacca, 125 Cal.App.2d 751, 271 P.2d 162. Thereafter, on June 10, 1954, Vacca was indicted on three felony counts of grand theft, and charged with three priors. On arraignment, and later at the time of trial, his motions to quash the indictment, on the ground that it involved the same offenses involved in the information upon which he had been discharged, were denied.

Although the record does not disclose that any of the offenses involved in the indictment were identical with those involved in the dismissed information, it may be assumed that one or more of them were the same. Even so, appellant's legal rights were not adversely affected by a subsequent indictment, not barred by the statute of limitations, for the same charge involved in the dismissed information.

Section 1387 of the Penal Code expressly provides:

[2] "An order for the dismissal of the action * * * is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony." Under this section, while the accused is protected from having criminal charges pending against him an undue length of time (and received such protection in this case by having the information dismissed), such dismissal does not bar subsequent prosecution for the same offense, when the subsequent charge is a felony and is filed within the period of the statute of limitations. In re Begerow, 136 Cal. 293, 68 P. 773, 56 L.R.A. 528; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Palassou, 14 Cal.App. 123, 111 P. 109; People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381; see cases collected 30 A.L.R.2d 462; 14 Cal.Jur.2d 349, § 126.

The judgment and order denying the motion for a new trial are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

132 Cal.App.2d 30

C. Ray MURRY and Margaret S. Murry, his wife, Plaintiffs and Respondents,

v.

E. R. LOVELL and Arlene L. Lovell, Defendants and Appellants.

Civ. 8575.

District Court of Appeal, Third District, California.

March 29, 1955.

Suit by lot owners to enjoin adjacent lot owners in subdivision from violating use restrictions allegedly created by common grantor. The Superior Court, Sutter County, Ben R. Ragain, J., granted injunction and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where common grantor, seeking to establish use restrictions on parcels of subdivision, subdivided land, prepared map of subdivision and recorded same together with document which described entire parcel, and declared restrictions upon property and each part thereof, but failed to include such restrictions in deeds to plaintiffs and defendants as grantees of individual lots, plaintiffs, as grantees, were not entitled to injunction restraining defendants, also grantees of common grantor, from violating such use restrictions.

Judgment reversed.

Injunction ⇐62(1)

Where common grantor, seeking to establish use restrictions on parcels of subdivision, subdivided land, prepared map of subdivision and recorded same together with document which described entire parcel, and declared restrictions upon property and each part thereof, but failed to include such restrictions in deeds to plaintiffs and defendants as grantees of individual lots, plaintiffs, as grantees, were not entitled to injunction restraining defendants, also grantees of common grantor, from violating such use restrictions.

Manwell & Manwell, Marysville, for appellants.

Hewitt & McBride, Yuba City, for respondents

VAN DYKE, Presiding Justice.

This is an appeal from a judgment against defendants which enjoined them as the owners of a lot in a subdivision from violating certain use restrictions which the trial court found to be binding upon them as owners of such lot. The suit was brought by the owners of the adjacent lot. Both plaintiffs and defendants claimed under a common grantor. The restrictions declared and enforced stated as to all lots in the subdivision, that: "No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighbor-

hood." The history of the title is this: Glenn F. Michael and wife owned a parcel of land. They subdivided the land, prepared a map of the subdivision and recorded the map. At the same time they recorded a document which described the entire parcel, declared the Michaels to be the owners thereof, and further stated that as such owners they were by the document declaring and establishing restrictions upon the property and each part thereof. The document contained a list of use restrictions, including those quoted above. It stated that the tract should be known as a residential tract, it prescribed limitations upon the type of residences that could be built, and upon the location of such residences upon the lots with respect to front and side lines; it prescribed other restrictions not necessary here to delineate. It appears that the owners had in mind a uniform plan of restrictions which they intended to impose upon each and every lot in their subdivision. After purchasing their lot the defendants began conducting thereon, and upon another parcel which they owned and which was outside the subdivision, the business of trucking; and mainly it was the noise emanating from the operation of the trucks that constituted the basis for the court's finding that defendants were violating the restriction quoted above against carrying on any noxious or offensive trade or activity.

Glenn Michael was a witness at the trial. He testified without objection that when he executed deeds to plaintiff and defendant he told each of them about the restrictions and read to them a copy of the recorded declaration.

It appears, however, that neither deed contained any reference to restrictions, and it does not appear from the evidence that any deed executed by Michael and his wife contained any such reference. Plaintiffs appear to have relied upon the recording of the declarative instrument and the subdivision map and upon the information given orally by Glenn Michael at the time the deeds were made, as sufficient proof to establish the existence of the servitudes. We think the proof wholly insufficient.

Although appellants in their briefs advance a number of reasons why, in their view, the judgment must be reversed, we think it unnecessary to discuss any of these save the contention that the servitudes relied upon were never created, with respect either to their lot or that of the respondents. This contention must be sustained. The leading case upon the subject is that of Werner v. Graham, 181 Cal. 174, 183–185, 183 P. 945, 949. Therein the court declared:

> "It is undoubted that, when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others. * * * In such a case the mutual servitudes spring into existence as between the *first parcel conveyed and the balance of the parcels at the time of the first conveyance.* As each conveyance follows, the burden and the benefit of the mutual restrictions imposed by preceding conveyances as between the particular parcel conveyed and those previously conveyed pass as an incident of the ownership of the parcel, and similar restrictions are created by the conveyance as between the lot conveyed and the lots still retained by the original owner. * * *
>
> "The difference between such a case and the one at bar is that here there is no language in the instruments between the parties—that is, the deeds—which refers to a common plan of restrictions, or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan. Is this difference material? This is the crux of the present case. It has been held that this difference is not material. There are decisions to the effect that, when it appears that the owner of a subdivided tract has

sold various lots in it from time to time and in each conveyance has exacted restrictive covenants which, it is evident, when all the deeds are considered together, were exacted in accord with a common plan, it is enough, and that mutual equitable servitudes have been created, although in any single deed taken by itself there is nothing to indicate any intent to create such reciprocal rights. * * *

"There is likewise authority to the contrary. * * *

"An analysis of such a case, however, leaves, we believe, no reasonable doubt as to which line of authorities is correct. The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them—in this case, the deed—constitute the final and exclusive memorial of such intent. * * * Nor does it make any difference that, as claimed by the defendants, Marshall gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Such understanding was not incorporated in the deeds, and, as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. *Any understanding not incorporated in them is wholly immaterial in the absence of a reformation.* * * * *This whole discussion may in fact be summed up in the single statement that, if the parties desire to create mutual rights in real property of the character of those claimed here, they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding.*" (Italics added.)

The rules declared in Werner v. Graham governing the creation of equitable servitudes have not as to the subject here under discussion been changed since that opinion was rendered. Like rules govern in most of the states. As an example, we refer to Gardner v. Maffitt, 335 Mo. 959, 74 S.W.2d 604, 606, 95 A.L.R. 452. In that case an owner of a tract of land had subdivided it and had recorded a plat of the subdivision. Concerning the creation of equitable servitudes the court said:

"Easements and restrictions on real estate can be created only by grant. * * * In 19 C.J. p. 945, § 156, n. 60, it is said: 'So long as a tract remains in one ownership, there can be no dominant and servient tenements as between different portions, and the owner may rearrange the quality of any possible servitude.' Hill v. Bernheimer, 78 Misc. 472, 140 N.Y.S. 35, cited thereunder, in effect holds that one who owns an entire tract or adjoining parcels of land, by distributing or redistributing the burdens of the various portions, creates no easement until a severance of title occurs. To like effect is Packer v. Mayor and Council of City of Woodbury, 129 A. 406, 407, 3 N.J.Misc. 661. Hence, in this instance, notwithstanding the recorded plat with the certificate as to building line restriction indorsed thereon, it cannot be said that there was an effective grant of such easement or restriction until a severance of title occurred. Until some person other than the Rex Realty Company, owner of the entire subdivision, acquired title to some part thereof, the owner of the whole had a perfect right to convey in any manner fairly agreed upon between it and the party to whom the first conveyance was made. * * *

* * * * * *

"The intention of the parties is the paramount and controlling question. That intention is to be ascertained from the terms of the deed considered in the light of the circumstances surrounding the parties."

We quote the following from Martin v. Holm, 197 Cal. 733, 742, 242 P. 718, 722:

"In support of their right to the relief prayed for, appellants rely, first, and in part, on estoppel, based on oral and written representations, made at the time of and prior to sales of lots by the original owners, to the effect that the entire Western Heights tract was restricted against business uses. As plaintiffs in the court below they therefore attempted to show that, when the tract was subdivided and the lots were placed on sale, maps and literature were given to prospective purchasers, and to those who bought lots, which contained information concerning the character of the purported restrictions. The trial court very properly sustained the objection of the defendants to the admission of any such evidence. The original owners may have had a general plan of restriction in mind. They may have led the various grantees to believe that the alleged restrictions were executed as part of a general scheme; but it is not the intent of the grantors that governs in such cases. It is the joint intent of the grantors and their grantees. As between the grantors and each of their grantees, the deeds between them constitute the final and exclusive memorial of whatever intention may have existed."

Said our Supreme Court speaking upon this same subject in Wing v. Forest Lawn Cemetery Association, 15 Cal.2d 472, 479, 101 P.2d 1099, 1103, 130 A.L.R. 120:

"The law is well settled in California, that the deed is the final and exclusive memorial of the intention and rights of the parties."

We think enough has been said to demonstrate that when Glenn Michael and his wife subdivided their property, filed for record a map showing the subdivision and recorded the declaration of restrictions, they unquestionably had in mind that they would convey the various lots subject to the proposed equitable servitudes thereby evidenced, but, having gone that far, they had not as yet created any servitudes whatever. They were still the owners of the whole property and until and unless they made conveyances, which conveyances contained the provisions for equitable servitudes either by direct expression in the deeds or by reference to the recorded declaration of restrictions or other effective means of creating by the severance, and as a part of it, the equitable servitudes counted upon herein, those equitable servitudes would not arise. So far as the record in this case is concerned, the Michaels appear to have contented themselves with recording the map, recording the declaration of restrictions and thereafter granting the parcels in fee simple by deeds which contained no reference to servitudes. They evidently believed that reading the declaration to the grantees and telling them that the conveyances were being made subject to equitable servitudes was sufficient to create those servitudes. It was not. We hold that, so far as the record here shows, no equitable servitudes existed.

The judgment is reversed.

SCHOTTKY and PEEK, JJ., concur.

131 Cal.App.2d 643

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carl E. BROWN and Victor L. Stoner, Defendants and Appellants.

Cr. 2991.

District Court of Appeal, First District, Division 2, California.

March 21, 1955.

Rehearing Denied April 5, 1955.

Hearing Denied April 20, 1955.

Prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife. From adverse judgments of the Superior

Court, City and County of San Francisco, Herman A. Van de Zee, J., and from orders denying a new trial, the defendants appealed. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to establish the guilt of both the defendants aside from confessions of husband's co-defendant.

Judgments and orders affirmed.

1. Conspiracy ⇐41

After conspiracy to commit an unlawful act is established, every act of each member of conspiracy in pursuance of their original plan is in contemplation of law the act of all of them.

2. Criminal Law ⇐427(5)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife, independent evidence, aside from confessions of other defendant, was sufficient as prima facie evidence of conspiracy as to defendant husband. West's Ann.Code Civ. Proc. § 1870, subd. 6.

3. Criminal Law ⇐427(5)

To make evidence of acts and declarations of an alleged conspirator relating to the conspiracy admissible against another conspirator, conspiracy need be proved only to extent of establishing prima facie evidence of that fact. West's Ann.Code Civ.Proc. § 1870, subd. 6.

4. Criminal Law ⇐427(4)

Prima facie evidence of conspiracy to murder wife of one of defendants based on husband's acts, lies and possible motive was not objectionable although it derived its meaning in large part from fact that assault by coconspirator was considered proved. West's Ann.Code Civ.Proc. § 1870, subd. 6.

5. Criminal Law ⇐427(4)

Evidence of acts and conversations constituting conspiracy is admissible even though proof of conspiracy cannot be shown by extrajudicial declarations of coconspirators. West's Ann.Code Civ.Proc. § 1850.

6. Conspiracy ⇐47

In prosecution of husband and another for conspiracy to murder and for assault with deadly weapon with intent to commit murder on husband's wife, evidence was sufficient to support verdict as to defendant husband's participation in conspiracy.

7. Criminal Law ⇐423(9)

In prosecution of husband and another for conspiracy to murder and for assault with deadly weapon with intent to commit murder on husband's wife, assault on wife did not terminate conspiracy, and acts or statements of conspirators after that event could be considered when purpose of conspiracy was not obtained by assault and there was evidence indicating that purpose had not been abandoned.

8. Criminal Law ⇐1168(2)

In prosecution of husband and another for conspiracy to commit murder, and for assault with a deadly weapon with intent to commit murder on husband's wife, failure to delete from other defendant's confessions, which were admitted against him alone, portions relating to husband was not prejudicial error when court was over generous in limiting those confessions to case against other defendant and testimony aside from confessions was sufficient to prove husband's participation. Pen.Code, § 217.

9. Criminal Law ⇐338(7)

Evidence which is relevant and otherwise admissible is not to be excluded because it may also have a tendency to prejudice defendant or his codefendant or because it is capable of being distorted to unfair and prejudicial uses.

10. Criminal Law ⇐423(3)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife, conversations between husband and other defendant relating to killing of wife, its desirability, opportunities and means for it, concealing of crime, other defendant's remuneration, etc., were generally admissible. Pen.Code, § 217.

11. Indictment and Information ⇐191

Offense of assisting a principal after the commission of a crime is not necessarily included in the main crime itself. Pen. Code, §§ 972, 1159.

12. Criminal Law ⇐795(1)

With respect to necessarily included offenses, it is court's duty to instruct jury on any such offense of which there is any evidence, and failure to give such instruction is prejudicial error. Pen.Code, § 1159.

13. Criminal Law ⇐814(2)

Court should instruct jury upon every material question upon which there is any evidence deserving any consideration whatever.

14. Homicide ⇐309(4)

In trial for murder, when evidence raises issue of manslaughter, instruction covering that offense must be given.

15. Conspiracy ⇐47
Homicide ⇐249

In prosecution of husband and another for conspiracy to commit murder and for assault with deadly weapon with intent to commit murder on husband's wife, evidence was insufficient to establish that husband was only an accessory after fact and not a principal in the crimes charged.

16. Criminal Law ⇐814(19)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to murder husband's wife, wherein husband continually asserted that all of his associations with other defendant after attack were in no way intended to assist that defendant in avoiding arrest, it was not error to refuse an instruction defining an accessory after the fact.

17. Criminal Law ⇐1168(2)

In prosecution of husband and another for conspiracy to murder and for assault with a deadly weapon with intent to commit murder on husband's wife, wherein, after other defendant had testified on voir dire as to admissibility of his confessions, prosecution was permitted to extend his cross-examination to case in chief, premature questioning concerning confessions did not cause a miscarriage of justice when confessor later testified in his own behalf in case.

18. Criminal Law ⇐369(1)

Evidence of commission of other crimes or degrading acts falling short of crimes is as a rule incompetent, if not relevant for special purposes.

19. Criminal Law ⇐369(2)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife, evidence regarding colorable transaction with respect to divorce paper as to which defendants cooperated in behalf of a client of husband's was relevant to show an intimate connection between defendants and was properly admitted.

20. Criminal Law ⇐371(12)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife, admission of evidence as to nightly relations of husband with other women was properly admitted as bearing on question of motive.

21. Criminal Law ⇐720(7, 9)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to commit murder on husband's wife, wherein confessions of other defendant were admitted as against him only, use of confessions by prosecuting attorney, for argument against husband by comparing husband's position as to certain events with his position as disclosed by confession was not error.

22. Conspiracy ⇐47
Homicide ⇐257(8)

In prosecution of husband and another for conspiracy to commit murder and for assault with a deadly weapon with intent to murder the husband's wife, evidence was sufficient to establish guilt of the defendants, aside from the confessions of other defendant.

Leslie C. Gillen, San Francisco, Sol A. Abrams, San Francisco, for appellant Carl E. Brown.

Edward T. Mancuso, Public Defender, City and County of San Francisco, Joseph I. McNamara, Deputy Public Defender, San Francisco, for appellant Victor L. Stoner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., San Francisco, Thomas C. Lynch, Dist. Atty., of City and County of San Francisco, Norman Elkington, Chief Asst. Dist. Atty., San Francisco, for respondents.

NOURSE, Presiding Justice.

Appellants and one Joseph Tenner were accused in one indictment in two counts: (1) Conspiracy to commit murder. (2) Assault with a deadly weapon with intent to commit murder on Florence Brown. All defendants pleaded not guilty and Stoner moreover not guilty because of insanity. On both counts the jury found Brown and Stoner guilty, Tenner or Tannenbaum not guilty. After disagreement of the first jury as to Stoner's sanity, a second jury found him sane. Motions for a new trial by Brown and Stoner were denied and they appeal from the judgments and orders denying a new trial. The appellants have filed joint briefs and many of the points raised apply to both and others to Brown singularly. We use the word "appellants" herein as applying to the contentions of both and of each individually.

In the evening of October 6, 1952, Mrs. Brown was found in her bedroom in the Brown apartment at 896 Eddy Street, San Francisco, covered with blood. On a chair in the living room was a ball peen hammer which proved to have human blood and hair on the ball. Beneath wounds on the back of Mrs. Brown's head, which could have been caused with that hammer, the bone of the skull had been shattered and depressed about one and a half inches. There was a pool of blood at the bottom of the television set in the living room and a trail of blood from there to the bedroom. Mrs. Brown had no recollection whatever of what happened after 7 o'clock in the evening of October 6 until she found herself in a hospital. She thought she had been in an automobile accident. Mr. Brown at different times told police there was nothing helpful he could offer.

On December 11, 1952, defendant Stoner was arrested by the Spokane police. On December 12, 1952, he made a confession to District Attorney Lynch and Inspector John O'Haire who went to Spokane, which confession was transcribed and the next day a further confession which was recorded. These confessions state in detail, to be mentioned later, his conspiracy with Brown and Tenner to kill Mrs. Brown so that Brown would get her money, the assault on Mrs. Brown with the ball peen hammer placed by Brown near the television set for that purpose, the price Stoner would get for the killing, his contact with Brown and payments made by Brown to him after the act. Before the grand jury Stoner voluntarily testified to the same effect as these confessions and he made three supplemental confessions in San Francisco when he was taken to places where he had before stated he had done certain things. However on December 28, 1952, in a statement to the three attorneys of the three defendants Stoner retracted his implication of Brown and Tenner, contending that his statements in that respect were made at the instigation of District Attorney Lynch who had offered him immunity. Until the trial, however, Stoner did not contend that he himself was not guilty of the assault. But at the trial he took the position that when in the evening of October 6 he went into the Brown apartment he saw blood on the television set, and the hammer and Mrs. Brown covered with blood on the bed and he got scared and ran. His six confessions and his testimony before the grand jury were admitted in evidence after a voir dire examination in which there had been a conflict between testimony of Stoner and of prosecution witnesses as to the free and voluntary character of his statements and as to the alleged offer of immunity. It is conceded that this conflict was resolved in the trial court against defendant and no error is predicated on this decision. However said statements of Stoner were offered only as against himself and the jury was admonished repeatedly that they could

only be used against him. Although the appeal is briefed in combined briefs of both Brown and Stoner the position of these two defendants is completely different. With respect to Stoner there is no contention that the evidence does not support the verdict; with respect to Brown it is contended that if the confessions of Stoner are eliminated there is no substantial evidence to support either of the two guilty verdicts.

With respect to Stoner the evidence with inclusion of the confessions is so overwhelming that any error urged in the briefs and to be mentioned later cannot have been prejudicial. All Stoner's confessions are in general wholly coherent and in accord with each other and in many points are corroborated by independent evidence. If the several confessions and testimony before the grand jury are taken together the substance of them is mainly as follows:

He had first met Brown when Brown had acted as his attorney in a criminal matter and when he had been released Brown had given him room and board and he had worked for him as a handyman in Brown's house and apartment from August until October 1952. Stoner also went with Brown to Mexico in the matter of Mexican divorce papers of one of Brown's clients. Through Brown he met Joe Tenner. In August or September there had been conversations indicating that Brown and Tenner wished to have Mrs. Brown killed so that Brown would get her money which they then could use for a place in Lafayette, the Acapulco, which Tenner wished to acquire and for a yacht Brown wished to buy. Stoner would get from $500 to $5,000; Brown's Cadillac and Tenner's car. The first attack on Mrs. Brown was planned with Brown for the evening of September 26th. Stoner was to hide in the apartment while Mrs. Brown was away visiting a friend in a hospital. Alibis both for Brown and Stoner were arranged. Stoner was to go out of town with friends but return for the killing and Brown would pass the evening with a colleague Don Pettus, and bring him back home later to find the body. On the twenty-fifth Stoner went on a double date to the Peninsula in Brown's Cadillac but something happened to the rear axle and the car had to be towed into Belmont. After the car had been repaired there he drove it the next day back to San Francisco leaving his girl friend in Belmont. He ate dinner with Brown who told him where he would leave a hammer in the apartment. Stoner later entered the apartment but Mrs. Brown returned unexpectedly when he had just got in and had not yet turned on the light. He did not dare go on with the plan. He told her he was waiting for Brown and stayed for some time but when Brown did not come and a telephone call showed his girl friend had become impatient, he left and took Brown's car first to Belmont and then to his home in San Diego. He had long distance telephone conversations with Brown who wanted him to try again but first to arrange in Mexico the matter of the divorce papers, which he did. In San Diego Stoner met a friend of his, Calvin Brown (herein further called Calvin), whom he took along back to San Francisco promising him a job with defendant Brown. In San Francisco on the morning of October 6 at a service station Stoner asked Calvin to call Brown's office; after a few tries Calvin reached Brown on the phone and Stoner spoke to him and made an appointment in Chinatown. During lunch there they arranged for the killing that night. Brown would tell Mrs. Brown that Stoner would be over that night to fix the television set and would place the hammer and some other tools behind the set. It should be made to look like a robbery; Brown would go to the bank and get money and tell the police that he had given it to her. Again the company of Pettus would be used as Brown's alibi. In the evening Stoner went with Calvin in Brown's Cadillac to the apartment. Stoner went up whereas Calvin remained down in the car looking at the Brown windows. Stoner knocked on the apartment door and paced around until Mrs. Brown opened it and said something like "Hi, it is you." He told her that he had come to fix the television set. He made her help by hold-

ing a wire and when she knelt down doing so he hit her on the head with the hammer which he found with other tools behind the set. He threw the hammer into a chair and went into the bedroom where he grabbed Mrs. Brown's billfold out of her purse and a .38 revolver from the top of a cabinet and went back to the car where he told Calvin: "Get the hell out of here, I think I killed her." They drove to a gas station where Stoner changed clothes. Stoner tried to reach Brown at Andy Wong's where Brown was to meet him but he was not there. The second time he phoned Andy Wong's Don Pettus came to the phone. He was also to be there to be used again as alibi. Don Pettus said that Brown probably was in his office and Stoner reached him there and made an appointment to meet in Quincy Street, an alley between California and Pine Streets. They met there, Calvin being left at the corner of the alley. When Brown got into the car he offered Stoner $100 but Stoner wanted more money and the pink slip of Brown's Cadillac. Brown said then to go down to his office. Brown could not find his keys to the office and had to ask the janitress to let him in. In the office Brown called his apartment and when the telephone was not answered he was satisfied that the deed was done and gave Stoner $500 and the pink slip of the Cadillac and said: "I'll see you later on when this cools off." Stoner gave Brown the .38 revolver he had taken from the apartment and left town after picking up Calvin. He gave Calvin the billfold of Mrs. Brown to tear it up together with identification cards and such that were in it. Calvin threw the pieces out of the car window, but when they stopped at a restaurant in Los Banos Calvin found part of the wallet sticking to the car door. He took it off and threw it on the ground. They went to San Diego to Calvin's home. Two days later in a telephone conversation with Brown he heard that Mrs. Brown was in a hospital in critical condition, that she couldn't remember what had happened to her and that she was not being watched. He and Calvin then decided to go back to San Francisco to finish the job. On the way there they rented a room at a motel near Oakland. Stoner phoned Mount Zion Hospital, asked for Mrs. Brown and talked to the night nurse but when there was some delay he feared the call was being traced and they went off in the car and passed the night in the Town House in Oakland. From there on October 10th Stoner called Brown and they made an appointment to meet at the Yacht Club. They talked in the Cadillac. Brown told Stoner that he had to have the car back because people were wondering where his car was and told Stoner to get out of town by plane. Stoner returned the pink slip and gave him papers he had obtained for him in Mexico. He picked up Calvin and drove with him to the airport where he parked the Cadillac. Brown came there also and gave him some money. They went back by plane to San Diego. Stoner went on to Mazatlan, Mexico. He had several telephone conversations with Brown in that time, mostly about the condition of Mrs. Brown and her memory of the night of the attack. Brown told him that he was trying to put into her mind that Stoner at that time had phoned from San Diego, and that he had not given any information to the police so that they also thought that Stoner had been in San Diego. Stoner in those calls also asked for money and Brown sent him money either under Brown's own name or under the name of George Malone. Including the $500 he received the night of October 6th he got approximately $1,000 from Brown. From Mazatlan he returned to San Diego. He went back again to San Francisco on November 11th to get the Cadillac. He had then another friend, Willie Taylor, with him. They stayed at the Regent Hotel in San Francisco under assumed names. He had conversations with Brown by telephone and personally. Brown did not wish to give him the car because Mrs. Brown was thinking that Stoner might have made the attack, and was also suspecting Brown now. He advised Stoner to stay away from Inspector Cahill. He also urged Stoner to kill Mrs. Brown at a beach house where she was staying. Brown gave him $100. Thereafter Stoner went to El Centro, next to

Butte and finally to Spokane. From each place he telephoned Brown who told him that Mrs. Brown still could not remember, that Inspector Cahill was looking for him. Brown sometimes sent him money. In Spokane Stoner was arrested.

These confessions are amply corroborated. Mrs. Brown testified that approximately two weeks before she was brought to the hospital she surprised Stoner in her apartment in the dark at 8 o'clock in the evening. Much of the corroboration is formed by the testimony of Calvin. He testified as to the telephone conversation from the booth at the service station in the morning of October 6th, that after Stoner had failed to reach Brown he gave Calvin a number and asked him to call. A lady secretary told him that Brown was busy. He then gave the number of the booth and the name Howard Patton, because Stoner had told him not to use his own name. When Calvin phoned again the lady said Brown was just through; a man then said, "Carl Brown speaking." Calvin gave the phone to Stoner who said, "Hello, Carl" and closed the door. After the telephone call Stoner said he had to see Carl and was going over with a cab. He told Calvin to wait at the service station. Stoner came back around 12 or 12:15.

That evening (the time of the assault) Mrs. Brown was seen by the witness Moye in the doorway of her apartment saying to a man who answered Stoner's description in height and dress "Oh, it's you." Blood was found near the television set and blood and hair on the hammer. The hammer was found in a chair in the living room where Stoner stated he threw it. Calvin testified that Stoner when he went into the apartment house and left Calvin in the parked car had pointed out to him the window of the apartment to which he was going. That a few minutes after he had gone the shadow of a woman moved by the window and right after a man's figure who pulled the shade down. Stoner returned in five minutes and when he got in the car told Calvin to drive straight on and said: "I killed her; I hit her seven times with a ball peen hammer." He was nervous and shaky. He asked if Calvin could see any blood on him and whether Calvin could see his arm moving up and down. Stoner had then a wallet and a .38 revolver, which he had not had before. He told Calvin to draw into a gas station; he had to get in touch with Carl right away. Stoner changed clothes at the gas station, saying that he had been seen by someone in the apartment house and phoned twice asking for Carl Brown. After the call he said he had to go to meet Carl right away. Stoner drove to an intersection on California, put Calvin off and placed him opposite a side street and himself drove into that street, stopped there a few seconds and drove on. A minute or two later he saw the car again come around a corner; then a man was sitting next to Stoner. It was 8:20 by a clock on a tower when the Cadillac drove off. Stoner came back after fifteen minutes and said they were going right back to San Diego. Later Stoner asked him to straighten the money in his wallet which he said was over $500. On the way up from San Diego there had been only $30. He said he had given the revolver back to Carl. Calvin also testified to the tearing up of the wallet and contents, and the finding and throwing down of a piece of the wallet near a restaurant in a little town. A portion of the wallet was found by police near the telephone booth of the restaurant Stoner had mentioned. Further Calvin corroborated the unexpected departure in the night from the motel near Oakland, when Stoner told him that he phoned the hospital where Mrs. Brown was and that he was afraid his call had been traced. Moreover Stoner at the trial generally corroborated his factual movements as contained in his confession although he changed their meaning. All long distance calls mentioned in the confessions were corroborated at the trial by telephone records.

[1] The above evidence overwhelmingly proves Stoner's guilt as to both counts, the conspiracy with Brown to commit murder, and the assault with a deadly weapon with the intent to commit murder. However, it is argued that the confessions

made after the arrest of Stoner are hearsay as to Brown and no proof of the conspiracy, so that they cannot become admissible as to Brown under section 1870, subd. 6, Code of Civil Procedure. "It is well settled that after a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy in pursuance of their orginal plan is in contemplation of law the act of all of them." People v. Harper, 25 Cal.2d 862, 870, 156 P.2d 249, 254.

The strongest independent evidence against Brown consists in his attempts to cover up incriminating circumstances like his contact with Stoner on the day of the assault and thereafter, the use of Brown's car by Stoner, his payment of money to Stoner. Although the evidence shows without conflict that Stoner had Brown's Cadillac from September 25 until October 10, Brown declared twice to the authorities that Stoner had had no access to the Cadillac later than two weeks before the assault. As stated before Brown denied all contact with Stoner on October 6th. However from the stated testimony of Calvin and the notation in Brown's telephone record the jury could conclude that on that morning he had a telephone conversation with Stoner which he wished to cover up. The same applies to the meeting after the attack. Here again there is the evidence of Calvin, as to telephoning by Stoner from a gas station, which is corroborated by the testimony of Pettus, that that evening he spoke at Andy Wong's on the telephone to somebody who had asked for Brown and told him that Brown was not there, that he was expected and might be reached at his office and Calvin's further evidence as to Stoner's parking in Quincy Street and passing thereafter in the car with a man. Stoner also testified that he called Brown from the service station. "I knew he was expecting to have me call, so I went down on purpose, to go up and see him." Although Brown claimed that he did not receive a phone call from Stoner, did not leave the office before he finally left to meet Pettus at Andy Wong's and that he had had no visitor, Miss Hogan, janitress in the building in which Brown had his office, testified that on the evening of October 6 she took Brown down in the elevator at approximately 8:30 and that he came back with another man ten or fifteen minutes later. She took them up to Brown's floor. Brown rang again for her and asked her to unlock his office with her pass key; he had left his keys in his car. She went with him to his office and opened it. Both men went inside. From this evidence the jury could conclude that immediately after the attack Stoner phoned Brown, that Brown went out and came back with somebody which circumstances he did not wish to be known, and that that person was Stoner. There is then the further evidence of Calvin that Stoner when he came back no longer had the .38 revolver which he had when he came from the apartment house and had $500 more than he had before. No .38 revolver, as seen by Calvin, was later found in Brown's office. Brown on October 7 told police that no gun was missing from the apartment, but the jury could believe Calvin's evidence that Stoner had taken a gun from there.

The meeting on October 10 between Stoner and Brown after which the Cadillac was returned at the airport took place in the car at an out-of-the-way place (the Yacht Club). Brown's testimony that it took place there because he had been to Marin County to serve papers—which were not served—is unbelievable. The jury could conclude that the arrangement was made for the purpose of secrecy. Brown sent money to Stoner after the assault giving the alias George Malone and sending the telegraphic money orders each time from a different Western Union office. The jury could conclude that this again was done for the purpose of secrecy. Brown's explanation that Stoner might be questioned and that his secretary quarrelled about the payments to Stoner does not explain the use of a false name. On December 13, 1952, Brown declared to the authorities that he had sent Stoner money to San Diego only. It was proved that he sent money orders under the name of George Malone to Butte, Montana and to Spokane, Washington, also. On the same date he stated that he had had no telephone

conversation with Stoner for more than a couple of weeks, whereas he had had more recent conversations with him by phone to El Centro, Butte and Spokane. He also stated that he had not seen Stoner since two weeks prior to the assault, whereas he had seen him on October 6, October 10 and November 13. (The last meeting is also corroborated by Stoner's friend Willie Taylor who testified to Brown's panic when he saw that he, an unknown person, was with Stoner when Brown came to see Stoner.)

Some other circumstances pointed out by respondent are noteworthy: On the evening of both visits of Stoner to Mrs. Brown, Brown was in the company of Pettus and brought him home with him and on October 6th he made the appointment with Pettus around noon (after having spoken to Stoner). Brown went home on October 6th at 4:00 P.M. so that he had an opportunity to place the hammer near the television set; he testified that the ball peen hammer (not a normal household implement) had been in the apartment off and on for a year. Mrs. Brown testified that she had never seen anything like it in the apartment. Respondent also points out independent evidence as to possible motive of Brown. He was not happy in his marriage and wanted separation before the assault. (After the assault he still said that such would be best.) There was also evidence indicating a relation with another woman around the time of the assault. Moreover Brown may have had a financial interest in Mrs. Brown's death. He had been the attorney for Mr. Richardson, Mrs. Brown's former husband, and after Richardson's death on August 21, 1950, he was the attorney for Mrs. Brown. Mrs. Brown testified that she entrusted to Brown the large amount of money contained in Mr. Richardson's safe deposit box and later another amount of more than $5,000. Mr. Brown gave her a receipt for $14,320 received for deposit. Although the evidence as to time and amounts received is not quite clear, Mr. Brown admitted receipt of similar amounts but contended that he had bought in October or November, 1951 a cashier's check of $10,000 in his own name which he later gave over to Mrs. Richardson. At the Crocker First National Bank, where Mr. Brown banked, no such check or application for it could be found. Brown and Mrs. Richardson executed a joint and several will, dated October 28, 1951, in which Mrs. Richardson left specific property to her son, the balance to Brown. Mr. Brown and Mrs. Richardson were married February 28, 1952. After a quarrel about a girl Mr. Brown returned one exemplar of the will to Mrs. Brown who later destroyed it and made a will leaving her whole estate to her son. However the joint will had been executed in twofold and Mr. Brown kept an executed copy in his office. At the trial Brown thought it a problem whether he would have presented that will for probate if after Mrs. Brown's death no other will had been offered. Mrs. Brown testified that the receipt for $14,320 and her new will dated September 17, 1952, were always in her safety deposit box in the Crocker First National Bank. Evidence of personnel of said bank showed that on October 27, 1952, when Mrs. Brown was in the hospital after the assault, Mr. Brown asked access to that safety box for the purpose of surrendering it. As the box was in the name of Mrs. Brown only, access was refused and Mr. Brown was told that the bank would have to call Mrs. Brown in the hospital. Brown then said that the police would not allow it. Brown contended at the trial that he had asked to surrender another empty box which Mrs. Brown had recently rented for a special purpose. However the bank clerk was certain that the keys which Mr. Brown showed him were those of the old box. Mrs. Brown testified that the keys were in a bag of hers in her closet when she went to the hospital and that they disappeared. She had given Brown no authority to surrender that box. Mrs. Brown had also advanced to Brown and Tenner $6,700 in connection with the intended purchase of the Acapulco Club (mentioned by Stoner). She testified that the money was to go in escrow. It was spent without the Acapulco being acquired. Brown took $1,400

for attorney's fees for his work on the deal, of which work there was no specification, and Mrs. Brown was not told about it.

[2, 3] The above independent evidence is sufficient as prima facie evidence of the conspiracy as to Brown. To make evidence of the acts and declarations of an alleged conspirator relating to the conspiracy admissible against the other, Code of Civil Procedure, § 1870, subd. 6, the conspiracy need be proved only to the extent of establishing prima facie evidence of that fact. People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17.

[4–6] This prima facie evidence is based on Brown's acts, lies and possible motive and is not objectionable as such although it derives its meaning in large part from the fact that the assault by Stoner is considered proved. If such an independently proved substantive crime of one conspirator could not be considered in evaluating the acts and relations of other conspirators as showing a common purpose, the provision of section 1870, subd. 6, would lose most of its importance. As a rule a conspiracy cannot be directly proved but must be inferred from the relation of the acts of the different conspirators. People v. Griffin, 98 Cal.App.2d 1, 43, 219 P.2d 519. People v. Curtis, 106 Cal.App.2d 321, 325, 327, 235 P.2d 51, cited by respondent, seems to go in that direction but is not very clear. See the paraphrase given in 11 Cal.Jur.2d 261: "Although proof of a conspiracy cannot be shown by extrajudicial declarations of coconspirators, evidence of the acts and conversations constituting the agreement is admissible under section 1850 of the Code of Civil Procedure, since such acts and conversations form 'a part of the transaction' which is in dispute." 11 Am.Jur. 575 says that the courts are not agreed as to whether declarations of a co-conspirator are admissible as to the preliminary proof of conspiracy. If this prima facie proof is sufficient all the acts and statements of Stoner in the presence of Calvin mentioned earlier become evidence also against Brown, e. g., Stoner's statement after the telephone conversation in the morning of October 6 that he had to go by taxi to meet Brown, his statements as to the assault, his statement after the subsequent telephone conversation from the service station that he had to meet Brown right away, his statement after he returned from his meeting with Brown that he had given the revolver taken at the apartment back to Brown or had left it in Brown's truck. When these and similar statements of Stoner are also considered the verdict as to Brown's participation in the conspiracy is sufficiently supported. The jury need not have believed the evidence as to the alibi of Brown at the time Calvin testified Stoner went to meet him in the morning of October 6, as to which alibi there were indications of fabrication.

[7] Appellant's contention that the assault on Mrs. Brown necessarily terminated the conspiracy and that no acts or statements after that event can be considered is without merit. The purpose of the conspiracy was not attained by the assault as Mrs. Brown survived and there is evidence indicating that the purpose had not been abandoned when Stoner returned to San Francisco on October 10. Moreover the conspiracy "may, for various purposes, extend in point of time beyond the actual commission of the substantive crime, providing there is some evidence showing that subsequent activities of the conspirators were a part of their scheme or plan." 11 Cal.Jur.2d 223 and cases there cited. Examples are division of the loot and payment for participation in the crime. People v. Ross, 46 Cal.App.2d 385, 396–398, 116 P.2d 81, and acts contemplating escaping punishment, People v. Tinnin, 136 Cal. App. 301, 306, 28 P.2d 951. The stated acts and declarations of Stoner are admissible as against Brown under such rule.

[8] It is next contended that, although Stoner's confessions were admitted against Stoner alone the failure to delete therefrom the portions relating to Brown, especially the repeated references to Brown's alleged culpability, constituted prejudicial error which could not be corrected by admonition to the jury. Appellant Brown points out a great number of references to him in the admitted confessions apt to

influence the jury against him, notwithstanding the repeated admonition of the court that the confessions could not be used against him.

It must be conceded that a large part of Stoner's confessions was detrimental to Brown, but we cannot concede that any portion of them should have been stricken. The trial court was over generous to Brown when it limited these confessions to the case against Stoner. The indictment against both defendants carried a count charging both with an "assault with intent to commit murder" under Penal Code, § 217. Stoner was merely the hired killer for Brown who prepared the whole scene of the crime, provided the weapon used, and paid his agent for performing the murderous act. It needs no citation of authorities to support the statement that conversations between principal and agent in preparation of an act to be performed by the agent for the benefit of the principal are binding and admissible against both. Here Brown hired Stoner as his agent to kill Brown's wife. We could eliminate from consideration all the "confessions" since Stoner's testimony was sufficient to prove Brown's participation. It is this testimony of Stoner which is important here rather than what is found in Stoner's confessions and that testimony completes the case against Brown.

[9] The general principle is stated as follows in 22 C.J.S., Criminal Law, § 600, p. 922: "* * * evidence which is relevant and otherwise admissible is not to be excluded because it may also have a tendency to prejudice defendant, or his codefendants * * * or because it is capable of being distorted to unfair and prejudicial uses, accused's remedy being to have the jury's attention directed to the legitimate purposes and legal effect of the evidence."

[10] In this case all conversations of Brown and Stoner relating to the killing of Mrs. Brown, its desirability, the opportunities and means for it, the means to cover up the crime, Stoner's remuneration and all contact between the two in relation to these subjects were generally admissible.

No specific objection or motion or "suggestion" to delete on the ground here treated was made when Stoner's first two (Spokane) confessions and his statements before the grand jury were actually offered in evidence. Only after all three had been read to the jury did the attorneys of Brown and Tenner revert to this point citing People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180, and move for a mistrial. And after this was denied, they moved to strike specific parts from the confessions, which motion was also denied. Both denials were correct. Even if the confessions read to the jury contained objectionable matter no sufficient motion to delete it was timely made and striking of parts after they had been read to the jury would not serve any good purpose. The confession had been admitted as to Stoner only and the jury had been clearly so instructed.

The next grievance is that the court failed to give an instruction proposed by defendants in the words of Section 32, Penal Code, defining an accessory after the fact. It is contended that this instruction should have been given because there was evidence from which the jury could have concluded that Brown's communications with Stoner and his providing of money to Stoner after the assault took place and after Brown had learned that Stoner had committed the assault were all made with the intent of making him avoid or escape arrest (without evidence that he was involved before the assault took place).

[11–13] When the same grievance was urged at the hearing of the motion for a new trial the trial judge took the position that it had been agreed between counsel and court that there would be no instruction on any lesser included offense, and when it was urged that accessory after the fact was not such an offense, he stated that then there was no point to the argument. It seems clear that assisting a principal after the commission of a crime is not necessarily included in the main crime itself in the sense of Section 1159, Penal Code. (See Section 972, Penal Code, which permits prosecution of the accessory alone and People v. Wallin, 32 Cal.2d 803, 807, 197

P.2d 734, which holds that the crime of the accessory is separate and distinct.) The stipulation does not seem to cover an instruction as to an accessory after the fact. With respect to necessarily included offenses it is the duty of the court to instruct the jury on any such offense of which there is any evidence, and the failure to give such instruction is prejudicial error. People v. Carmen, 36 Cal.2d 768, 773, 228 P.2d 281, 284. This follows from the general rule there stated: "'It is elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever.'"

Appellants' contention that there is here evidence from which it could be concluded that Brown was only an accessory after the fact is not supported by the record.

[14, 15] The Carmen case, supra, merely follows the settled rule that, in a trial for murder, when the evidence raises the issue of manslaughter, an instruction covering the minor offense must be given. The theory of the case is based squarely on the showing that evidence was present which would have supported a conviction on the minor offense. The position of the respondent is clearly stated in respondent's brief from which we quote, "May we point out that at no time during the trial did the appellant Brown assert that he was assisting Stoner in avoiding arrest. The reverse is the case. Brown continually asserted that all of his associations with Stoner after the attack were in no way intended to assist Stoner in avoiding arrest. All of their telephone conversations were related to the divorce papers which Stoner was to get in Mexico, or were requests by Stoner for money. The meeting between Stoner and Brown at the Yacht Club was only for the purpose of handing over these divorce papers, returning Brown's Cadillac, and paying Stoner for his services. Brown explained that all of the money which he had given Stoner was in payment for work which the latter had done for him, or in payment of Stoner's compensation claim. He constantly denied any knowledge that Stoner was sought by the police. If such were true, as Brown claims, how could he have aided Stoner with the 'intent of avoiding arrest?'"

[16] The rule of People v. Sanchez, 30 Cal.2d 560, 567–568, 184 P.2d 673, is controlling here. It was there held that it was not error to refuse to instruct the jury on an issue which was contrary to the defendant's testimony. Here Brown consistantly denied all activities in aid of Stoner's escape from arrest. No other witness testified to the contrary. The moneys paid to Stoner by Brown were all paid or contracted for before the assault. They were paid as wages for the contemplated murder—not in aid of Stoner's flight from arrest.

[17] The next error of law argued is that the trial court, after defendant Stoner had testified on voir dire as to the admissibility of his confession, permitted the prosecution to extend his cross-examination to the case in chief. Respondent argues that the position taken repeatedly by Stoner that District Attorney Lynch and Inspector O'Haire told him to say what he put in his confessions, although he denied it to them, constitutes an implied denial of guilt and that some testimony volunteered by Stoner moreover constituted an express denial of guilt in the case in chief and thereby opened up this subject. It must however first be noted that later Stoner testified in his own behalf in the case in chief so that thereafter he could be cross-examined—and was cross-examined at length—as to all points here complained of. It is contended that the premature questioning on these points "forced" Stoner on the advice of counsel repeatedly to invoke his constitutional right in the presence of the jury. Considering the overwhelming evidence against Stoner this cannot have caused a miscarriage of justice even if Stoner contrary to the express ruling of the trial judge was entitled to invoke the privilege. The contention that there could also be prejudice to Brown seems wholly hypothetical and there is no showing of any prejudice by the premature questioning. It would seem that Stoner's denial that the confession contained his original statements to the authorities did not impliedly

deny his guilt. If this were accepted a separate hearing on voir dire would become impossible. However Stoner also said: "That part about sex crimes, both Inspector O'Haire and Mr. Lynch said, 'Did I say that', but I never even touched the woman in my life." The court held that the last phrase was a denial of the assault and there seems no reason to hold said construction impossible. It is contended on appeal that this was only a denial of a sex crime. However in the long argument on this matter before the trial court in the absence of the jury that contention was never made. The point argued in this respect was mainly that Stoner had not said, "I never even touched *the* woman in my life" but "I never even touched *a* woman in my life." It is also argued on appeal that even if Stoner had volunteered a denial this would not have opened the door to cross-examination as to his guilt of the assault, but this is contrary to the authorities. People v. Zerillo, 36 Cal.2d 222, 227, 223 P.2d 223 and People v. Teshara, 141 Cal. 633, 638, 75 P. 338, quoted in the Zerillo case. At any rate this grievance is no basis for reversal.

[18] Further error is predicated on the court's allegedly permitting the introduction of evidence of other crimes or practices of the defendants unrelated to any issue on trial. Evidence of commission of other crimes or degrading acts falling short of crime is as a rule incompetent if not relevant for special purposes. 8 Cal. Jur. 58 et seq., Crim.Law, § 167; People v. Zemavasky, 20 Cal.2d 56, 62, 123 P.2d 478.

[19] In this connection appellants complain of evidence regarding a colorable transaction with respect to an antedated Mexican divorce paper as to which Stoner and Brown cooperated in behalf of a client of Brown's. This evidence was contained in Stoner's second confession, his grand jury testimony, his fifth confession and in a statement of Brown, admitted in evidence. Prior to the admission of the last two statements, objections or motions to delete directed to this point were made. However no such objections were made the first two times when such evidence was received. Brown also could then have objected because it was without value for the case against Stoner and prejudicial to him. After this evidence had come in without objection the admission of similar evidence over objection is not so prejudicial as to require reversal. The pre-trial statements of Brown in that respect are relevant to corroborate Stoner's confession in general. Respondent points out correctly that such evidence is admissible if it tends logically, naturally and by reasonable inference to establish any fact material for the people or to overcome any material matters sought to be proved by the defense. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924; People v. Hughes, 123 Cal.App.2d 767, 769, 267 P.2d 376. Respondent contends that the evidence was relevant to show an intimate connection between the defendants, relevant in all cases of conspiracy. And with that we agree.

[20] Brown also complains of the admission of evidence as to nightly relations of his with other women, among whom his secretary Dorothy Zentner and especially one Sharon Davis, and as to his ownership of 1181 Clay Street where he and each of the two named women had lived. His relation with other women was relevant to his bad relation to his wife which deserves consideration in the matter of motive. The ownership of 1181 Clay Street is indirectly of importance for his relation to the named women. The house was recorded under the name of Sui Mae Hing. Brown and Miss Zentner contended that a deed in that name was made out by Miss Zentner; handwriting experts testified that the deed was in the handwriting of Sharon Davis. There is no error here.

The questioning of Brown on cross-examination did not bring out more than the text of the grand jury proceedings, already received in evidence, without prejudicial comment and it does not appear that this was for other purposes than general impeachment or that it was prejudicial.

[21] Portions of the District Attorney's argument to the jury pointed out as improper and constituting prejudicial error include the following: The frequent use of Stoner's confessions, admitted as against him only, for argument against

Brown by comparing Brown's position as to certain events with the one given by Stoner in the confession. This was all within the facts proved, and the argument was not error.

[22] The case is not even close on its facts. The evidence shows a cold blooded attempt to murder Mrs. Brown so that her husband could acquire a large amount of real and personal property standing in her name. Stoner was merely a weak minded tool employed by Brown for that purpose. Aside from Stoner's repeated confessions the testimony of other witnesses and the circumstantial evidence discloses the guilt of both defendants unmistakably. Both were given a fair trial and the errors assigned were not prejudicial.

The judgments and the orders denying a new trial are all affirmed

DOOLING and KAUFMAN, JJ., concur.

131 Cal.App.2d 780

Myrtle CADIGAN, Plaintiff and Respondent,

v.

AMERICAN TRUST COMPANY, Executor of the Estate of Margaret Grant, Deceased, Defendant and Appellant.

No. 16257.

District Court of Appeal, First District, Division 1, California.

March 25, 1955.

As Modified on Denial of Rehearing April 22, 1955.

Action by a vendee against executor of deceased vendor for cancellation of purchase money note, reconveyance of trust estate and recovery of monthly installments paid executor since death of decedent. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., gave judgment for the vendee and an appeal was taken. The District Court of Appeal, Fred B. Wood, J., held that where the vendor had orally promised to remit the unpaid balance of purchase money note and deed of trust on her death, and four months later, on the request of the vendee, had written a letter to the vendee whereby she expressed the promise in writing, the note, deed of trust and the letter were to be taken together as one contract

Affirmed.

1. Evidence ⇐419(15)

With respect to promissory notes which recite consideration as "for value received", recital is non-contractual in nature and true consideration may always be shown by parol.

2. Evidence ⇐419(15)

In action by vendee against executor of vendor for cancellation of purchase money note and reconveyance of trust estate, evidence sustained trial court's finding that vendor's oral promise to remit unpaid portion of principal upon her death was an integral part of the bargain, and part of consideration, so that promise could be shown by parol.

3. Mortgages ⇐105

Where vendor orally promised to remit unpaid balance of purchase money note and deed of trust on her death, and four months after execution of note and deed of trust vendor on request of vendee wrote letter to vendee whereby she expressed the promise in writing, the note, deed of trust and letter were to be taken together as one contract, in action after vendor's death to cancel note and for reconveyance of trust estate. West's Ann.Civ.Code, §§ 1625, 1642.

4. Bills and Notes ⇐134

Fact that promissory note was given to vendor on April 12 and letter from vendor to vendee promising to remit unpaid portion of purchase money on vendor's death was written on August 10 did not as matter of law prevent note and letter from being treated as having been "made as parts of substantially one transaction" within statute relating to such writings. West's Ann.Civ.Code, §§ 1625, 1642.

5. Contracts ⇐176(1)

Whether two writings were made as parts of substantially one transaction within meaning of code provision is question of

fact in each case. West's Ann.Civ.Code, §§ 1625, 1642.

6. Contracts ⇐164

Under code provision that several contracts relating to same parties, between same parties, and made as parts of substantially one transaction, are to be taken together, it is not necessary that each contract refer to the other or that either refer to the other. West's Ann.Civ.Code, §§ 1625, 1642.

7. Contracts ⇐164

Code provision that several contracts relating to same matters, between same parties, and made as parts of substantially one transaction, are to be taken together, is in effect declaratory of common law and is applicable whether or not each of writings involved constitutes a contract. West's Ann.Civ.Code, §§ 1625, 1642.

Cushing, Cullinan, Duniway & Gorrill, Vincent Cullinan, San Francisco, for appellant.

Jarvis, Miller & Decker, Charles W. Decker, San Francisco, for respondent.

FRED B. WOOD, Justice.

April 12, 1944, Margaret Grant executed and delivered to James and Myrtle Cadigan a deed conveying certain real property to the Cadigans and received from them their promissory note in the principal sum of $6,150 bearing interest at 6 percent (payable at the rate of $42.50 a month) and deed of trust securing the note.

August 10, 1944, Margaret Grant wrote, signed and mailed the following letter to the Cadigans: "You have bought from me a parcel of property (known as Number 2207–19th Ave) upon which I hold a Trust Deed for $6150.00. Your payments interest and principal is $42.50 per month. I agree to leave a release upon my death leaving you the balance of the unpaid principal free of my mortgage providing your payments are lived up to, as per our agreement, each month. $42.50 Principal and interest."

Margaret Grant died May 14, 1953. She left no "release" by will or otherwise. The Cadigans had made all the installment payments which had accrued on the note and were not in default at the time of decedent's death. There was still unpaid upon the note, according to its terms, the sum of $4,478.48.

Myrtle Cadigan[1] brought this action against the executor of Grant for cancellation of the note, reconveyance of the trust estate, and recovery of monthly installments, totalling $297.50, which plaintiff had paid to the executor since the death of the decedent.

The trial court found that the deed, the note, the deed of trust, and the letter were executed and delivered in accordance with and pursuant to the terms of an oral agreement between the parties thereto, and gave judgment for the plaintiff.

The parties are agreed that the sole question upon this appeal is whether the admission and consideration of evidence of the oral agreement and of Grant's letter of August 10, 1944, was a violation of the parol evidence rule. Defendant views the note and deed of trust as the final integration in writing of the agreement of the parties, one which upon its face purports to be a complete expression of the whole agreement and thus does not permit the use of extrinsic evidence to vary its terms. Plaintiff, upon the other hand, claims that the note, the deed of trust, and the letter must be read and construed together as a single integrated contract.

The inquiry starts with the scrutiny of two writings: The promissory note of April 12th, an absolute and unqualified commitment to pay $42.50 per month until $6,150 and interest thereon shall have been paid; and the letter of August 10th, a firm commitment that if the monthly installments are punctually paid as they fall due the amount which remains unpaid upon the death of the payee shall be cancelled. It appears from the letter that these two writings bear a potential legal relationship, each to the other.

1. It was stipulated that Myrtle had succeeded to any and all interest of James in this property.

[1–3] Our first inquiry is whether each of these writings was given for a consideration. The answer is "yes." The recital of consideration in the promissory note ("for value received") is noncontractual in nature. In that type of case the "true consideration may always be shown by parol." Wells v. Wells, 74 Cal.App.2d 449, 457, 169 P.2d 23, 27; see also cases collected in 18 Cal.Jur.2d 754–756, § 270) as well as such matters as execution and delivery (18 Cal. Jur.2d 756–758, § 271). The promissory note represented the major portion of the purchase price of the property deeded to the makers by the payee. The promise to remit the unpaid portion of the principal upon the death of the payee was an integral part of the bargain, the major inducement to the Cadigans to buy.

We thus seemingly have two "contracts [instruments] relating to the some matters, between the same parties, and made as parts of substantially one transaction," which "are to be taken together." Civil Code, § 1642. The questioned parol evidence demonstrates that such is the case. It consists principally of the testimony of Mr. and Mrs. Cadigan. It shows that they had been tenants of this property for some time when Mrs. Grant suggested that they buy the place, offering to let them have it for a small down payment ($350), the balance to be paid at the same rate as their rent ($42.50 monthly), and, upon her death, the amount of the principal then remaining unpaid would be cancelled if meanwhile they kept up the monthly payments. She told them she was making similar arrangements with others of her tenants, to reduce her tax burden and to be relieved of the task of employing people to take care of her properties, adding that she had no relatives and would rather have her property go to her tenants than to the state.

Mr. Cadigan testified fully concerning the oral agreement. As to the cancellation of the unpaid residue of the note upon the death of the payee, he testified that Mrs. Grant "said if I would buy the property that she would fix in writing, yes, fix in writing the property would revert to us, title clear and no further payments on—in the event of her death. And I says: 'Well, that's just an oral statement right now,' I says, 'Will you actually do that for us?' and she said, 'I certainly will.'" Continuing, he testified that he accepted this proposal and made an appointment to meet her at the title company the next day, when she executed the deed and the Cadigans executed the note and the deed of trust. Upon that occasion he asked Mrs. Grant if she was going to "fix up this writing for us that she said she would, and she said: 'Well, I'll put that in the mail for you.'" He did not receive that writing from her right away; "I believe it was at least three or four months elapsed and I spoke to Mrs. Cadigan, I says: 'Why don't you call Mrs. Grant and get that letter she promised us?' which she did"; and in a day or two Mrs. Grant mailed them the letter of August 10, 1944.

Mrs. Cadigan testified that when she phoned Mrs. Grant to remind her about the agreement to cancel the note on her death "she said she was sorry she hadn't sent it before and she would send it." Mrs. Cadigan had not asked Mrs. Grant for it before that time, after the note was executed. About August 10th was the first time she asked for it, and Mrs. Grant sent it.

The evidence amply supports the trial court's finding that not all of the terms of the oral agreement were reduced to the writings contained in the promissory note and the deed of trust. An important part of them was reduced to writing in the form of the letter of August 10, 1944, from the payee to the makers of the note. In short, these writings were made as parts of one transaction and therefore are to be taken together. Thus viewed, they constitute one written contract, the final written memorial of the parties.

Mrs. Grant's letter is like the letter penned by the payee of one of the promissory notes involved in Symonds v. Sherman, 219 Cal. 249, 251–253, 26 P.2d 293, 294. That letter was found pinned to the note, among the effects of the payee, after her death. In it the payee declared that the note "'is to be given back to'" the maker of the note "'at the time of my death'". It was shown by extrinsic evidence that cancellation upon the death of the payee was an integral part of the loan transaction which the note in part expressed; hence,

the note and the letter must be read together. "It is a general rule that several papers relating to the same subject-matter, and executed as parts of substantially one transaction, are to be construed together as one contract. 6 Cal.Jur. 298; 19 Cal.Jur. 832; Civ.Code, § 1642; Goodwin v. Nickerson, 51 Cal. 166. We think this rule applies under the circumstances here shown, and that these findings and judgment, in so far as this particular note is concerned, are supported by the evidence, which shows an agreement, on ample consideration and evidenced by a written memorandum, that the principal sum of the note is not to be paid." 219 Cal. at page 253, 26 P.2d at page 295.

This principle was similarly applied by our Supreme Court as recently as 1950 in Mayers v. Loew's, Inc., 35 Cal.2d 822, 221 P.2d 26. There, also, two writings were involved, a formal contract and a letter which fixed for certain working conditions commencement dates different from those fixed in the formal contract. The court held, all the justices concurring, that the "consideration of the letter of February 1st in the interpretation of the formal contract is not objectionable on the ground that it tends to vary, modify, or contradict the terms of that contract. Those terms are established by the contract and the letter and not by one to the exclusion of the other." 35 Cal.2d at page 828, 221 P.2d at page 29. The rationale of the decision is indicated by the following excerpts: "'Where two or more written instruments are executed contemporaneously, with reference to the other, for the purpose of attaining a preconceived object, they must all be construed together, and effect given, if possible, to the purpose intended to be accomplished.' [Citations.] Since the purpose of the agreements may be ascertained only by reference to each of the documents executed to accomplish that purpose, it was error to exclude any of those documents from consideration." 35 Cal.2d at pages 827-828, 221 P.2d at page 29. "The agreements in the present case are ambiguous and internally inconsistent. * * * [Here the court describes the ambiguities and inconsistencies.] The terms of the agreement furnish no clear answer to these questions. It is thus apparent that the contract is not clear on its face, and under the theory of the parol evidence rule that has been accepted by the majority of this court, evidence of the negotiations of the parties and of surrounding circumstances was admissible for the purpose of determining the meaning of the contractual provisions. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761–762, 128 P.2d 665; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 228–229, 78 P.2d 1154; Merkeley v. Fisk, 179 Cal. 748, 757, 178 P. 945; see Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 306, 307, 188 P.2d 470; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561–562, 147 P.2d 84; Torrey v. Shea, 29 Cal.App. 313, 316–317, 155 P. 820; Code of Civil Procedure, § 1860; Civil Code, § 1647." 35 Cal.2d at pages 828–829, 221 P.2d at page 30.

Similar holdings upon similar facts were also made in the following cases: Torrey v. Shea, supra, 29 Cal.App. 313, 316–319, 155 P. 820; Spotton v. Dyer, 42 Cal.App. 585, 588, 184 P. 23; Orton v. Dabney, 82 Cal. App. 281, 287–288, 255 P. 532; Sintzel v. Wagner, 119 Cal.App. 335, 337, 6 P.2d 293; Citizens' National Trust & Savings Bank v. Arrowhead Springs Beverage Co., 126 Cal.App. 550, 559, 14 P.2d 821; Lynch v. Bank of America Nat. Trust & Savings Ass'n, 2 Cal.App.2d 214, 223, 37 P.2d 716; Bergman v. Ornbaun, 33 Cal.App.2d 680, 684, 92 P.2d 654; Body-Steffner Co. v. Flotill Products, supra, 63 Cal.App.2d 555, 560, 147 P.2d 84; Western Helicopter Operations v. Nelson, 118 Cal.App.2d 359, 366, 257 P.2d 1025.

The authorities relied upon by the defendant are not applicable. In Unger v. Goldman, 12 Cal.App.2d 129, 131, 54 P.2d 1126, in Estate of McEuen, 18 Cal.App.2d 180, 63 P.2d 332, and in Ucovich v. Basile, Jr., 26 Cal.App.2d 272, 79 P.2d 188, the subsequent writing which purported to modify the contract was not a part of the original transaction and was given without consideration; hence, it was not a part of the original contract and could not qualify as a subsequent modifying contract. In Reid v. Johnson, 85 Cal.App.2d 112, 192 P.2d 106, the several contracts in question

represented separate and distinct transactions, did not constitute a single contract, were not interdependent. In Williams v. Silverstein, 213 Cal. 269, 276, 2 P.2d 165, an escrow agreement invoked to modify certain promissory notes did not modify them, was not inconsistent with their terms. In each of the following cases only one "writing" was involved, and an attempt made to modify that writing by evidence of a mere oral agreement; McArthur v. Johnson, 216 Cal. 580, 582, 15 P.2d 151; Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 513–514, 24 P.2d 163; Oakland Medical Bldg. Corp. v. Aureguy, 41 Cal.2d 521, 523–524, 261 P.2d 249; Scatena v. Lawson, 95 Cal.App. 720, 724–726, 273 P. 592; Seth v. Lew Hing, 125 Cal.App. 729, 736–738, 14 P.2d 537, 15 P.2d 190; Nourse v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999; Van Fleet-Durkee, Inc., v. Oyster, 91 Cal.App.2d 411, 413–414, 205 P.2d 32; Security First Nat. Bank v. Rospaw, 107 Cal.App.2d 220, 223, 237 P.2d 76; Stafford v. Russell, 117 Cal.App.2d 326, 330, 255 P.2d 814.

[4, 5] Defendant argues that the April 12th promissory note and the August 10th letter here involved can not, as a matter of law, be treated as having been "made as parts of substantially one transaction", Civil Code, § 1642, because not executed on the same date. The code section does not say so, nor does the case law so hold. Lynch v. Bank of America, Nat. Trust & Sav. Ass'n, supra, 2 Cal.App.2d 214, 223, 37 P.2d 716; Sintzel v. Wagner, supra, 119 Cal.App. 335, 337, 6 P.2d 293; Body-Steffner Co. v. Flotill Products, supra, 63 Cal.App.2d 555, 560, 147 P.2d 84. In some of the cases, it is true, the rule is expressed in terms of written instruments executed "contemporaneously" or "at the same time" but we do not infer therefrom an intent to limit the rule to cases in which the instruments are executed on the same day or within any arbitrarily prescribed period of time. For example, in Mayers v. Loew's, Inc., supra, 35 Cal.2d 822, 827, 221 P.2d 26, the court uses the expression "contemporaneously" in stating the general principle but cites the Lynch and the Body-Steffner Co. cases among others, in support of that principle. It is a question of fact in each case. In the instant case the evidence supports the finding that although there was a delay of four months in reducing the contents of the letter to writing, both writings were made as parts of one transaction.

[6] Defendant contends it is not enough that the letter refers to the promissory note; that the note should also refer to the letter, for the rule to be applicable. That is not the law. The statute makes no such requirement. Cases in which the question has been presented hold it unnecessary for either instrument to refer to the other. Torrey v. Shea, supra, 29 Cal.App. 313, 316, 155 P. 820; Spotton v. Dyer, supra, 42 Cal. App. 585, 588, 184 P. 23; Orton v. Dabney, supra, 82 Cal.App. 281, 288, 255 P. 532. In Mayers v. Loew's, Inc., supra, 35 Cal.2d 822, 221 P.2d 26, the letter referred to the formal contract but it does not appear that the formal contract referred to the letter.

[7] Defendant further claims that the statute which allows two or more writings to be "taken together", Civ.Code, § 1642, applies only to writings each of which is a "contract"; hence, that the mere letter in the instant case can not be considered. The answer is that the code section is in effect the declaration of a common law principle in the statement of which the broader term "written instruments" is acceptably used. That was the term actually used in Mayers v. Loew's, Inc., supra, 35 Cal.2d 822, 827, 221 P.2d 26. The word "papers" was used in Western Helicopter Operations v. Nelson, supra, 118 Cal.App.2d 359, 366, 257 P.2d 1025. For a discussion of this point we refer to Citizens' Nat. Trust & Savings Bank v. Arrowhead Springs Beverage Co., supra, 126 Cal.App. 550, 554, 14 P.2d 821. In the instant case, the note, the deed of trust, and the letter "taken together", Civ.Code, § 1642, comprised the "contract in writing", Civ.Code, § 1625. The terms of the contract are established by these three instruments, not by one to the exclusion of either of the others.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mary PENNY, Defendant and Appellant.

Cr. 5262.

District Court of Appeal, Second District, Division 2, California.

March 25, 1955.

Rehearing Denied April 5, 1955.

Hearing Granted April 20, 1955.*

Defendant was convicted of manslaughter in the Superior Court of Los Angeles County, Burdette J. Daniels, J., and she appealed. The District Court of Appeal, McComb, J., held that the instructions were not subject to the objections urged and that the evidence sustained conviction on ground of lack of due caution and circumspection by defendant in applying a solution of phenol to the face of the deceased and that where the defendant did not raise a plea of double jeopardy in the trial court she could not raise it on appeal.

Orders affirmed.

1. Criminal Law ⇐1144(13)

On appeal from a judgment of conviction the evidence is viewed in the light most favorable to the people.

2. Criminal Law ⇐810, 823(1)

In prosecution for homicide by a face rejuvenator as alleged result of application of a solution of phenol to the face of deceased, instructions respecting the practice of cosmetology were not erroneous as conflicting were the uncontradicted evidence disclosed that defendant was not a licensed cosmetologist and in view of instruction that the instruction was not to be taken as an opinion of the court as to what the facts were, and that if an instruction applied to a certain set of facts which the jury found did not exist the jury should disregard the instructions. West's Ann. Bus. & Prof.Code, § 7415.

3. Criminal Law ⇐824(2)

In prosecution for homicide committed by a face rejuvenator who used an excessive solution of phenol upon the face of the deceased, failure of court of its own motion to give an instruction explaining terms in instruction respecting practice of treatment of ailments, blemishes, disfigurements, etc., was not error where no additional instructions were requested by defendant and the language of the statute was expressed in ordinary words which would be understood by an ordinary individual. West's Ann. Bus. & Prof.Code, § 7415.

4. Criminal Law ⇐824(2)

Instructions defining an offense may be given in the language of the statute where no amplification is requested by defendant.

5. Criminal Law ⇐476

In prosecution for homicide committed by a face rejuvenator in using an excessive solution of phenol upon the face of deceased, admitting opinion of physician that burns on the deceased's face were caused by a solution containing phenol in excess of 10 per cent was not error in view of the proper foundation laid for admission of the opinion.

6. Criminal Law ⇐472

Expert testimony is admissible where conclusions to be drawn by jury depend on existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority thereon and where the conclusions to be drawn from the facts stated as well as knowledge of the facts themselves depends on scientific knowledge not within the range of ordinary training or intelligence.

7. Criminal Law ⇐469

Where conclusions to be drawn by jury depend on existence of facts which are not common knowledge and are peculiarly within the knowledge of men whose experience or study enables them to speak with authority thereon, not only the facts but the conclusions to which they lead may be testified to by the experts.

8. Criminal Law ⇐800(2)

In prosecution for homicide committed by face rejuvenator by using an excessive solution of phenol on the face of the deceased instruction defining "due caution and circumspection" as meaning such cau-

* Opinion vacated 285 P.2d 926.

tion and circumspection as are reasonably appropriate to avoid injury to one's self and others etc., was proper.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Caution and Circumspection".

9. Homicide ⇐309(1)

In prosecution for homicide committed by a face rejuvenator by alleged use of an excessive solution of phenol on face of the deceased, instruction defining term due caution and circumspection was not error for failure to instruct that negligence required was something more than ordinary civil negligence.

10. Homicide ⇐250

Evidence sustained conviction of manslaughter of a face rejuvenator by allegedly using an excessive solution of phenol on the face of the deceased. West's Ann.Bus. & Prof.Code, § 7415.

11. Homicide ⇐250

In prosecution for homicide committed by face rejuvenator by using an excessive solution of phenol on the face of the deceased, substantial evidence sustained a finding that death resulted from the commission of a wrongful act not amounting to a felony where the jury might have concluded that defendant in applying the solution was practicing cosmetology and thereby violating the statute requiring a license. West's Ann.Bus. & Prof.Code, § 7415.

12. Homicide ⇐34

One who violates laws designed to prevent injury to others is guilty of involuntary manslaughter if death is caused thereby.

13. Criminal Law ⇐1028

In prosecution for homicide of a face rejuvenator who allegedly used an excessive solution of phenol on the face of the deceased, verdict of conviction was not void on the ground that defendant was placed twice in jeopardy where defendant did not raise the plea in the trial court but raised it for the first time on appeal.

14. Criminal Law ⇐1028

If plea of double jeopardy is waived when not entered in any stage of the proceeding before the trial court it cannot be raised for the first time on appeal.

D. Brandon Bernstein, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From an order denying defendant's motion for a new trial, after a jury trial resulting in a verdict of guilty of manslaughter, defendant appeals. There is also an appeal from the order granting defendant probation.

[1] *Facts:*[1] On May 4, 1953, defendant was a face rejuvenator and had been one for seven years. The face rejuvenation consisted of removing wrinkles. Defendant would put an application on the face which formed a pack and removed the skin, and the wrinkles would be gone. She had licenses issued by the City License Division and held a city tax receipt for a professional occupation.

In October, 1952, Kay Stanley told defendant that she wanted her face rejuvenated and that she had seen the face of another woman whom defendant had treated. Mrs. Stanley had a very bad skin which had acne and quite a few lines. On the aforementioned date in May, 1953, pursuant to Mrs. Stanley's request, defendant mixed an ounce of distilled water, a heaping tablespoon of resorcin and 16 drops of phenol. She applied this solution to Mrs. Stanley's face, beginning with the cheeks, using an applicator with cotton on the end. She covered about a square inch at a time and then used a sterile gauze for absorption. She completed the upper portion of the face in about two hours and then took about a half hour to tape the face, using overlapping pieces of special tape over

1. The evidence is viewed in the light most favorable to the People (respondent) pursuant to the rule set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269 [2], 108 P.2d 732 (hearing denied by the Supreme Court).

which she placed regular tape. The taping was completed about 1:30 p. m. and Mrs. Stanley had lunch and rested.

About 6:00 p. m. defendant began treating the lower half of Mrs. Stanley's face, using the same solution. It took between 45 minutes and one hour. After defendant had completed the application underneath the chin, Mrs. Stanley asked if she could sit up a while before the taping was commenced. This she did and defendant went to get her a glass of water. When defendant returned, Mrs. Stanley said she felt a little faint and then fainted. After Mrs. Stanley fainted, defendant called Dr. Wallace and left a message for him. About an hour and a half later the doctor arrived and found that Mrs. Stanley was dead.

[2] *Questions:* First: *Did the trial court err in instructing the jury as follows?*

"Any licensed cosmetologist who applies to any human being a solution of phenol greater than ten per cent is guilty of a misdemeanor.

"This is an unlawful act not amounting to a felony. Business & Professions Code, Section 7415."

"Every person who engages in, or attempts to engage in, the practice of cosmetology or any branch thereof without a license therefor issued by the State Board of Cosmetology or in an establishment other than one licensed by the State Board of Cosmetology is guilty of a misdemeanor.

"The art of cosmetology includes the beautifying of the face, neck, arms, bust or upper part of the human body, by the use of cosmetic preparations, antiseptics, tonics, lotions or creams.

"A violation of this law is an unlawful act not amounting to a felony."

No. Defendant urges that the foregoing instructions are conflicting and there is no evidence that defendant was a cosmetologist, hence the first instruction quoted was not supported by the evidence. These contentions are devoid of merit for the reason that the evidence clearly showed that defendant was not a cosmetologist, but defendant's own testimony disclosed that she was engaging or attempting to engage in cosmetology with respect to Mrs. Stanley. She testified she was occupied in face rejuvenation, that is the removal of wrinkles; that this was done by putting an application on the face which removed the skin, and that this procedure made the face look younger and fresher and gave it "a lovely complexion;" that the formula defendant used was procured from a "beauty rejuvenation place;" that the solution she used contained phenol and resorcin.

Applying the above instructions to the foregoing evidence it is clear the jury might have concluded that the activity in which defendant was engaging required at least that she be a licensed cosmetologist.

The jury could have found also that defendant applied a solution of phenol greater than ten percent on the face of Mrs. Stanley. Such implied finding is supported by the testimony of Dr. Newbarr that in his opinion the solution placed upon Mrs. Stanley's face was in excess of ten percent phenol. Thus the application by defendant of a solution of phenol in excess of what even a licensed cosmetologist could legally apply would have a direct bearing on the issue of whether defendant acted without due caution and circumspection.

Defendant's stricture on the instructions that they were conflicting in that some of the jury could have voted for conviction because they believed defendant had no cosmetology license and was required to have one; and that other jurors could have voted for conviction because they believed defendant had a cosmetology license and used a solution of phenol greater than ten percent; and that still other jurors could have decided that defendant did not need a cosmetology license but was guilty because she used a solution greater than ten percent, is devoid of merit for the reason that the uncontradicted evidence disclosed that defendant was not a licensed cosmetologist. This uncontradicted evidence coupled with the instruction given the jury that an instruction was not to be taken as an opinion of the court as to what the facts are, and that if an instruction applied to a certain set of facts which the jury found did not

exist, the jury should disregard such instruction, makes it obvious that defendant's contention is not well taken.

People v. Moore, 43 Cal.2d 517, 275 P.2d 485, relied on by defendant, is factually different from the instant case. In such case the Supreme Court found that the deceased came to the house of the defendant on the occasion of a fatal shooting in violation of the wishes of the defendant and of a court order; and that there was no support in the record for the portion of an instruction stating that the right of self-defense does not exist against a person who in threatening or attempting to threaten injury is acting lawfully. The facts in such case are not analogous to those here present.

[3] Second: *Did the trial court err in not of its own motion giving an instruction explaining the terms used in the following instruction given to the jury?*

"Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without at the time of so doing having a valid, unrevoked physician's and surgeon's certificate, drugless practitioner's certificate, or chiropodist certificate is guilty of a misdemeanor.

"A violation of this law is an unlawful act not amounting to a felony."

[4] *No.* Defendant contends that it was error for the court to fail to give to the jury of its own motion a further instruction as to what constituted a violation of the foregoing instruction relying upon People v. Burns, 88 Cal.App.2d 867, 873 [5], 200 P.2d 134, wherein the appellate court held that in a prosecution under Penal Code, section 273d, the jury should have been instructed as to the meaning of "traumatic condition." Such decision is not applicable to the facts in the case at bar for the reason that in the quoted instruction there is no technical or unfamiliar term or terms such as "traumatic." It is settled that instructions defining an offense may be given in the language of the statute where no amplification is requested by defendant. (People v. Reed, 38 Cal.2d 423, 430 [1], 240 P.2d 590.)

In the instant case no additional instructions were requested by defendant. Therefore the foregoing rule is applicable and in addition, the language in the statute is not expressed in technical terms, but by ordinary words which would be understood by the ordinary individual. Hence no further instruction was required. (People v. Knowles, 35 Cal.2d 175, 183 [9], 217 P.2d 1.)

[5] Third: *Did the trial court err in admitting the opinion of Dr. Newbarr that the burns on Mrs. Stanley's face were caused by a solution containing phenol in excess of ten percent?*

No. Defendant contends that there was no proper foundation laid for the admission of Dr. Newbarr's opinion that the solution applied to decedent's face contained more than ten percent phenol. This objection is devoid of merit.

Dr. Newbarr was examined at length on voir dire as to his qualifications and testified that there is no actual test to determine the amount of phenol applied to the skin by taking a specimen of the skin; that his opinion as to the percentage of phenol was based on the autopsy and on his experience which included the examination of many phenol burns, knowing the effect of different percentages of phenol and its reaction on the skin from reports of cases, having seen skin painted with a preparation such as camphophenique, containing about 4.75 percent phenol without any burn resulting. He further testified that he took into account the condition of Mrs. Stanley's face, its coagulated appearance, showing a deep burn and the rapidity with which the burn ensued; that in his experience he had seen many cases where phenol had run out of the corners of the mouth of a suicide.

[6, 7] Expert testimony is admissible where the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are

peculiarly within the knowledge of men whose experience or study enables them to speak with authority thereon, and also in cases where the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend on scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts but the conclusions to which they lead may be testified to by an expert. (People v. Tucker, 88 Cal.App.2d 333, 339 [1], 198 P.2d 941).

In the light of the foregoing rule a proper foundation having been laid for Dr. Newbarr's testimony it was proper to permit him to answer the question to which objection had been made.

[8] Fourth: *Did the trial court err in instructing the jury thus?*

"I instruct you that the term or phrase 'due caution and circumspection' is to be construed by you as the equivalent of criminal negligence."

"309. Definition of 'Due Caution and Circumspection.'

"Due caution and circumspection, as those words are used in the instruction just given, mean such caution and circumspection as are reasonably appropriate to avoid injury to one's self and others, under the conditions at hand as they would be viewed by an ordinarily reasonable person in the same situation as the person whose conduct is in question. To exercise due care and circumspection is to take those proper precautions which a person of ordinary prudence would use in the same circumstances."

"309–A. 'Due Caution and Circumspection' a Relative Term. When there is a question whether or not a defendant conducted himself without due caution and circumspection, the jury must answer the question in the light of all the surrounding circumstances, for the term 'due caution and circumspection' is a relative term, and the amount of caution required under it will vary in accordance with the nature of acts being done, the surrounding circumstances, and the danger that reasonably should be apprehended."

[9] *No.* The foregoing instructions are consonant with the rule announced in People v. Pociask, 14 Cal.2d 679, 683, et seq., 96 P.2d 788. Defendant's contention that it was error not to instruct the jury that the negligence required was something more than ordinary civil negligence, and that the instruction does not meet the requirements of People v. Driggs, 111 Cal.App. 42, 295 P. 51, and People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978, was fully answered contrary to her contention by People v. Pociask, supra, 14 Cal.2d 684, 96 P.2d 791, where it is said:

"'* * * That when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life. (Citing cases)' * * * Anything in the Driggs and Hurley cases inconsistent therewith must be deemed to be disapproved."

[10] Fifth: *Was the evidence sufficient to sustain a conviction on the ground of lack of due caution and circumspection?*

Yes. Bearing in mind the rule that the evidence on appeal is to be viewed in the light most favorable to the people, we find that defendant admitted that she knew phenol is a poison and can be absorbed through the skin; that resorcinol and phenol are dangerous to be left around; that their indiscriminate use can be dangerous; that she did not know whether a person with acne would react differently, and that she had never made inquiries of a doctor as to such matters; that she did not know of any chemical reactions that took place to the skin when her solution was applied; that she had never discussed what she put on people's faces with anybody; that in this state of knowledge she undertook to remove blemishes and pits from Mrs. Stanley's face, in order to leave it nice and smooth. She further testified that

she was going to remove the wrinkles from Mrs. Stanley's face and as to the pits on her face, defendant considered that "what goes, goes."

She further admitted that she applied her solution to Mrs. Stanley's face and under her chin. The expert testimony disclosed that Mrs. Stanley died from phenol poisoning and from edema of the glottis due to the application of a mixture containing phenol to the face and neck.

From the foregoing evidence the jury could properly conclude that the solutions defendant put on Mrs. Stanley's face and neck resulted in her death because defendant did not use due caution and circumspection. This conclusion is further supported by the testimony of Dr. Newbarr that Mrs. Stanley had third degree burns on her face which in his opinion resulted from the application of a solution containing more than ten percent of phenol. (Cf. People v. Chavez, 77 Cal.App.2d 621, 628, 176 P.2d 92.)

[11] Sixth: *Was there substantial evidence to sustain a finding that the death resulted from the commission of a wrongful act not amounting to a felony?*

Yes. The jury might well have concluded that defendant in applying a solution of phenol to Mrs. Stanley's face for the purpose of rejuvenating it was practicing cosmetology and thus violated the statute requiring such a person to obtain a license. Also the jury might well have found that the acts of defendant constituted a violation of the statute requiring one who practices or attempts to practice, or holds himself out as practicing any mode of treating the afflicted, or who treats for any blemish of any person, to be licensed.

Hence in placing the solution on Mrs. Stanley's face defendant was doing illegal acts. This apparently was the view of the trial judge who at the time of the motion for a new trial remarked that in his opinion defendant was doing what amounted to "acid surgery."

There is likewise no merit in defendant's contention that there were no witnesses who testified that the acts performed by defendant required such license. Under the evidence and the instructions the jury was warranted in concluding that defendant was acting in violation of the statutes.

[12] Defendant's contention that the death of Mrs. Stanley was due to an allergy and not to the fact that defendant was practicing without a license is also untenable because the jury under the evidence could have found that defendant violated laws designed to prevent injury to others by requiring that those performing certain acts should first be licensed as a cosmetologist or under the Medical Practice Act. It is settled that one who violates laws designed to prevent injury to others is guilty of involuntary manslaughter if death is caused thereby. (People v. Mitchell, 27 Cal.2d 678, 683, 166 P.2d 10.)

Seventh: *Was the verdict void for the reason that defendant was placed in jeopardy twice?*

[13] *No.* Defendant points out that the record shows that on April 1, 1954, the jury having been sworn, defendant and her counsel being present in court, the matter of the misconduct of a juror was taken up in chambers in the absence of defendant and "the defendant's motion for a mistrial is granted."

Thereafter proceedings were resumed in open court and the jury discharged. Defendant now contends for the first time on appeal that because the minutes do not affirmatively show her personal request for or consent to the mistrial, she was illegally tried the second time, having once been in jeopardy.

[14] The rule is settled that a plea of double jeopardy or double punishment is waived when not entered in any stage of the proceedings before the trial court and cannot be raised for the first time on appeal. (People v. Phillips, 76 Cal.App.2d 515, 524 [10], 173 P.2d 392; People v. Kelly, 132 Cal.App. 118, 122, 22 P.2d 526; In re Harron, 191 Cal. 457, 467, et seq., 217 P. 728.) Since defendant did not raise the plea in the trial court, the foregoing rule is here applicable and she may not successfully urge it on appeal.

The orders are affirmed.

MOORE, P. J., and FOX, J., concur.

131 Cal.App.2d 603

WARD MANUFACTURING CO., a corporation, doing business as Ward Refrigerator & Mfg. Co., a limited partnership, Plaintiff-Respondent,

v.

E. V. MILEY, doing business as Ed Miley's Sierra Refrigeration & Fixtures, Defendant-Appellant.

Civ. 20455.

District Court of Appeal, Second District, Division 3, California.

March 18, 1955.

Transitory action on an account stated and the common count for goods sold and delivered. From an order of the Superior Court of Los Angeles County denying a change of venue, Ellsworth Meyer, J., the defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that in view that the contract was made and accepted in Los Angeles County venue of the cause of action was properly laid there.

Order denying change of venue affirmed.

1. Venue ⇐36

Defendant who would be entitled to a change of venue on one contractual cause of action if it were the only one remains entitled to such change regardless of joinder of one or more causes in which he would not be entitled to a transfer. West's Ann.Code Civ.Proc. § 395.

2. Appeal and Error ⇐854(2)

Faulty reason though disclosed by the record does not destroy a correct ruling.

3. Account Stated ⇐18(1)

A count alleging an account was stated between the parties and a balance was found due the plaintiff from defendant and that defendant agreed to pay plaintiff the balance but has not paid any part thereof was sufficient as a pleading of the common count.

4. Venue ⇐68

Presumption is, in absence of an affirmative showing in that particular, that the county in which the title of the action shows that it is brought, is prima facie the proper county, where the court in which the action is brought has jurisdiction of the subject matter thereof.

5. Venue ⇐72

The averments of a complaint are to be determined as true upon a motion for change of venue at least to the extent that they are not controverted.

6. Venue ⇐68

Where first cause of action alleged that a count was stated in Los Angeles county, burden of overcoming prima facie venue showing made thereby rested upon moving defendant, and fact that his residence was in Fresno County was not enough, but he was required to show that the contract was not made or to be performed in Los Angeles county. West's Ann.Code Civ.Proc. § 395.

7. Venue ⇐68

Rules that burden of overthrowing prima facie venue showing made by statement of a cause of action rests upon the moving defendant applies to both individuals and corporations. West's Ann.Code Civ.Proc. § 395.

8. Account Stated ⇐7, 8

An "account stated" constitutes a new contract either express or implied, for which a previous indebtedness furnishes the consideration, and any action thereafter must be brought on the new agreement which establishes prima facie without further proof, the accuracy of the supporting items which may not be inquired into in the absence of allegations of fraud, mistake, or illegality.

See publication Words and Phrases, for other judicial constructions and definitions of "Account Stated".

9. Venue ⇐70

Sufficiency of defendant's showing on motion to change venue to the county of his residence in action on account stated, depends upon whether his affidavit was directed to the cause of action alleged, since the affidavits must be confined to the case made by the complaint and neither party can shift the issues to some other theory of action. West's Ann.Code Civ.Proc. § 395.

10. Venue ⇐72

In action on an account stated where defendant filed a motion for change of venue to the county of his residence alleging that the obligation, if any, was incurred in that county, it was not the function of the trial judge to consider the merits of the plaintiff's plea. West's Ann.Code Civ.Proc. § 395.

11. Venue ⇐72

In action on account stated where defendant filed a motion for change of venue to the county of his residence on ground that obligation, if any, was incurred in that county where the complaint allegation of an account stated was not controverted, motion for change of venue was properly denied. West's Ann.Code Civ.Proc. § 395.

12. Evidence ⇐43(1)

Generally courts take judicial notice of the records in the court before them at the moment.

13. Appeal and Error ⇐925(2)

It is to be presumed on appeal in support of a ruling denying a motion for change of venue that the lower court properly took judicial notice of the records in the cause before them at the moment.

14. Evidence ⇐1

A reviewing court will take judicial notice of matters properly the subject thereof even if it appears that the trial judge did not do so.

15. Venue ⇐70

In action on account stated where defendants filed a motion for change of venue on the ground that he was resident of another county and that obligation, if any, was incurred therein, conclusions in defendant's affidavits for change of venue were insufficient to sustain the burden of proof resting on defendant. West's Ann.Code Civ.Proc. § 395.

16. Contracts ⇐145

A contract made by telephone, is entered into at the place where the recipient of the call is, at time he accepts the offer.

17. Venue ⇐7

Where contract for the sale of refrigerating equipment was made by telephone and accepted in Los Angeles County, such county was the place of contract as respects venue in action on account stated for amount due under the contract notwithstanding defendant's residence in another county. West's Ann.Code Civ.Proc. § 395.

18. Venue ⇐7

An agreement that refrigerating equipment sold to defendant was to be delivered to the defendant's truck at Los Angeles fixed such county as the place for performance justifying denial of the defendant's motion for change of venue to the county of his residence, and the fact that the price was fixed f. o. b. Los Angeles was of no controlling significance since it merely indicated that title was to pass and the contract was to be performed in that county. West's Ann.Code Civ.Proc. § 395.

19. Sales ⇐56

Where seller received at his office in Los Angeles County a letter from buyer for the shipment of refrigerating equipment and the merchandise was delivered in Los Angeles to a motor carrier for shipment to the buyer at Fresno and the sales and shipping order mailed to the defendant was the last act necessary to acceptance, and completion of the contract as such having occurred in Los Angeles and the mailed order having been accepted by a document mailed in Los Angeles County such became the place of the contract.

20. Appeal and Error ⇐1011(1)

It is for the trial judge to resolve any conflicts in the evidence and when he has done so the reviewing court will not interfere.

21. Venue ⇐70

In action on an account for merchandise sold defendant, evidence justified a denial of defendant's motion for change of venue to the county of his residence on the ground that Los Angeles was a place of contracting and inferentially the place of performance of the obligation. West's Ann. Code Civ.Proc. § 395.

John D. Chinello, Fresno, for appellant.

Philip T. Lyons, Los Angeles, for respondent.

ASHBURN, Judge pro tem.

Defendant appeals from an order denying his motion for change of venue from Los Angeles County to Fresno County. The action is a transitory one and defendant established without contradiction the fact of his residence in Fresno County where he does business under the fictitious name E. V. Miley's Sierra Refrigeration and Fixtures. The motion was made upon two grounds: First, that defendant was a resident of Fresno County and, second, that the obligation, if any, was incurred in that county.

The complaint, filed in Los Angeles County, is in two counts. The first is an action on account stated and the second is a common count for goods sold and delivered. Appellant argues that the court denied his motion upon the theory that the plaintiff has a right to try the case where filed if one of the causes of action is based upon a contract which was made or to be performed in that county regardless of the status of the other cause of action; that the reverse of that proposition is established law. The record does lend some support to this argument. The minute order reads: "Motion denied—Found that the contract in the first cause of action was entered into and was to be performed in Los Angeles County."

[1, 2] It is settled law that a defendant who would be entitled to a change of venue on one contractual cause of action if it were the only one, remains entitled to such change regardless of joinder of one or more other causes in which he would not be entitled to a transfer. Goossen v. Clifton, 75 Cal.App.2d 44, 48, 170 P.2d 104; Erwin v. Cee-Tee Construction Co., 114 Cal.App.2d 364, 370, 250 P.2d 287. But faulty reasoning, though disclosed by the record, does not destroy a correct ruling. Hayutin v. Rudnick, 115 Cal.App.2d 138, 141, 251 P.2d 707. So we must examine the question of whether both causes of action were in such condition as to warrant a trial in Los Angeles County over defendant's objection.

Section 395, Code of Civil Procedure, which fixes defendant's residence as a proper venue in the ordinary transitory action contains this sentence: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

The first count alleges that plaintiff is a corporation engaged in business in Los Angeles and "That on the 30th day of June, 1953, at Los Angeles, California an account was stated between the plaintiff and the defendants, and upon such statement a balance of $5,697.20 was found due to plaintiff from the defendants." Also: "That the defendant agreed to pay to the plaintiff said balance of $5,697.20 but has not paid the same or any part thereof." The second count says: "That on the 30th day of June, 1953, the defendants were indebted to plaintiff in the sum of $5,697.20 on an account for goods and merchandise consisting of freezers and refrigeration equipment sold and delivered by plaintiff to defendants, at their request, in the City of Los Angeles; that no part thereof has been paid, and there is now due plaintiff thereon from defendants, the sum of $5,697.20 with interest thereon from June 30, 1953."

[3–7] First we consider the situation existing with respect to the first cause of action. It is the common count and sufficient as a pleading in this state. Doyle v. McPherson, 36 Cal.App.2d 81, 83, 97 P.2d 249. The complaint fixes *prima facie* the proper place for trial. Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 306, 195 P. 284, 288: "The presumption is, in the absence of an affirmative showing in that particular, that the county in which the title of the action shows that it is brought is, *prima facie,* the proper county, where the court in which the action is brought has jurisdiction of the subject-matter thereof." This rule has been reiterated many times and with the corollary that the averments of the complaint are to be deemed true upon a motion for change of venue, at least to

the extent that they are not controverted. See Coley v. Hecker, 206 Cal. 22, 24, 272 P. 1045; Mills v. Dickson, 129 Cal.App. 728, 730, 19 P.2d 278; Liera v. Los Angeles Finance Co., 99 Cal.App.2d 254, 258, 221 P.2d 737; Freedman v. Imperial Cattle Co., 112 Cal.App.2d 593, 596, 246 P.2d 986; White v. Kaiser-Frazer Corp., 100 Cal.App.2d 754, 758, 224 P.2d 833; Connell v. Bowes, 49 Cal. App.2d 542, 544, 122 P.2d 71; Peterson v. Sherman, 68 Cal.App.2d 706, 711, 157 P.2d 863; Neet v. Holmes, 19 Cal.2d 605, 607, 122 P.2d 557. This first cause of action alleges that the account was stated in Los Angeles County. And the burden of overthrowing the *prima facie* venue showing made thereby rested upon the moving defendant; his residence in Fresno County was not enough; he had to show that the contract was not made or to be performed in the county where the action was pending. Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 342, 21 P.2d 443; Yellow Mfg. Acceptance Corp. v. Stoddard, 93 Cal.App. 2d 301, 303, 208 P.2d 1040; Hearne v. De Young, 111 Cal. 373, 376, 43 P. 1108; Walker v. Wells Fargo Bank etc. Co., 8 Cal.2d 447, 449–450, 65 P.2d 1299; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 364, 99 P.2d 678; Pacific Bal Industries v. Northern Timber, 118 Cal.App.2d 815, 826, 259 P.2d 465; County of Modoc v. Madden, 136 Cal. 134, 137, 68 P. 491; 25 Cal.Jur. § 42, p. 909; 1 Witken California Procedure, § 249, p. 768. The rule in this regard is the same as to individuals and corporations.

[8, 9] Whether that burden was carried successfully by appellant in the instant case turns largely upon the nature of an account stated. "An account stated constitutes a new contract, either express or implied, for which a previous indebtedness furnishes the consideration. Any action thereafter must be brought on the new agreement, which establishes prima facie without further proof the accuracy of the supporting items, which may not be inquired into or surcharged in the absence of allegation of fraud, mistake, or illegality. The creditor must recover on the account stated or not at all, and recovery cannot be had upon the original items on which it is based." Cited cases fully support the text just quoted from 1 California Jurisprudence 2d, section 56, pages 387, 388. They are exemplified by Auzerais v. Naglee, 74 Cal. 60, 63, 64, 15 P. 371; Gardner v. Watson, 170 Cal. 570, 574, 150 P. 994; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal.App.2d 568, 577, 126 P.2d 644. The sufficiency of defendant's showing also depends upon whether his affidavit was directed to the cause of action alleged, the account stated; for the affidavits must be confined to the case made by the complaint and neither party can shift the issue to some other theory of action; specifically, neither party was free to go into the background facts which furnish the consideration for the stated account and would disappear from view upon the trial of that major issue. Sims v. Mains, 131 Cal.App. 307, 310, 311, 21 P.2d 447; Sloan v. Court Hotel, 72 Cal.App.2d 308, 313, 314, 164 P.2d 516; Meadows v. Emett & Chandler, 99 Cal.App.2d 496, 498–499, 222 P.2d 145.

Defendant supported his motion by one affidavit, made by himself. It does not mention the alleged account stated. After setting forth residential facts it avers a conversation had in Fresno in November 1952 (not the date alleged in the complaint, which was June 30, 1953), with plaintiff's sales manager in which defendant "orally agreed to sell to your affiant, and your affiant orally agreed to purchase from said plaintiff, certain merchandise consisting of open face refrigerated meat cases, subject to certain terms and conditions and contingencies then and there agreed upon." To this is added the following: "That subsequently said refrigerated meat cases were delivered by the plaintiff above-named to your affiant, and all as subject to the terms and conditions orally agreed upon during the month of November, 1952; that said agreement concerning the purchase of said merchandise, and the obligations thereby incurred, if any, was entirely transacted in the County of Fresno, State of California, and said agreement in its entirety was oral, and not in writing.

[10, 11] "That the subject matter and basis of the First Cause of Action of plaintiff's complaint, and the subject matter of the Second Cause of Action of plaintiff's

complaint, is, and each of them, are based upon transactions which occurred entirely in the County of Fresno, State of California, being the County of your affiant's residence." Not a word about an account stated; the affidavit is devoted entirely to the consideration for it if there was such statement of account. The complaint allegation that there was one is not controverted in any fashion. It was not the function of the trial judge to consider the merits of plaintiff's plea. Freedman v. Imperial Cattle Co., 112 Cal.App.2d 593, 596, 246 P.2d 986; White v. Kaiser-Frazer Corp., supra, 100 Cal.App.2d 754, 758, 224 P.2d 833. So far as the first count is concerned the motion was correctly denied for the reasons above-stated. But there is another ground upon which the ruling should be upheld.

[12–14] The parties joined in canvassing the facts that lay back of the first count. Defendant's affidavit was opposed by those of Brent C. Cochran (sales manager of plaintiff) and Jack Cairns (employee of plaintiff). Appellant's counsel seems to assume that those affidavits were not to be considered upon his motion because they were served and filed as part of the supporting papers upon defendant's countermotion to retain the case in Los Angeles for convenience of witnesses, which motion was premature, no answer having been filed, and was denied. The record shows however that the two motions were heard on the same day. It is the general rule that courts take judicial notice of the records in the cause before them at the moment. 18 Cal. Jur.2d § 53, p. 471; Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 711, 134 P.2d 800, and it is to be presumed in support of the ruling that this was done. See Nuckolls v. Bank of California, Nat. Ass'n, 7 Cal.2d 574, 578, 61 P.2d 927; Vaughn v. Jonas, 31 Cal.2d 586, 601, 191 P.2d 432; 4 Cal. Jur.2d § 559, p. 426. Indeed, a reviewing court will take judicial notice of matters properly the subject thereof even if it appears that the trial judge did not do so. Varcoe v. Lee, 180 Cal. 338, 341–342, 181 P. 223; Greif v. Dullea, 66 Cal.App.2d 986, 998, 153 P.2d 581; Rogers v. Cady, 104 Cal. 288, 290, 38 P. 81.

[15] The ensuing discussion will apply to both counts for the affidavits cover two transactions whose amounts aggregate the sum of $5,967.20 for which each cause of action seeks recovery. Defendant's affidavit relates specifically to only one conversation which he places in the month of November 1952 and in the County of Fresno. He says that Brent Cochran, sales manager representative of plaintiff, "orally agreed to sell to your affiant, and your affiant orally agreed to purchase from said plaintiff, certain merchandise consisting of open-face refrigerated meat cases, subject to certain terms and conditions and contingencies then and there agreed upon." What those terms or conditions or contingencies were he does not say. Whether they provided for delivery and payment in Los Angeles we do not know,—so far as his affidavit is concerned. He also says: "That subsequently said refrigerated meat cases were delivered by the plaintiff abovenamed to your affiant, and all as subject to the terms and conditions orally agreed upon during the month of November, 1952;" Delivered where? In Los Angeles? Pursuant to what terms and conditions—payment on delivery in Los Angeles? For one who has the burden of proof he is noticeably vague. And he does not help his proof any by adding these conclusions "that said agreement concerning the purchase of said merchandise, and the obligations thereby incurred, if any, was entirely transacted in the County of Fresno, State of California"; also "That the subject matter and basis of the First Cause of Action of plaintiff's complaint, and the subject matter of the Second Cause of Action of plaintiff's complaint, is, and each of them, are based upon transactions which occurred entirely in the County of Fresno, State of California, being the County of your affiant's residence." For conclusions they are, no more and no less.

The opposing affidavit of said Brent C. Cochran, sales manager for plaintiff, says that on November 25, 1952 he, at his office in Los Angeles, received a telephone call from defendant Miley, who then ordered six pieces of refrigeration equipment at a price of $5,157, f. o. b. Los Angeles and

that same "was ordered to be picked up at Los Angeles, California by the customer's truck." Also that he, Cochran, made out a "Sales and Shipping Order" and forwarded same to Miley in Fresno. A copy of the order is attached and it contains this notation "via Cust. Truck." The affiant further states that the merchandise was in fact delivered at Los Angeles "to B & B Trucking Company for delivery to Mr. Miley at Fresno, California." This affidavit is factual and was met by no counter affidavit, no sort of refutation except the generalities above-quoted.

[16–18] The law is that a contract made by telephone is entered into at the place where the recipient of the call is at the time he accepts the offer. Restatement of Conflict of Laws, section 326, comment c, page 405: "*Acceptance by telephone.* When an acceptance is to be given by telephone, the place of contracting is where the acceptor speaks his acceptance." Cf. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 315, 74 P. 855, 65 L.R.A. 90; Trinity Universal Ins. Co. v. Mills, 293 Ky. 463, 169 S.W.2d 311, 314; Traders Oil Mill Co. v. Arnold Bros. Gin Co., Tex.Civ.App., 225 S.W. 2d 1011, 1013; Pearson v. Electric Service Co. of Pensacola, 166 Kan. 300, 201 P.2d 643, 645; Cousins v. Harrison, 33 Ala.App. 199, 30 So.2d 393, 394; United States v. Bushwick Mills, 2 Cir., 165 F.2d 198, 202; 17 C.J.S., Contracts, § 356, p. 814; 1 Williston on Contracts, Rev.Ed. § 82, p. 237; § 97, p. 312. This fixes Los Angeles County as the place of contract. And the agreement that the merchandise was to be delivered to customer's truck at Los Angeles fixes that county as the place for performance. The fact that the price was fixed f. o. b. Los Angeles has no controlling significance. It merely indicates that title was to pass and the contract thus to be performed in that county. See Woodbine v. Van Horn, 29 Cal.2d 95, 107, 173 P.2d 17; Southern Pac. Co. v. Hyman-Michaels Co., 63 Cal.App.2d 757, 764, 147 P.2d 692.

There was no error in the ruling that plaintiff had a right to trial of the first count in Los Angeles County.

[19] The affidavit of Jack Cairns, in opposition to the motion, deals with the occurrence of June 1, 1953. He says that he received on that day, at his office in Los Angeles, a letter from defendant addressed to plaintiff saying "Please send immediately 1–W.M.F. 30–2."; that he prepared a "Sales and Shipping Order" and mailed same to defendant in Fresno; it carries the notation "via Truck"; that on June 12, 1953 the merchandise was delivered in Los Angeles to Pacific Freight Lines for shipment to Miley at Fresno "Freight Collect." The sales and shipping order, mailed to defendant, was the last act necessary to acceptance and completion of the contract. It having occurred in Los Angeles, and the mailed order having been accepted by a document mailed in Los Angeles, that became the place of contract. It is well settled that this is the law. Bank of Yolo v. Sperry Flour Co., supra, 141 Cal. 314, 315, 74 P. 855, 65 L.R.A. 90; Rawson v. J. C. Forkner Fig Gardens, Inc., 206 Cal. 4, 6, 272 P. 1057; Johnson v. Banta, 87 Cal.App.2d 907, 909, 198 P.2d 100; Taylor v. J. B. Hill Co., 67 Cal.App.2d 581, 582, 154 P.2d 926; 11 Cal.Jur.2d § 68 at p. 155; 1 Witkin on California Procedure, § 231, p. 742. None of the facts set forth in this affidavit is denied. It fixes Los Angeles as the place of contracting and inferentially as the place of performance.

[20] It was for the trial judge to resolve any conflicts in the evidence; when he has done so the reviewing court will not interfere. Havutin v. Rudnick, supra, 115 Cal. App.2d 138, 140, 251 P.2d 707; Schreiber v. Hooker, 114 Cal.App.2d 634, 640, 251 P.2d 55.

[21] Defendant is not entitled to trial of either cause of action in the County of Fresno.

The ruling is correct. The order denying change of venue is affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

131 Cal.App.2d 804

Anita M. COOPER, Appellant,

v.

RETIREMENT BOARD, SAN FRANCISCO CITY AND COUNTY EMPLOYEES' RETIREMENT SYSTEM, John F. Brady, Dewey Mead, Harry Stewart, Belford Brown, Bert Crowley and James McGovern, as members constituting the Retirement Board of the City and County of San Francisco, and Dion Holm and Norman Wolff, Respondents.

Civ. 16243.

District Court of Appeal, First District, Division 1, California.

March 28, 1955.

Proceeding on application for writ of mandamus to compel Retirement Board to pay widow of retired policeman full amount of his pension. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., gave judgment for Board. Widow appealed. The District Court of Appeal, Peters, P. J., held that where policeman, who had been retired because of service connected chronic myocarditis, was assaulted when he attempted to arrest taxi driver for running through stop signs, and died two days later of pulmonary edema, evidence was sufficient to support Board's finding that death was not a result of service connected disability, and that widow was not entitled to full amount of pension.

Judgment affirmed.

1. Mandamus ⇐168(2)

In mandamus proceeding to require retirement board to pay widow of retired policeman full amount of his pension, widow had burden of showing that evidence and reasonable inferences from it did not support findings of Board.

2. Mandamus ⇐168(4)

In mandamus proceeding to require retirement board to pay widow of retired policeman full amount of his pension, board enjoyed in its favor all inferences arising from conflicts of evidence, even though an equally reasonable adverse inference was possible.

3. Municipal Corporations ⇐187(1)

After retirement, policeman had no official duties to perform, and he reverted to his civilian status with no greater police responsibilities, liabilities or duties than his fellow citizens.

4. Municipal Corporations ⇐187(6)

Where retired policeman was assaulted by taxi driver whom he attempted to arrest for running through stop signs, assault was not suffered in performance of any police duties, and his resulting death was not service connected, and his widow was not entitled to receive his full pension.

5. Municipal Corporations ⇐187(9)

In proceeding before retirement board on claim of widow of retired policeman for full amount of policeman's pension, where widow proved that husband suffered heart condition caused by his employment, and such condition existed continuously until time of his death, which resulted from sudden heart attack, there was no evidence that such heart condition was legal cause of death.

6. Municipal Corporations ⇐187(8)

In proceeding before retirement board on claim of widow of retired policeman for full amount of his pension, even if inference contrary to attending physician's testimony that policeman's death was not service connected, arose from physician's other testimony, resolving of conflict was for board, as it was a question of fact.

7. Evidence ⇐571(1)

In proceeding before retirement board on claim of widow of retired policeman for full amount of his pension, testimony of physician was not required to be disregarded as unsubstantial simply because physician based conclusions on medical record rather than on physical examination of policeman.

8. Evidence ⇐571(9)

In proceeding before retirement board on claim of widow of retired policeman for full amount of his pension, testimony of physician that policeman's death was not connected to work in police department based on conclusions in policeman's medical record, rather than on a physical examina-

tion of policeman, was sufficient to support finding that death was not so connected.

9. Municipal Corporations ⇐187(8)

In proceeding before retirement board on claim of widow of retired policeman for full amount of his pension, even if cross-examination testimony of attending physician was in conflict with his testimony on direct examination, such conflict was for board as trier of fact.

Walter H. Duane, San Francisco, for appellant.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for respondents.

PETERS, Presiding Justice.

Anita Cooper brought this action for a writ of mandate to compel the Retirement Board of San Francisco to pay to her a pension identical in amount with that formerly paid to her husband, now deceased, who was a retired police officer. The Retirement Board fixed the pension at one-half the amount that had been paid the husband. The Superior Court refused to interfere with that determination. From the judgment of denial Anita Cooper appeals.

The City Charter of San Francisco provides that if a police officer retired for disability dies as a result of a service-connected injury or illness, the surviving widow receive a pension in the same amount that had been paid her husband (§ 168.3), but if, after retirement for disability a former policeman shall die from a non-service connected injury or illness, the widow shall receive a pension of one-half that paid her husband (§ 168.1.5).

The Superior Court made two basic findings. 1. "The finding of the Retirement Board that James J. Cooper did not die as a result of an injury received in, or illness caused by the performance of his duty, is sustained by the evidence." And 2. "The findings of the Retirement Board that petitioner did not sustain her burden of proving that James J. Cooper died as a result of injury received in or illness caused by the performance of his duty, is sustained by the evidence."

[1, 2] It is appellant's contention that such findings are totally unsupported and that the evidence compels, as a matter of law, a finding that death was caused by a service-connected illness. Of course, on such an appeal, it is appellant's burden to show that the evidence and the reasonable inferences therefrom do not support the findings of the Board. Marshall v. City of Oakland, 92 Cal.App.2d 593, 207 P.2d 882; Loveland v. City of Oakland, 80 Cal.App.2d 31, 180 P.2d 937. The respondent enjoys in its favor all inferences arising from conflicts in the evidence, even though an equally reasonable adverse inference is possible. Morgan v. City of Los Angeles, 91 Cal.App. 2d 134, 204 P.2d 375. In other words, the appellant must not only show that a finding in her favor would have been supported, but must demonstrate that such finding is compelled, as a matter of law.

Tested by these standards, appellant has failed to sustain her burden. James Cooper, a policeman, married appellant in 1933. In April of 1944, at the age of 45, he was retired. He was then found to be suffering from "chronic endocarditis with aortic insufficiency" and, in general, he then had "chronic myocarditis, with a conduction system lesion producing a complete heart block." The Retirement Board found that this disability was service-connected and granted him a monthly pension of $170. After retirement, Cooper moved to Marin County, and accepted employment in San Francisco as a messenger and investigator for an express company. His attending physician testified that Cooper's heart was in such condition that he was in danger of a sudden attack at any time, and that over-exertion, or too much excitement, might bring on such an attack. The doctor opined, however, that the express company work could be carried on without danger, and had so informed Cooper.

On July 14, 1952, Cooper was assaulted by a cab driver. Cooper had been driving in San Francisco and saw the cab driver drive through several "stop" signs without stopping. Cooper tried to arrest the offending cab driver, displaying his police "star," of the type given to all retired policemen. The cab driver seriously objected to being placed under arrest, attacked Coop-

er, and hit him in the face several times. Cooper fell to the ground and hurt his hand, and was hospitalized. On July 16, 1952, while still in the hospital, he died from a "pulmonary edema." This can be caused by any overexertion or overexcitement or emotional upset.

[3, 4] Dr. Reitzel, an internist, was called by respondent. He had never attended Cooper, nor had he been present at the autopsy. He had, however, examined all of the records in the case. He told the Board by letter, and testified at the hearing, that it was his opinion that "this man's death was in no way connected, either by causal connection or by aggravation, to his work in the Police Department." On cross-examination he was asked: "Will you say that the matter of his having been struck did not aggravate his condition and bring about his death?" He responded: "Oh, I think the injury he had may have been a factor at that time."

It is obvious that, at most, the evidence shows that the cause of death, in a legal sense, according to both doctors, was the overexertion or excitement caused by the altercation with the cab driver. Although appellant apparently contends that this fight occurred in the performance of her husband's duties as a police officer, it is apparent that this contention is unsound. After his retirement Cooper had no official duties to perform, reverting then to his civilian status with no greater police responsibilities, liabilities or duties than his fellow citizens. Therefore, the assault was not suffered in the performance of any police duties.

[5, 6] Aside from the assault, about all appellant proved was that in 1944 her husband suffered from a heart condition caused by his employment, that such condition existed continuously until the time of his death, and that such death resulted from a sudden heart attack. But there is no evidence that such heart condition was, in the legal sense, the cause of death. The evidence is to the contrary. Dr. Reitzel positively testified that, in his opinion, there was no causal connection between the death and the prior police duties. Even if a contrary inference arose from the attending physician's testimony, which is doubtful, the resolving of that conflict was for the Retirement Board. It was a pure fact question. See cases collected in Annotation 27 A.L.R.2d 1004. The language used by Mr. Justice Dooling in Loveland v. City of Oakland, 80 Cal.App.2d 31, 180 P.2d 937, is applicable here. At page 34 of 80 Cal.App.2d, at page 939 of 180 P.2d it is stated:

"The next step in her argument proceeds: Loveland was suffering from an impairment of the heart incurred in the performance of duty; he died of heart failure; therefore his death was caused by reason of the bodily injury for which he was pensioned.

"There is a disarming appearance of logical consistency in the sequence: a, heart injury; b, death from heart failure; *ergo,* c, the death from heart failure was caused by the heart injury. This conclusion, however, was left entirely to inference, since appellant offered no direct proof of the cause of death. The burden was upon appellant to establish the cause of death (Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67) and in the face of the adverse finding below she bears the heavy burden before this court of showing, not that the evidence will support a finding that her husband's service-connected injury caused his death, but rather that it will not support the contrary finding actually made; or, to put it affirmatively, appellant must convince us that the evidence compels a finding that her husband's death was caused by the injury for which he was pensioned."

Cases such as Peters v. Sacramento City Employees' Retirement System, 27 Cal.App. 2d 10, 80 P.2d 179, and Buckley v. Roche, 214 Cal. 241, 4 P.2d 929, cited by appellant, are obviously inapplicable. There a fire captain in one case, and a police officer in the other, died while in the performance of their official duties, having engaged in unusual exertion immediately prior to death. That is not this case.

[7–9] Nor must Dr. Reitzel's direct testimony be disregarded as unsubstantial simply because he based his conclusions on the medical record rather than on a physical examination of Cooper. Such testimony is sufficient to support the finding. Loveland v. City of Oakland, 80 Cal.App.2d 31, at page 35, 180 P.2d 937, and cases there cited. Nor

do we believe that a fair reading of Dr. Reitzel's testimony on cross-examination, quoted above, is in conflict with his testimony on direct. But even if it were, such conflict was for the trier of the fact.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

131 Cal.App.2d 692

Theodore A. KOHLER, Jr., as Administrator of the Estate of Joseph Hustler, Deceased, Plaintiff and Respondent,

v.

William BRISTOW et al., Defendants,

Julia Chatten, George E. Sneed, Kerr Phelan, Ida Harvey, Walter M. Gleason, Grace M. Nilon, Rachel M. Moore, Frank S. Morgan, Betsy M. Fuller, Jane Morgan, Elizabeth C. Barker, Edith H. Hoffman, Rachael Hoffman, Retta A. Morgan, as successor in interest to John T. Morgan, Jr., Alice G. Cox, Peter tum Suden, and Frank S. Morgan, as Administrator with the Will annexed of the Estate of John Nankervis, deceased (sued herein as Frank S. Morgan, as Administrator of the Estate of J. Nankervis, also known as John Newton Nankervis, deceased), Appellants.

Civ. 8564.

District Court of Appeal, Third District, California.

March 21, 1955.

Action to quiet title to realty. From a judgment for plaintiff in the Superior Court, Nevada County, Raymond McIntosh & George L. Jones, JJ., the defendants appealed. The District Court of Appeal, Schottky, J., held that the evidence justified the judgment for plaintiff on the ground that plaintiff had established title by adverse possession that an alleged variance between complaint and judgment was not material and that other alleged errors were not prejudicial.

Judgment affirmed.

1. Trusts ⇐373

In suit to quiet title where defendants attacked the record title of plaintiffs by questioning the validity of an 1899 deed to the grantee therein, on ground that being a trustee, he had no right to convey to himself and that the deed was void because lacking signature of trustee, whether the trustee was still living at the time that the deed from remaining trustee to the grantee was executed was a question of fact for the trial court.

2. Trusts ⇐278

It is a presumption that a trustee or other person, whose duty it is to convey realty to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest. West's Ann.Code Civ.Proc. § 1963, subd. 37.

3. Adverse Possession ⇐114(1)

In action to quiet title to realty evidence supported judgment for plaintiff on the ground that plaintiff had established title by adverse possession.

4. Adverse Possession ⇐27

Where acts in regard to land by occupiers thereof were conducted under the permission of the record owners to so use the land, since the occupiers were in privity with the one asserting ownership rights in the land, such acts inured to the benefit of the plaintiff claiming title by adverse possession.

5. Executors and Administrators ⇐130(1)

Possession by heirs or their successors in interest of realty is properly proven and shown to be possession by the administrator during the period from the death of the deceased to the appointment of the administrator.

6. Executors and Administrators ⇐129(3)

In action by administrator to quiet title to realty, where plaintiff proved possession in decedent and his sons of the

realty from at least 1900 to 1913 when the decedent died and, payment of taxes by the successors in interest, the rights of the heirs inured to the benefit of the administrator of the deceased in maintaining the action.

7. Adverse Possession ⇐86

In action to quiet title to realty, that taxes on the property were permitted to go delinquent in 1934 and that there was no redemption until 1936 did not defeat the plaintiff's claim of adverse possession.

8. Judgment ⇐251(1)

In action to quiet title to realty, fatal variance between complaint and judgment did not exist because complaint alleged adverse possession as to both plaintiff and a corporation and a dismissal as to the corporation was entered, where the plaintiff sought by evidence throughout the trial to establish his title.

9. Pleading ⇐388

A variance between pleading and proof is immaterial where a party has not been misled thereby to his prejudice.

10. Evidence ⇐372(1)

An objection to the admissibility of certain documents and other items as foundational data for the testimony of witnesses as to adverse possession, many of which were ancient documents within the meaning of the statute, went to their weight as evidence rather than to their admissibility. West's Ann.Code Civ.Proc. § 1963, subd. 34.

11. Appeal and Error ⇐1054(1)

Where action to quiet title was tried by the judge, fact that some of the documents admitted might be inadmissible did not require a reversal, where it did not appear that the appellants suffered any prejudice resulting therefrom. West's Ann.Const. art. 6, § 4½.

12. Appeal and Error ⇐1051(1)

In action to quiet title, where alleged inadmissible evidence related only to the issue of record title and there was ample evidence to support the judgment on the ground of adverse possession, admission of the documents was not prejudicial. West's Ann.Const. art. 6, § 4½.

Walter B. Gleason & Norman J. Ronald, San Francisco, for appellant.

Lynne Kelly and William J. Cassettari, Grass Valley, for respondent.

SCHOTTKY, Justice.

This action was commenced on September 20, 1939, by Lila M. Champion, as the administratrix of the estate of Joseph Hustler, deceased, and the San Juan Gold Company, a Nevada corporation, to quiet title against defendants. The complaint alleged "that plaintiffs, by themselves and their predecessors in interest, have been in the actual, exclusive and adverse possession of the real property hereinafter described continuously for more than twenty years prior to the filing of this complaint, claiming to own and owning the same in fee against the whole world, and have paid all taxes of every kind levied or assessed against said real property during the period of five years continuously next preceding the filing of this complaint." Defendants in their answer denied the allegations of the complaint and alleged that they had claims and rights to the property which were superior to those of the plaintiff. Following a judgment in favor of plaintiffs in the first trial, defendants' motion for a new trial was granted. At the beginning of the second trial counsel for plaintiff San Juan Gold Company made a motion to dismiss the complaint as to that plaintiff which motion was granted, and the trial proceeded with the only plaintiff being the above-named plaintiff who had since the filing of the action been substituted in the place of the former administratrix of the estate of estate of Joseph Hustler.

The trial court found in accordance with allegations of the complaint hereinbefore set forth and entered a decree quieting the title of plaintiff against the claims of defendants. Defendants' motion for a new trial was denied and defendants have appealed from the judgment.

Appellants contend that the evidence is insufficient to support a judgment in favor of respondent either on the basis of the record title or on the ground of adverse possession, and also that the trial court committed prejudicial error in admitting certain documents in evidence.

The two parcels involved in this action (comprising a total of approximately 140 acres) constitute a part of a large tract of hilly and brushy placer mining ground in Nevada County known as the Patterson Patent, consisting of approximately five hundred acres. On November 1, 1879, the United States Government issued a patent covering this Patterson Patent to three trustees, namely, Joseph Hustler, John Nankervis and M. Fitzpatrick, the Joseph Hustler named in the patent being the decedent whose estate respondent herein represents as administrator. This patent was recorded on December 31, 1900. These three trustees received this patent as trustees for approximately twenty-three persons named in the patent, one of them being Joseph Hustler. These beneficiaries of this patent (and trust) were a group of early day pioneers who had located and owned various placer mining claims which together made up the area embraced by this patent. These individuals, in order to facilitate the securing of a final title to their respective parcels, conveyed their possessory mining estates to the aforementioned three trustees by a deed of trust dated August 14, 1877, with the object shown that these trustees would proceed to secure a patent covering the entire area and then deed back to the various beneficiaries their respective parcels. On September 25, 1899, Joseph Hustler and Michael Fitzpatrick, as trustees of the Patterson Patent, deeded certain land to Joseph Hustler.

The evidence in the case consisted largely of documents. Respondent sought to prove his record title by introducing in evidence the trust deed of 1877; the patent from the United States of America to the trustees; the probate file (No. 400) of the estate of John Nankervis, to show that he died in 1888, so that subsequent deeds from the two remaining trustees were not void or invalid; the deed of 1899 from Hustler and Fitzpatrick, as trustees of the Patterson Patent, to Joseph Hustler; and the probate file in the estate of Joseph Hustler.

It appears from the record that on April 27, 1878, Joseph Hustler executed a mortgage of some property to John Ryan, the property being described as "the Donovan claim or Ryan and Donovan claim situate in the Cherokee Mining District, and more particularly described in the survey and map made by D. B. Merry in 1872, and which is here referred to and made a part hereof." This was introduced to show that even before the patent was issued Hustler was claiming ownership of the property. Ross Taylor, county surveyor of Sierra County, called by respondent as an expert witness, testified that the property described in this mortgage and other documents was the same as that described by the complaint, and also the deed of 1899 was introduced to show its description and that it was the same ground as described in the complaint. Respondent introduced in evidence a mining survey of Hustler and Sons, and the plat thereof, filed by D. B. Merry on July 23, 1874. Merry was county surveyor of Nevada County at that time. Respondent also introduced in evidence a deed dated September 15, 1874, from Matthew Kilroy to Hustler and Sons; this was used by Mr. Taylor as a foundation for including the land described in this deed as part of that described in the complaint.

Mr. Taylor testified that he conducted a survey on the ground of the lands described in the complaint and he related in detail the events regarding the survey. As a basis of substantiating the correctness of his survey he used several of the documents aforementioned, and also some other old maps and surveying notes. Many of the references in the old deeds and surveys are to natural objects which no longer exist, but Mr. Taylor testified that to the greatest extent possible his survey accurately portrayed the lands as held by Mr. Hustler, and that such is the same as the lands described in the complaint. Mining operations on the lands in

the community over the last forty to fifty years has caused quite a change in the topography of this area.

Appellants introduced in evidence the probate file (No. 3939) of John Nankervis, which showed that this Mr. Nankervis died in 1917. To show that this John Nankervis was the one who was a trustee of the Patterson Patent, defendants also introduced into evidence a letter from this John Nankervis to Mr. John T. Morgan, a prominent banker of Nevada City, California, dated October 31, 1916, in which the writer discusses the fact of his being a trustee of the Patterson Patent.

Appellants attack the record title of respondent by questioning the validity of the 1899 deed to Hustler, on the grounds that being a trustee he had no right to convey to himself and that the deed was void because it lacked the signature of the trustee Nankervis, who they allege died in 1917 and not in 1888 as alleged by respondent. Appellants also contend that the deed is insufficient to serve as a basis for the adjudication of a fee title in the decedent in the parcels involved in this action in that the description in the deed does not relate to the particular parcels described in the complaint.

[1, 2] We believe that whether or not the John Nankervis, who was a trustee, was still living at the time the deed from the remaining trustees to Joseph Hustler was executed, was a question of fact for the trial court to determine. There were 23 beneficiaries named in the patent to the trustees and the record shows that all of the deeds issued by the trustees before 1889 were executed by John Nankervis along with the other two trustees and that none of the trustees' deeds after 1888 were executed by Nankervis. The record also shows that while Joseph Hustler was one of the trustees he was also named in the patent as one of the beneficiaries (as were also the other two trustees), and, as argued by respondent, it is a presumption "That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest." Code Civ.Proc., sec. 1963, subd. 37.

[3] The trial court made no express finding on the issue of whether respondent had proved a record title but apparently based its judgment upon the finding that title of respondent was established by adverse possession. In view of the fact that we are satisfied that the record supports a judgment based on adverse possession it is unnecessary to discuss appellants' contention as to lack of proof of record title in respondent, although we believe that the record would also support such a finding.

With reference to the issue of adverse possession Jerome Coughlan and William Coughlan testified that they had been familiar with the Joseph Hustler property since about 1900, that they had lived in the immediate vicinity all of their lives, that they knew the ground while Mr. Hustler was alive and when he and his boys, William and James, worked the same for mining and that they knew the location of the Hustler house, barn, etc., on the property. It appears that they were familiar with the land claimed by Hustler and its location and boundaries, that they received permission from Will Hustler to graze and pasture their cattle on the land, that they did so until Joseph Hustler's death and continued doing so up to the time of the trial. It was also shown that whenever cattle belonging to others strayed on the land, the Coughlans chased them off, and that the Coughlans have caused trespassers to be evicted and kept unauthorized persons from mining on the land.

Sometime prior to 1913, Joseph and James Hustler moved to Cherokee to live, but Will Hustler remained living on the land. About 1919 Will Hustler moved to Columbia Hill, but he continued mining the property until 1923 or 1924. From about 1921 on, William Coughlan did some mining on South Shady Creek, which apparently was on the land involved.

About two years before his death Will Hustler lived with Jerome Coughlan. Prior to his death in 1933, Will Hustler executed a gift deed of his rights in the

land to May Campbell (sister of William and Jerome Coughlan). From that time on, May Campbell paid the taxes upon the property and the Coughlan men "took charge of the ground because she was not able to go down there." For a period of two years the taxes became delinquent, but were redeemed and the taxes were then kept paid up to the time of trial.

Appellants contend that respondent did not prove possession, that the adverse use was that of others and not by respondent or his decedent, that the grazing of cattle was not a sufficient use, as it was not enclosed land and cattle belonging to others also grazed on this area, that the ground was primarily used for mining purposes and the grazing was limited, that the grazing was not confined to the description as set forth in the complaint, and that the complaint alleges adverse possession in both respondent and the San Juan Gold Company, yet the judgment declares only adverse possession by respondent, and that this variance is fatal. It is also contended that respondent failed to prove payment of the taxes for five years, or that such payment was on the particular parcels described in the complaint, that the taxes were not paid by respondent, but by an independent third party, and that even if payment was in behalf of respondent, since the taxes were allowed to go delinquent in 1934 and the property was not redeemed until 1936, the period of five years was interrupted and therefore respondent's proof on this point failed.

[4–6] The record shows that respondent proved possession in Joseph Hustler and his sons of the lands involved from at least 1900 to 1913 when Joseph died. After that time all uses and operation of said lands were made and conducted by the heirs of Joseph Hustler, Will and James, and by their tenants or individuals permitted to operate on the lands in subordination of the alleged legal title. The acts in regard to the land by the Coughlans were conducted under permission of the Hustlers to so use the land, and since they were in privity with the one asserting ownership rights in the land, such acts inured to the benefit of respondent. Possession by the heirs or their successors in interest is properly proven and shown to be possession by the administrator during the period from the death of Hustler to the appointment of his administrator. The possession of the heirs and successors in interest was not hostile in nature to the estate. This is likewise applicable to the payment of the taxes by the successors in interest of the rights of the heirs and therefore payment of the taxes by May Campbell inured to the benefit of the administrator, respondent, in regard to maintaining the present action.

The land was primarily used for mining purposes, but testimony related that the pasturage was considered good, at least along South Shady Creek and wherever the water circulated on the land. Not only did the Coughlans graze their cattle on this land during the years, but William Coughlan also did some mining on the property. Trespassers and other unauthorized persons were removed from or kept off the property. The Coughlans testified that they knew the location of the boundaries of the Hustler property and that they grazed their cattle on it and continually herded stray cattle of others off the land; they also grazed their cattle on other lands, and in the later years from about 1925 on they pastured their cattle during the winter months about twenty-five miles to the south of the lands involved.

The evidence shows that all the taxes levied or assessed on the lands in question during the period of 1933 to 1940 were paid, as aforementioned, and the tax papers in evidence were the only ones on record with descriptions concerning the lands involved.

[7] We do not agree with appellants' contention that since the taxes on the property were permitted to go delinquent in 1934 and there was no redemption until 1936, the interruption of the five year period defeated respondent's claim of adverse possession. The leading case of Owsley v. Matson, 156 Cal. 401, 404–405, 104 P. 983, considered this point and the court held that where the tax became delinquent and a sale occurred and re-

demption was made while the party or his successor in interest was in undisturbed possession and all of this was done in good faith, it was sufficient to bring the occupant within the terms of the statute which requires payment of taxes by him. The Owsley case distinguishes the earlier case of McDonald v. McCoy, 121 Cal. 55, 53 P. 421, cited by appellants on this point and points out that in the McDonald case the person in possession had failed to pay any taxes during his possession and the redemption took place after he had ceased to have possession.

[8, 9] There is no merit in appellants' contention that respondent did not prove a sufficient degree of possession of the property, as is apparent from the evidence hereinbefore set forth. Equally without merit is appellants' contention that there is a fatal variance between the complaint and the judgment because the complaint alleges adverse possession as to both respondent and the San Juan Gold Company. A dismissal as to plaintiff San Juan Gold Company was entered at the outset of the action and it is clear that respondent sought by evidence throughout the trial to establish his title. It is elementary that a variance between pleading and proof is immaterial where a party has not been misled thereby to his prejudice. The rule is thus stated in 21 Cal.Jur. 264, as follows:

> "A variance between an allegation and proof is immaterial where it has not actually misled, or could not mislead, the adverse party to his prejudice in maintaining his action or defense upon the merits."

[10–12] There is no merit in appellants' contentions regarding the admissibility of certain documents and other items as foundational data for the testimony of the witnesses, mainly Mr. Taylor. Many of them were ancient documents within the meaning of section 1963(34) of the Code of Civil Procedure, and the objection goes to their weight as evidence rather than to their admissibility. It may be that some of the field notes and maps were not authenticated and were hearsay, but this action was tried by a judge who could give them the weight to which they were entitled. In a case such as this, such evidence is often the best obtainable and the judge is competent to weigh it for what it is worth. Even if the trial court incorrectly admitted any of the documents as contended by appellants, it does not appear that they suffered any prejudice which would warrant a reversal of the case. Cal.Const., Art. VI, Sec. 4½. Furthermore, this evidence which appellants claim was erroneously admitted related only to the issue of the record title, and as hereinbefore pointed out there is ample evidence to support the judgment on the ground of adverse possession.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

131 Cal.App.2d 705

Archie L. JOHNSTON, Plaintiff and Respondent,

v.

Salvatore C. ORLANDO and Peter Orlando, Defendants and Appellants.

Civ. 16263.

District Court of Appeal, First District, Division 1, California.

March 22, 1955.

Employee of contractor brought action against owner of realty, who had contracted with contractor to clear irrigation pipe of debris, and owner's son, for injuries sustained by employee when his hand was crushed by cable attached to owner's tractor, which was operated by son to assist contractor with the work, when owner allegedly signaled son to start tractor. The Superior Court of the County of Santa Clara, Elmer D. Jensen, J. pro tem., entered judgment for employee, and owner and son appealed. The District Court of Appeal, Bray, J., held

that evidence sustained implied finding that owner and son undertook duty of operating tractor and giving necessary signals therefor but failed to perform the duty with due care, and that question whether employee assumed the risk of harm was for jury, and that refusal to give instruction on unavoidable accident was not prejudicial error.

Judgment affirmed.

1. Automobiles ⇐244(2)

In action by employee of contractor against owner of realty, who had contracted with contractor to clear irrigation pipe of debris, and owner's son, for injuries sustained by employee when his hand was crushed by cable attached to owner's tractor, which was operated by son to assist contractor with the work, when owner allegedly signaled son to start tractor, evidence sustained implied finding that owner and son undertook duty of operating tractor and giving necessary signals therefor, and failed to perform duty with due care.

2. Negligence ⇐4

He who undertakes to do an act must do it with reasonable care.

3. Negligence ⇐105

Negligence of a joint tort-feasor is not a defense.

4. Parent and Child ⇐13(1)

A father may be liable for the tortious act of his son, if father has directed or encouraged or ratified the act by accepting its benefits.

5. Master and Servant ⇐318(1)

One, who entrusts work to independent contractor, but who retains control of any part of the work, is subject to liability for bodily harm to others, for whose safety he owes duty to exercise reasonable care, if harm is caused by his failure to exercise his control with reasonable care.

6. Automobiles ⇐245(67)

In action by employee of contractor against owner of realty, who had contracted with contractor to clear irrigation pipe of debris, and owner's son, for injuries sustained by employee when his hand was crushed by cable attached to owner's tractor, which was operated by son to assist contractor with the work, when owner allegedly signaled son to start tractor, question whether employee assumed risk of injury was for jury.

7. Appeal and Error ⇐1067

In action by employee of contractor against owner of realty, who had contracted with contractor to clear irrigation pipe of debris, and owner's son, for injuries sustained by employee when his hand was crushed by cable attached to owner's tractor, which was operated by son to assist contractor with the work, when owner allegedly signaled son to start tractor, refusal of requested instruction on unavoidable accident was not prejudicial error.

Rankin, O'neal, Luckhardt, Center & Hall, San Jose, Byron J. Snow, Santa Clara, of counsel, for appellants.

Morgan & Beauzay, San Jose, for respondent.

BRAY, Justice.

Defendants appeal from a judgment on a jury verdict of $5,000 in favor of plaintiff in a personal injury action.

Questions Presented.

1. Whether the evidence brings the case within the general rule that one who voluntarily assumes a duty by affirmative conduct must exercise due care in performing that duty, Prosser on Torts, 194–197. 2. Should an instruction on unavoidable accident have been given?

Evidence.

Defendant Salvatore C. Orlando owned property through which El Camino Real ran. A cement irrigation pipe, 12 inches in diameter and 150–160 feet long, extended under the highway from one part of Salvatore's property to the other. Salvatore contracted with A. J. Peters & Sons for the latter to clear the pipe of debris which had collected therein. Plaintiff was employed by Peters as a laborer. Byrne was Peters' foreman in charge of the work. After unsuccessfully trying a different method for cleaning the pipe, Byrne devised the fol-

lowing one: A well driller's "bucket" (a piece of pipe closed at one end) was pulled into the pipe until it met resistance. It was then backed out and emptied. At first a single winch truck was used for power. In order to pull from both sides it was necessary to disattach the cable from the truck on the one side, drive across the highway, and attach a pull on the other side. On the second day, Salvatore became dissatisfied with the time consumed in the operation and its cost. He suggested that he and his son, defendant Peter Orlando, could take care of the work on one side of the highway utilizing their tractor and eliminating the need for Byrne's presence in a supervisory capacity. Byrne agreed to this suggestion, it being understood that neither Salvatore nor Peter were being hired. Thereafter on one side of the highway the cable was pulled by a winch operated by the contractor's employee Price, and on the other side of the highway by a tractor operated by defendant Peter. After Salvatore and his son volunteered aid, Byrne took off one of the men on the crew. Byrne knew that the job was dangerous in the sense that all construction jobs are dangerous.

Plaintiff's job was to remove the debris from the bucket after each run on the pipe. He was stationed in a manhole or stand-pipe, wearing gloves to protect his hands. The morning of the accident (third day) Byrne took plaintiff and Price out on his pickup truck. He stayed long enough to set up the job, watch several runs on the irrigation pipe and see plaintiff empty the bucket several times. From this point on the testimony becomes sharply contradictory. Byrne testified he stopped giving signals and then started to leave for another job. Salvatore, standing at the manhole, took over the giving of signals five to ten minutes later. As Byrne was heading for his truck he heard plaintiff yelling. Byrne ran back to the manhole and found plaintiff in it with his hand wedged between the cable and the side of the manhole. Salvatore was there shouting angrily at his son Peter on the tractor. Byrne testified he was not giving the signals to the tractor and was not near the manhole at the time of the accident. Plaintiff testified that when he went into the manhole Salvatore was standing near it in a position to give signals and that Salvatore was to signal Peter. While in the manhole he could not see Salvatore. The bucket came to the manhole and stopped. He picked it up to empty it. Suddenly the tractor started, causing the cable to pull taut and it crushed plaintiff's hand between it and the side of the manhole. (It is conceded that plaintiff's hand was badly injured.) About a month later, he and one Santana talked to Salvatore and Peter about the accident. Salvatore admitted giving signals to Peter. Peter stated that his father gave the signals but because of trees they were difficult to see. Santana testified to the same effect. Salvatore and Peter did not deny making these statements. They merely could not remember making them.

Defendant Peter, aged 20, testified that he operated the tractor on signal from Byrne, that he could not see plaintiff in the manhole. It was Byrne, not Salvatore, that told him to operate the tractor, although he was not hired by or did not expect compensation from him or his company. At the time of the accident Salvatore was merely a spectator, standing 15 feet away from the manhole. It was Byrne who gave the signal that caused him to start the tractor, resulting in plaintiff's injury. Peter contradicted Byrne and claimed that the tractor was used from the very beginning of the bucket operation, rather than the winch being moved back and forth across the highway. Peter and Salvatore both denied that Salvatore had used angry words towards Peter immediately following the accident.

Salvatore testified that Byrne asked him if he had a tractor which could be used. He said he had. Byrne asked Peter to drive without asking Salvatore's permission. Salvatore did not discuss saving money with Byrne. Byrne gave the fatal signal. Salvatore was 15 feet away from the manhole. Salvatore did not give signals at any time nor participate in the job in any way.

1. Liability.

[1] Defendants contend that they owed no duty to plaintiff because the plan of removing the debris was not defendants' and that plaintiff entered the stand-pipe and

undertook to guide the bucket at Byrne's instance, and not at defendants'. This contention overlooks the theory upon which plaintiff is entitled to recover. The testimony of plaintiff and Byrne to the effect that Salvatore undertook the sole control of the tractor, supported, too, by the testimony of plaintiff and Santana as to the admissions of the defendants, was sufficient if believed by the jury (and it obviously was) to support the implied finding that defendants undertook the duty of operating the tractor and giving the necessary signals therefor, and failed to perform the duty with due care. The jury having found, in effect, that it was not Byrne's duty to give signals at this time and that he did not, the accident, under the evidence, could have occurred in only one of two ways, either of which would make defendants liable therefor. Either Salvatore gave the signal without observing plaintiff's precarious position (no one testified to seeing Salvatore give a signal), or he gave no signal and Peter started the tractor without it. In the latter event, as Peter was employed by and working for Salvatore at the time, Salvatore would be liable for Peter's negligence under the doctrine of respondeat superior.

[2–5] Citing Been v. Lummus Co., 76 Cal.App.2d 288, 173 P.2d 34, to the effect that liability for handling dangerous instrumentalities arises from failure to use due care, and that such failure arises only when the circumstances show that the actor had reason to know that his act was likely to produce injury to the other party, defendants claim that the risk of harm here was the basic method devised by Byrne to clean the pipe and that therefore the negligence was that of Byrne, not defendants. Assuming the method to have been dangerous, nevertheless at least one proximate cause of the injury was defendants' failure to use due care in the operation of the tractor. He who undertakes to do an act must do it with reasonable care. See 38 Am.Jur. 659, Negligence, § 17; Restatement, Torts, §§ 283, 289. At best, Byrne would have been a joint tort-feasor with defendants, and, of course, the negligence of a joint tort feasor is not a defense. See 19 Cal.Jur. 664. The motivating force behind the cable was in the sole control of defendants. The suggestion that defendants did not know that pulling the cable without regard to what plaintiff was doing with the bucket at the moment would be dangerous, merits no discussion. If Salvatore signalled without looking at plaintiff, or if Peter started the tractor without a signal, they did "an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another. * * *" Restatement, Torts, § 284. Salvatore would be liable for defendant Peter's negligence. "Apart from any basis of the family relation itself, one member of the family may of course be held responsible for the torts of another to the same extent as for those of any other person. Thus a father may be liable for the tortious act of his son if he has directed or encouraged it, or has ratified it by accepting its benefits. Also, of course, the son may act as the agent or servant of the father, and to the extent that the tort is committed within the scope of the agency the parent may be liable." Prosser on Torts, p. 913. "One who entrusts work to an independent contractor, *but who retains the control of any part of the work,* is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement, Torts, § 414; emphasis added.

[6] Defendants contend that plaintiff assumed the risk of injury. Apparently this contention is based upon the fact that plaintiff testified he knew that the tractor driver could not see him while in the manhole and that he did not actually know whether Salvatore, whom he testified was supposed to signal and who was standing by the manhole when he went in it, was actually standing there after he got in. He did not look to see. This certainly does not constitute assumption of risk as a matter of law. Whether, under the circumstances of this case plaintiff was justified in relying on defendants' duty under the circumstances to exercise due care was a question of fact for the jury. The cases cited by defendants on this point are readily distinguishable.

In King v. Griffith Co., 65 Cal.App.2d 114, 150 P.2d 8, an employee of a subcontractor was injured while attempting to step over a sewer ditch. The court held that the danger of attempting to cross the ditch was *obvious*. In Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 157 P.2d 57, the court referred to the rule that a contractor is not ordinarily liable for injuries to workmen resulting from defects which are clearly visible or obvious or are constructively or actually known to the workmen but held it not applicable to the facts of that case, as the accident was not due in any way to the shortness of the ladder which shortness was obvious to the plaintiff.

There is a considerable difference between the obvious dangers of those cases and the situation here. Had defendants performed their duty (plaintiff had the right to assume they would), plaintiff's position in the manhole was not necessarily a dangerous one. It would be a curious rule of law which would hold that a person relying on the use of due care by persons owing that duty to him, in the absence of anything indicating they would not use it, was assuming the risk of their nonperformance and therefore could not recover for their negligence.

2. Instruction on Unavoidable Accident.

[7] "The recent decision of the Supreme Court in Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, indicates that the giving of such an instruction might not have been improper. That decision has been interpreted as meaning that 'the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law.' Driver v. Norman, 106 Cal.App.2d 725, 727, 236 P.2d 6, 8." Taylor v. Luxor Cab Co., 112 Cal.App.2d 46, 56, 246 P.2d 45, 50. However, as said in the Taylor case, "it does not follow that the failure to give such an instruction in our case was reversible error." 112 Cal.App.2d at page 56, 246 P.2d at page 51. As there, the element of inevitability or unavoidability claimed here, turns upon defendants' claim that plaintiff failed to prove that defendants were negligent. The trial court fully instructed the jury that plaintiff could recover only if plaintiff proved defendants to be negligent and that such negligence proximately caused the accident.[1] A further instruction to the effect that a failure to prove defendants' negligence constituted inevitable accident could not possibly have changed the verdict. As said in Gunter v. Claggett, 65 Cal.App.2d 636, 642, 151 P.2d 271, 274, "* * * unavoidable accident is simply another way of urging that defendant was not negligent. The jury has found, and the finding is supported, that defendant was negligent. No prejudicial error occurred in failing to instruct on this issue." To the same effect, Guay v. American President Lines, 81 Cal.App.2d 495, 514, 184 P.2d 539. Defendants' evidence was to the effect that it was Byrne's duty to signal Peter and that Byrne actually gave the signal that caused Peter to start the tractor, thereby causing the accident.[2] Plaintiff's evidence was that it was Salvatore's duty to signal and that either Salvatore failed to signal, or if he did that Peter either disregarded the signal or started the tractor without signal. "Inasmuch as 'the terms inevitable or unavoidable accident signify an injury which is caused by something other than the actionable negligence of the parties involved,' and the '"* * * defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence if any, was not the proximate cause of the injury"'. Parker v. Womack, supra, 37 Cal.2d 116, 120 and 120–121, 230 P.2d 823, 826, and the jury was fully advised on those subjects, we find no reversible error in the trial court's failure to give the proffered instructions on inevitable or unavoidable accident." Taylor v. Luxor Cab Co., supra, 112 Cal.App.2d at page 57, 246 P.2d at page 51.

1. Moreover, the jury were instructed that if it found that Peter was acting under the direction of Byrne, plaintiff could not recover.

2. Defendants do not concede that the accident was caused by the tractor pulling the cable. They contend that the evidence does not show how the accident occurred. However, plaintiff's own testimony fully justifies the conclusion that it was so caused.

In Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 245 P.2d 583, 589, the court lists cases in which it was held that the failure to give the unavoidable accident instruction was not error, and referred to Jaeger v. Chapman, 95 Cal.App.2d 520, 213 P.2d 404, as holding that while it would not have been improper to give such an instruction in that case, it "'* * * was not error to refuse to give it where all elements of defendant's liability were covered by other instructions.'" (They were in our case.) The court then discusses the Parker v. Womack case, supra, pointing out that there the trial judge gave such an instruction, but on motion for new trial was convinced he had erred. The Supreme Court held that it was not prejudicial error under the circumstances to give it. Then says the court in the Lloyd case, supra, 111 Cal.App.2d at page 637, 245 P.2d at page 590, "But the holding that it was not prejudicial error in that case to *give* the instruction, does not mean that it was prejudicial error in this case to *refuse* it." So, in our case it was not prejudicial error to refuse it.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

131 Cal.App.2d 788

Frank P. H. ALDRICH et al., Plaintiffs-Respondents,

v.

TRANSCONTINENTAL LAND & WATER COMPANY, a corporation, et al., Defendants,

Transcontinental Land & Water Company, a corporation, and Continental Subdivisions, Inc., a corporation, Appellants.

Civ. 20323.

District Court of Appeal, Second District, Division 3, California.

March 25, 1955.

Action by 98 purchasers of land to rescind contracts of purchase and to recover money paid. Vendors' assignee commenced action against 13 of purchasers in Municipal Court to recover balance due on contracts. Purchasers moved for temporary injunction restraining assignee from prosecuting Municipal Court actions. The Superior Court, Los Angeles County, Arnold Praeger and Frank G. Swain, JJ., granted preliminary injunction and denied motions to vacate injunction. Vendors appealed. The District Court of Appeal, Parker Wood, J., held that where complaint alleged that vendors entered into a scheme to defraud purchasers by false representations as to value and location of land, and made such false representations to each purchaser, and same form of contract was used in sales to all purchasers, there were questions of law and fact which were common to all the parties to the action and purchasers were properly joined, although sales to each purchaser were at different time and place.

Orders affirmed.

1. Vendor and Purchaser ⇐123, 341(1½)

Where 98 purchasers joined in action to rescind contract of purchase and to recover money paid vendors, alleged that vendors entered into a scheme to defraud purchasers by making false representations as to value of land, and such false representations were made to each purchaser, and same form of contract of sale was used in sales to all purchasers, there were questions of law and fact common to all the parties to the action, purchases were series of transactions and purchasers could join as plaintiffs, although sales to them were at different times and places. West's Ann. Code Civ.Proc. § 378.

2. Courts ⇐121(4)

Statutes conferring jurisdiction on inferior courts of demands below a certain amount do not forbid determination of such demands in Superior Court, where they are connected with a larger claim or with a type of demand solely within the jurisdiction of the Superior Court.

3. Action ⇐45(1)
Courts ⇐121(4)

In action by 98 purchasers of land to rescind contracts of purchase and to recov-

er money paid, where 57 of groups of causes of action were for amounts within jurisdiction of Municipal Court, and three of groups were for amounts within jurisdiction of Superior Court, Superior Court had jurisdiction of causes of action for amounts within jurisdiction of Municipal Court, and two classes of cause of action were properly joined. West's Ann.Code Civ.Proc. § 378.

4. Injunction ⇐26(4)

An injunction may be granted where it is essential to promote the ends of justice, so that an entire controversy should be determined in one proceeding, to prevent the pendency of two or more actions involving the same subject matter, to prevent a partial litigation of the controversy or to prevent a multiplicity of suits depending on the same facts or principles.

5. Injunction ⇐32

Where 98 purchasers of land had commenced action to rescind contracts of purchase and to recover money paid, and after commencement of action, vendors' assignee commenced actions against 13 purchasers in Municipal Court to recover balance due on contracts, Superior Court did not abuse its discretion in enjoining assignee from prosecution of Municipal Court actions. West's Ann.Code Civ.Proc. §§ 416, 526, subd. 6.

Gendel & Raskoff, and Douglas Badt, Los Angeles, for appellants.

Homer C. Compton, Los Angeles, for respondents.

PARKER WOOD, Justice.

Appeal by certain defendants from preliminary injunction and from orders denying motions to vacate the injunction.

There are 98 plaintiffs herein. The amended complaint sets forth 60 alleged "Counts", and each "Count" sets forth two alleged "Causes of Action." In each "Count" one or more of the plaintiffs make the allegations in each of the two causes of action in the "Count." The first of the two causes of action in each "Count" alleges a rescission of a contract to purchase real property from defendants Continental Subdivisions, Inc., or Transcontinental Land & Water Company, and seeks a return of money paid, and the second cause of action is for money had and received. In other words, the amended complaint is in effect a complaint wherein there are 120 causes of action, and wherein certain of the 98 plaintiffs appear as the plaintiff or plaintiffs in 60 groups of two causes of action—one cause of action being to recover money after rescission and the other cause of action being for money had and received. Fifty-seven of the "60 groups" were for amounts that were within the jurisdiction of the municipal court; and 3 of those groups were for amounts within the jurisdiction of the superior court.

The complaint herein was filed on April 7, 1952. Defendants Continental and Transcontinental demurred to the complaint, and the demurrer was sustained on July 24, 1952. On July 29, 1952, said defendant Continental assigned its rights in 13 of said contracts of purchase to defendant M. Allis for the purpose of collection. It thus appears that when Continental made said assignments it knew that this present action was pending in the superior court. On July 29, 1952, Allis commenced 13 actions in the municipal court of Los Angeles to recover the amounts due on the contracts.

On August 28, 1952, the plaintiffs herein filed an amended complaint, and they also filed a supplemental complaint for an order restraining the defendants herein from proceeding with the municipal court actions pending the trial of this present action.

The defendants in the 13 actions failed to appear therein and their defaults were entered on September 3, 1952. Their motions to be relieved from the defaults were granted by the municipal court on October 21, 1952. On October 29, 1952, Allis appealed to the appellate department of the superior court from the orders granting such relief.

On May 27, 1953, while the appeals from those orders were pending, the superior court issued an order requiring Continental Subdivisions, Inc., and Allis to show cause why they and their agents should not be restrained during the pendency of the present action from prosecuting the municipal

court actions or bringing any new actions involving the contracts involved in the present action. Also on that day, the superior court issued a temporary restraining order so restraining said defendants.

On June 5, 1953, the superior court made a minute order granting such a preliminary injunction as to defendant Continental Subdivisions, Inc. On June 9, 1953, the superior judge signed and filed a preliminary injunction enjoining Continental Subdivisions, Inc., and its agents from prosecuting the municipal court actions or bringing further actions against plaintiffs herein involving the contracts which are the subject of the present action.

On June 22, 1953, defendants Continental Subdivisions, Inc., and Allis made a motion (in the superior court) for an order vacating the preliminary injunction or for an order modifying the injunction to permit Allis to file a reply brief on appeal in the municipal court actions. On July 1, the injunction was so modified.

On July 13, 1953, the orders of the municipal court, relieving the defendants in the 13 actions from default, were reversed. Judgments have not been rendered in the municipal court upon the defaults.

On July 17, 1953, Continental Subdivisions, Inc., filed a notice of motion to vacate the preliminary injunction or to modify it to permit Continental and its agents to proceed with the municipal court actions and enter judgments therein. On July 24, 1953, said motion was denied.

The appeal in the present case is by defendants Continental Subdivisions, Inc., and Transcontinental Land & Water Company. They appeal from the minute order granting the preliminary injunction; from the preliminary injunction; from a purported order of July 1, 1953, and from an order of July 24, 1953, denying motions to vacate the preliminary injunction.

Appellants contend that the superior court did not have jurisdiction to enjoin them from proceeding in the municipal court actions. They argue that there was a misjoinder of parties plaintiff in that there was no question of law or fact which was common to all the parties to the action as required by section 378 of the Code of Civil Procedure; that in each of the "60 groups" of causes of action a different parcel of real property is involved; that in each sale a different plaintiff or plaintiffs were involved; that each contract is a separate contract in which no other plaintiff or plaintiffs have any interest; that plaintiffs allege that several types of alleged misrepresentations were made by defendants at different times, in different places and concerning different parcels of property. Said section 378 provides: "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist * * * where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; * * *."

It was alleged in substance in the first causes of action that about March 11, 1948, defendants entered into a scheme to cheat and defraud the public and particularly said plaintiffs, in that, defendants purchased certain tracts of land in Kern County for the purpose of subdividing said lands and creating fictitious values for them by making false representations relative to their value and location, knowing that said lands were not readily accessible, that they would be sold without previous inspection and that the purchasers would be dependent on information given them by defendants; as a part of said scheme defendants caused to be incorporated certain companies, named as defendants herein, for the purpose of holding title to said lands and shielding defendants from individual liability.

It was further alleged therein that through such corporations the following false representations were made to each of the plaintiffs: there was being constructed on said lands a community of stores, churches, residential and rental units, known as Rocket Town, and that paved streets and sewers were in or would be in by a certain date; Rocket Town was at the gates of a testing station being operated by the federal government; there was a great demand for housing by employees of said

station; thousands of the employees were ready to purchase lots and houses and there was a ready resale market for all lots sold to plaintiffs; FHA loans were available for investors for rental housing and business buildings; by means of maps, printed in literature distributed by defendants to plaintiffs, relative locations of said lands with respect to important highways and communities were so contorted as to give the impression that the lands were close to the highways and communities whereas they were separated by hundreds of miles; in the printed form of contract defendants represented that if there was no inspection of the property and if it was not as represented in the literature which accompanied the contracts that plaintiffs' money would be refunded; the project was the "Beverly Hills" of the desert; there was a desperate need for housing in Rocket Town and it had a sensational future; lot owners in said tract were qualified to procure 100 per cent financing under the "Wherry bill"; hundreds of people working for the testing station were living in tents and shacks; construction for lot owners would cost $4.-50 per square foot; there would be plenty of water at all times; various businesses were ready to go into Rocket Town, and lots had been sold to chain drugstores and food stores; the government testing station was permanent, and the government intended to increase its personnel as soon as additional housing was available in the vicinity.

It was alleged further therein that all of said representations were made with full knowledge of their falsity with intent to deceive plaintiffs; said false representations were relied upon by plaintiffs who were induced thereby to purchase the property (specifically described therein); contracts and deeds were executed by defendants Transcontinental Land & Water Company or Continental Subdivisions, Inc., and plaintiffs paid certain sums (specifically set forth therein) to defendants as the purchase price or on account of the purchase price of said property; a copy of the contract between defendants and one of the plaintiffs herein is attached to and made a part of the complaint; said copy is the same form which defendants used in making sales of the property to the other plaintiffs herein; about February 18, 1952, plaintiffs served upon defendants Transcontinental and Continental notices of rescission, the form and substance of which are set forth in exhibits attached to and made a part of the complaint; in the notices of rescission plaintiffs demanded the return of all things of value received by defendants from plaintiffs, and offered to reconvey the property to defendants upon receipt of all sums paid to defendants; defendants had failed and refused to pay said sums or any part thereof; the property is not worth the sums which plaintiffs paid or agreed to pay for it, and each lot sold to the various plaintiffs is not worth in excess of a certain amount specified in the complaint—the amounts specified as the value of the various lots range from $5 to $30.

It was further alleged therein that plaintiffs were lulled into a false sense of security and were precluded from asserting their rights immediately upon discovery of the falsity of the representations, due to further misrepresentations of defendants to the effect that the building program was being held up principally for the reason that defendants were attempting to get better financing from FHA for the investors; and for the further reason that when individual plaintiffs herein complained to defendants about their failure to carry out their promises, the defendants informed said plaintiffs that plaintiffs could not prevail in any action against defendants for misrepresentation due to a provision in the contracts to the effect that vendors were not liable for any misrepresentations of their agents not contained in said contracts, and that if the plaintiffs failed to obtain judgment against defendants, the plaintiffs would be liable for all costs and attorneys' fees incurred by defendants; plaintiffs believed said representations and were thereby intimidated until an association of dissatisfied purchasers (plaintiffs) of said lands was formed and plaintiffs were advised by counsel; immediately upon becoming aware of their rights, plaintiffs gave notices of rescission to the defendants.

It was alleged in the second causes of action that on or prior to February 18, 1952, defendants received from plaintiffs for the use of plaintiffs certain sums of money (specifically set forth therein); on said February 18, plaintiffs demanded of defendants payment of such sums; defendants have not paid any part thereof.

[1] The allegations of the complaint present questions of law and fact which are common to all the parties to the action. Some of those questions are whether: (1) Defendants entered into a scheme to cheat and defraud the plaintiffs by making false representations relative to value and location of the subdivided land. (2) Defendants, as a part of the scheme, incorporated certain companies for the purpose of shielding individual defendants from liability. (3) False representations, as specifically alleged, were made to each plaintiff relative to buildings that were being constructed on the land, and relative to streets and sewers that were on the land; that there was a great demand for housing in Rocket Town by employees of a testing station operated by the federal government; that FHA loans were available; that maps, in literature distributed by defendants to plaintiffs, gave false impression as to the relative locations of highways and communities; that lots were actually sold to chain stores; that there would be plenty of water. (4) Defendants represented in the contracts made with plaintiffs that, if there was no inspection of the property and if the property was not as represented in the literature which accompanied the contracts, the plaintiffs' money would be refunded. (5) The same form of contract was used in the sales to all the plaintiffs. (6) Plaintiffs served upon defendants the same form of notice of rescission, and all those notices were served about February 18, 1952. (7) The various lots were practically worthless. (8) Plaintiffs were lulled into a false sense of security and precluded from rescinding immediately, by reason of misrepresentations regarding a delay in the building program and regarding attempts to get better FHA financing for investors.

Adams v. Albany, 124 Cal.App.2d 639, 269 P.2d 142, was an action by 78 plaintiffs for damages based on conspiracy and fraud of defendants in the sale of houses to plaintiffs (war veterans and wives). A demurrer to the second cause of action on the ground of misjoinder of parties was sustained without leave to amend. It was alleged in said second cause of action that defendants fraudulently conspired to and did obtain priorities (under the provisions of the Veterans' Emergency Housing Act of 1946) for materials, and that the houses they built were not in conformity with specifications submitted with the applications for priorities; the plaintiffs relied upon representations of defendants that the houses were built according to the specifications. Those allegations were followed by special allegations relating to the house purchased by each of the 40 separate sets of plaintiffs. The court therein held that a community interest in the questions of law and fact sufficiently appeared to meet the statutory requirement and to permit plaintiffs to join in the action. It was stated therein, 124 Cal.App. at page 647, 269 P.2d at page 147: "One scheme is alleged, based on conspiracy and fraud, depending upon the same basic misrepresentations, and leading to a series of transactions exactly similar in kind and manner of operation which have affected all of the plaintiffs." It was also said therein, Id., 269 P.2d at page 147: "The controlling questions of law, relating to liability, are the same with respect to each of the plaintiffs. A very large part of the evidence as to one of the series of incidents would be equally applicable to the others. While some of the evidence, as to details and amounts, would vary with respect to the different plaintiffs, no good reason appears in law or in reason to compel the filing of 40 separate actions, with a resulting duplication, that many times, of all of the evidence."

Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682, was an action commenced by 193 plaintiffs, each claiming a separate and independent cause of action for damages caused by alleged fraud of defendants. Each cause of action therein was in substance that defendants conspired to organ-

ize a corporation and to float its stock at more than actual value; defendants prepared and circulated throughout the country a prospectus which misrepresented the value of the stock; plaintiffs relied upon the alleged truthfulness of the prospectus and were induced thereby to purchase stock at prices far in excess of its value. It was held therein that the causes of action presented common issues which were basic, and that there was not a misjoinder of plaintiffs. It was stated therein, 144 N.E. 684, that the questions common to the causes of action were whether defendants conspired to organize a corporation and float its stock at more than its real value, whether in pursuance of the conspiracy they fraudulently issued a prospectus showing the stock to be much more valuable than it really was, and whether they did this with intent to defraud the public by inducing it to buy the stock at an unconscionable value.

Appellants argue further to the effect that since the sales were made at different times and places, the sales did not arise out of the same transaction or series of transactions within the meaning of said section 378. In Akely v. Kinnicutt, supra, it was said further, 144 N.E. 684: "Then it is urged by appellants that there is lacking that feature, essential to the collection in one complaint of all of these causes of action, that they should be 'in respect of or arising out of the same transaction or series of transactions.' We do not find any basis for this claim. Each cause of action is based upon a purchase of stock at a fictitious value in reliance upon representations, as alleged, of defendants in respect of the value of that stock, which were untrue and fraudulent, and made for the purpose of inducing the public including plaintiff to make such purchases. The transaction in respect of or out of which the cause of action arises is the purchase by plaintiff of his stock under such circumstances, and such purchases conducted by one plaintiff after another respectively plainly constitute a series of transactions within the meaning of the statute * * * and the many purchases by plaintiffs respectively do not lose their character as a series of transactions because they occurred at different places and times extending through many months." In the present case the sales constituted a series of transactions within the meaning of said section 378.

There was not a misjoinder of parties plaintiff herein.

[2] As above stated, 57 of the groups of causes of action were for amounts that were within the jurisdiction of the municipal court, and 3 of the groups were for amounts within the jurisdiction of the superior court. It is conceded that if there is a proper joinder of plaintiffs the superior court has jurisdiction of the causes of action that are for amounts within the jurisdiction of the municipal court. In Kane v. Mendenhall, 5 Cal.2d 749, at page 756, 56 P.2d 498, at page 501, it was said: "Thus it appears that the former constitutional provisions and the present statutory provisions conferring jurisdiction on the inferior courts of demands below certain amounts have not been interpreted as forbidding determination of said demands in the superior court where they are connected with larger claims or with a type of demand solely within the jurisdiction of the superior court."

[3] As a summary, it may be said that the causes of action presented questions of law and fact common to all parties, that the causes of action arose out of the same series of transactions, that the causes of action for amounts within the jurisdiction of the municipal court were properly joined with causes of action for amounts within the jurisdiction of the superior court, and therefore there was not a misjoinder of parties plaintiff. The superior court had jurisdiction of the subject matter. In view of the supplemental complaint seeking an injunction, the superior court had jurisdiction to enjoin appellants from proceeding in the 13 municipal court actions.

[4, 5] Appellants contend further that the court erred in granting the injunction. They argue that the granting of the injunction was in effect the same as granting relief from the defaults; that the injunction did not prevent a multiplicity of actions, since the defaults had been entered

and nothing remained to be done except to enter judgments on the defaults; and that it was an abuse of discretion to grant the injunction. The 13 municipal court actions were commenced by Allis, appellants' assignee, for collection, about four months after the superior court action was commenced. Those 13 actions were based on 13 of the contracts of sale which were involved in the superior court action. Prior to the time the assignments of those claims were made by appellants to Allis, the appellants had appeared in the superior court action and, of course, knew that the superior court action was pending. Section 416 of the Code of Civil Procedure provides: "From the time of the service of the summons and of a copy of the complaint in a civil action * * * the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. * * * The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." In Curl v. Pacific Home, 108 Cal.App.2d 655, 239 P.2d 481, plaintiff sought declaratory relief with respect to a contract regarding her occupancy of a room, and she obtained a preliminary injunction enjoining defendant, during the pendency of that action, from prosecuting a municipal court action for unlawful detainer which defendant had commenced against her. The court said, 108 Cal.App.2d at page 661, 239 P.2d at page 485: "The portion of the injunction that enjoins the appellant from proceeding further with the municipal court action is clearly proper since the superior court through the service of process first obtained jurisdiction * * *." Section 526 of the Code of Civil Procedure provides: "An injunction may be granted in the following cases: * * * 6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; * * *." In Engleman v. Superior Court, 105 Cal.App. 754, at pages 759, 760, 288 P. 723, at page 725, Pomeroy's Equity Jurisprudence is quoted as follows: "'Where it is essential to promote the ends of justice that an entire controversy should be determined in one proceeding, so that, the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles.'" The court herein did not abuse its discretion in granting the injunction.

The notice of appeal herein recites in part that an appeal is taken from an order of July 1, 1953, denying a motion to vacate the preliminary injunction. The record does not show that there was such an order. The appeal from that purported order is dismissed.

The orders granting preliminary injunction and denying motion to vacate preliminary injunction are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

132 Cal.App.2d 25

In the Matter of the ESTATE of Jonas E. YOUNG, also known as Jonas Edward Young and as Jonas Young, Deceased.

Per Algot West, Appellant.

Patricia F. Moore, Respondent.

Civ. 8430.

District Court of Appeal, Third District, California.

March 29, 1955.

Rehearing Denied April 19, 1955.

Hearing Denied May 25, 1955.

Petitions for letters of administration upon estate of intestate. The Superior Court, Tehama County, Richard B. Eaton, J., rendered a decree adjudging that both petitioners were natural children of and entitled to inherit from intestate in equal shares, and from portion of decree so adjudging as to one petitioner, the other petitioner appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence

as to nonaccess by husband was sufficient to remove conclusive presumption as to legitimacy of child born to wife during marriage.

Portion of decree appealed from affirmed.

1. Appeal and Error ⇐931(1)

Where the proof is conflicting, that which supports trial court's determination must be taken as true on appeal.

2. Bastards ⇐3

Evidence that husband was absent from home and did not visit or see wife from August of 1925 until late in February, 1926, was sufficient to remove conclusive presumption as to legitimacy of child born to wife on September 9, 1926. West's Ann. Code Civ.Proc. § 1962, subd. 5.

3. Bastards ⇐3

Conclusive presumption of legitimacy may be removed by proper and sufficient evidence showing that husband, though not impotent, was entirely absent at the period during which child must in the course of nature have been begotten. West's Ann. Code Civ.Proc. § 1962, subd. 5.

4. Bastards ⇐6

In proceeding to establish petitioner's right to inherit as natural child of intestate, though born during mother's marriage to another, evidence supported findings that during period, in which petitioner in the course of nature must have been begotten, mother and husband were not cohabiting within statute establishing conclusive presumption of legitimacy and did not have sexual intercourse or opportunity therefor, and that mother's husband was not petitioner's father. West's Ann.Code Civ.Proc. § 1962, subd. 5.

5. Bastards ⇐3

In proceeding to establish right of petitioner to inherit from intestate, though born during mother's marriage to another, evidence substantially supported finding that mother's husband was not father of petitioner as against disputable presumptions of legitimacy established by statute. West's Ann.Code Civ.Proc. § 1963, subd. 31; West's Ann.Civ.Code, § 193.

6. Bastards ⇐6

In a case lying without the conclusive presumption classification, paternity is a fact to be proved as any other fact by a preponderance of the evidence. West's Ann. Code Civ.Proc. § 1962, subd. 5.

7. Appeal and Error ⇐1010(1)

Where conclusive presumption of legitimacy is not applicable, decision of trial court as to paternity, if substantially supported, must be upheld on appeal. West's Ann.Code Civ.Proc. § 1962, subd. 5.

Alfred E. Frazier, Red Bluff, for appellant.

Pugh & Webster, by Stanley Pugh, Red Bluff, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from that portion of a decree which adjudges that respondent Patricia F. Moore was the natural child of the deceased, Jonas E. Young, and entitled to inherit and succeed to his estate in equal shares with appellant, whom the same decree adjudged likewise to be the natural child of said deceased. Both appellant and respondent had petitioned the trial court for letters of administration upon the estate of Young who had died intestate. Each claimed to be the natural child of decedent and disputed the like claims of the other. It was stipulated that the trial court in determining which of the two was entitled to letters could determine the right of each as an heir. After a trial upon the facts the court found that each of the petitioners was a child and an heir of decedent, but found that neither ought to receive letters of administration because of the enmity between them and a third person was appointed as such personal representative. Patricia Moore did not appeal from that part of the decree which adjudges that Per Algot West, appellant herein, was entitled as a child of decedent to share equally with her.

[1] We will state the facts within the scope of the rule that where proof is conflicting that which supports the trial court's determination must be taken as true. Joseph H. Baker and Isabelle Mary Baker were married in 1907 and remained husband

and wife until the death of Baker at a time when respondent Patricia was about 13 years of age. She was born during this marriage, on September 9, 1926. Baker and a partner conducted a contracting and building business in San Francisco. In 1923 he moved his family to Tehama County and located them upon a parcel of farming and range land which he had purchased and which lay about 20 miles westerly from Red Bluff. It was mountain or foothill land and somewhat isolated. Having settled his family on the property, Baker returned to San Francisco and went on with his business there. From that time on he spent most of his time in San Francisco, visiting his family only occasionally, sometimes twice, sometimes three or four times, a year. Mrs. Baker was never in San Francisco after moving to Tehama County and the evidence shows that Baker was absent from Tehama County from August of 1925 to late in February, 1926. The evidence supports the inference that during this period Baker and his wife were not together. The normal date of conception of Patricia must be placed somewhere in the forepart of December. Decedent Jonas Young was, when the Baker family moved to Tehama County, an unmarried man about six years older than Mrs. Baker who lived on a neighboring ranch which he operated. Commencing shortly after Mrs. Baker came to Tehama County Young became a frequent visitor in her home. The two rode after stock together and became close companions. When Patricia attained school age she was sent to a convent at Santa Rosa and the evidence supports the inference that she was there mainly supported by Young for a period of seven years. Joseph Baker died October 22, 1939, and within a few months thereafter Mrs. Baker married Young. She immediately moved to his ranch home about a mile distant from her own, and Patricia was taken from the convent at Santa Rosa and brought to the new home where she resided, except for brief intervals, until Young's death in March, 1952. When she came to live with Young and her mother, Patricia was told by her mother that Young was her father. At her birth Patricia was normally developed for a nine months' baby. While she was at school in Santa Rosa Young visited Patricia on a number of occasions. When she was eight years old her mother told Mary, Patricia's older sister, that Young was Patricia's father, and she asked the older girl not to blame her mother too much nor to hold Patricia's illegitimacy against the child, but to be kind to her and to do whatever she could for her, all of which the older girl promised she would do. It was shown that upon Patricia's birth there was gossip in the neighborhood concerning her paternity, rumor having it that Young was her father. On many occasions during the years following the death of Joseph Baker, Young openly acknowledged respondent to be his child. Thus, in September, 1940, when Young, being an alien, was required to register as such, Patricia accompanied him to the place of registration wherein he answered to a question as to whether he had any children that he had one child, Patricia. In March, 1943, Patricia was before the juvenile court and Young was called as a witness on her behalf, the minutes of the court showing that "upon inquiry by said counsel witness [Young] acknowledged Patricia * * * as his daughter and that said minor was born on September 9, 1926." At that time he told the probation officer that Patricia was his daughter. Patricia's mother was in court during the proceedings referred to. Patricia was involved in a divorce action against her first husband in March, 1948, and Young then testified on her behalf that she could live in his home, that he would assist her to the best of his ability, that he had theretofore publicly acknowledged that she was his daughter and that he intended to leave his property or a substantial part of it to her. In April, 1950 he stated to an official census taker that Patricia was his child.

[2–4] Appellant first contends that this case falls within the provisions of Section 1962, subdivision 5, of the Code of Civil Procedure, which reads: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate". While, of course, Patricia is disputably presumed to be legitimate, having been born in wedlock during the existence of the marriage of Baker and her mother, we think that the foregoing facts

permit the trial court to treat the situation as not falling within the conclusive presumption classification. In re Estate of Walker, 180 Cal. 478, 181 P. 792; Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308, 309, and other cases, lay down the rule that a conclusive presumption may be removed by proper and sufficient evidence showing that the husband, though not impotent, was "entirely absent at the period during which the child must, in the course of nature, have been begotten". From the testimony in this case that Joseph Baker was absent from August, 1925, through the major part of February, 1926, that during that period his wife, living on an isolated mountain ranch about 200 miles away from San Francisco where Baker lived, did not go to San Francisco, the court could infer that as a matter of fact he had no access and that within the meaning of the cited code section he and his wife were not during that period cohabiting. This evidence was strengthened by a showing that during this period the financial conditions obtaining both at San Francisco and in Tehama County with respect to the Bakers were such that the parties were struggling to make ends meet; that Mrs. Baker seldom went even to the nearby town of Red Bluff, and that the family was closely confined to the Tehama County ranch. The trial court could consider that it would be extremely unlikely under all the conditions obtaining that Mr. and Mrs. Baker would meet other than in San Francisco or in Tehama County. We hold that the trial court's findings that "said Isabelle M. Baker, the undisputed mother of said Patricia F. Moore, intermarried with one Joseph H. Baker in the City of Martinez, California, on October 26, 1907, and from that date until the death of said Joseph H. Baker, on September 30, 1939, the said parties continued to be husband and wife, *and lived and cohabited together as husband and wife excepting during such times as Joseph H. Baker lived and worked away from home*", and the further findings, "That continuously from the month of August, 1925, until the month of February, 1926, said Joseph H. Baker lived and resided in the City of San Francisco, California, and continuously during said period, and for several years prior thereto and continuously thereafter until the time of her death said Isabelle M. Baker lived and resided in the County of Tehama, California", and the further finding, "That between said month of August, 1925, and the month of February, 1926, said Joseph H. Baker did not visit or see said Isabelle M. Baker, his wife, and during said period said Isabelle M. Baker did not see or visit said Joseph H. Baker", and the further finding, "That said Joseph H. Baker and Isabelle M. Baker did not at any time during said period from August, 1925, to February, 1926 have sexual intercourse or have any opportunity whatever for sexual intercourse, and said Joseph H. Baker did not conceive and is not the father of said Patricia F. Moore", are all supported by the evidence. See In re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, holding that the conclusive presumption of legitimacy is not applicable to a case where the child was born 304 days after the husband last had sexual intercourse with the mother, such period of gestation being exceptional and not according to the usual laws of nature. See also Cinders v. Lewis, 93 Cal.App.2d 90, 208 P.2d 687.

[5–7] Appellant finally contends that even if the case be not one of conclusive presumption, nevertheless the evidence is insufficient to justify a finding against the presumptions of legitimacy declared in code sections such as Code of Civil Procedure, Section 1963, subdivision 31, and Civil Code, Section 193. We think it apparent and hold that the evidence substantially supports the trial court's findings as against said disputable presumptions of legitimacy. Giving these presumptions full scope, they do no more as evidence than conflict with the evidence we have related. The fact of paternity in a case lying without the conclusive presumption classification is to be proven as any other fact. The preponderance of evidence governs the decision in the trial court and on appeal that decision must be upheld if substantially supported.

That portion of the decree appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

132 Cal.App.2d 36

Fredrick S. FARR et al., Plaintiffs and Appellants,

v.

E. K. BRAMBLETT et al., Defendants and Respondents.

Civ. 16114.

District Court of Appeal, First District, Division 2, California.

March 30, 1955.

Rehearing Denied May 2, 1955.

Hearing Denied May 25, 1955.

Action for damages for libel. The Superior Court, Monterey County, Anthony Brazil, J., sustained general demurrers, and plaintiff appealed. The District Court of Appeal, Dooling, J., held, inter alia, that action of newspaper advertisers in displaying matrix or copy of advertisements to editors, publishers, managers and employees of newspapers which printed advertisements was publication in a newspaper, within statute limiting a plaintiff in libel action to special damages unless a demand for retraction be made, but statute did not apply to cases where, after advertisers had displayed matrix or copy, newspapers had failed or refused to publish the allegedly libelous matter.

Judgment reversed in part and affirmed in part.

1. Libel and Slander ⇐70

Statute providing that plaintiff suing for damages for publication of libel in newspaper cannot recover punitive damages unless correction be demanded included publication of a libelous advertisement. West's Ann.Civ.Code, § 48a.

2. Libel and Slander ⇐70

Telegram which person allegedly slandered by newspaper advertisement sent to advertisers and editors of newspapers and which invited advertisers to meeting to make immediate retraction was not a demand for retraction as required by statute providing that plaintiff can recover punitive damages for libel in a newspaper only after demanding a retraction. West's Ann. Civ.Code, § 48a.

3. Libel and Slander ⇐70

Action of newspaper advertisers in displaying matrix or copy of advertisements to editors, publishers, managers and employees of newspapers which printed the advertisements was publication in a newspaper, within statute limiting a plaintiff in libel action to special damages unless a demand for retraction be made, but statute did not apply to cases where, after advertisers had displayed matrix or copy, newspapers failed or refused to publish the allegedly libelous matter. West's Ann.Civ. Code, § 48a.

4. Libel and Slander ⇐51(4)

Statute creating privilege for communications without malice to persons interested therein by one who is also interested is a qualified privilege only which does not cover publication made with malice in fact. West's Ann.Civ.Code, § 47, subd. 3.

5. Libel and Slander ⇐83

Plaintiff's complaint in libel action against newspaper advertisers in connection with advertisement relating to political campaign sufficiently pleaded actual malice to exclude the alleged libels from privilege accorded by statute relating to communications without malice to persons interested therein by one who is also interested. West's Ann.Civ.Code, § 47, subd. 3.

6. Limitation of Actions ⇐127(2)

Where causes of action in fourth amended complaint were in substance introduced in second amended complaint, within limitation period, and were not, when first introduced, attacked as foreign to cause set out in original complaint, fourth amended complaint was not barred by limitations. West's Ann.Code Civ.Proc. § 340, subd. 3.

7. Pleading ⇐420(2)

Where amendatory allegations are not, when first introduced, attacked by motion to strike on ground that they are entirely foreign to cause set out in original complaint, the objection is waived.

8. Libel and Slander ⇐76

Action for damages for libel in displaying matrix or copy of advertisements to newspaper publishers who declined to publish the advertisements was, since not subject to statute relating to allegedly libelous material printed in newspapers, subject to claimed objection of being prematurely

brought under that statute. West's Ann. Civ.Code, § 48a.

9. Libel and Slander ⇐25

"Publish" is the term of art in the law of libel, and in itself imports that communication to others which is essential to the tort.

See publication Words and Phrases, for other judicial constructions and definitions of "Publish".

10. Libel and Slander ⇐84

Complaint which charged that defendants had published allegedly libelous material was sufficient notwithstanding that it failed to allege that those to whom material was exhibited read it. West's Ann. Code Civ.Proc. § 460.

11. Appeal and Error ⇐766

Where defendants' brief, on plaintiffs' appeal from the sustaining of general demurrers, does not, in respect to arguments regarding special demurrers, comply with rule that headings be generally descriptive of subject-matter covered, reviewing court is justified in ignoring special demurrers. Rules on Appeal, rule 15(a).

12. Pleading ⇐8(13)

Allegations, in libel complaint, that defendants were members of a group organized and responsible for a congressional campaign and that a defendant acted as their servant and agent properly pleaded ultimate facts.

13. Conspiracy ⇐7

A conspiracy to commit libel followed by publication of libelous matter by conspirators is an actionable tort.

14. Conspiracy ⇐18

Complaint in libel action sufficiently alleged conspiracy among defendants to commit libel and publish libelous matter.

15. Libel and Slander ⇐84

Although validity of counts in libel complaint arising from defendants' actions in displaying to newspaper publishers, who declined to print them, allegedly libelous advertisements, depended upon counts' not being within statute relating to libelous printing in newspapers, complaint was not required to allege that there had been no newspaper publication such as would bring case within statute. West's Ann.Civ.Code, § 48a.

16. Pleading ⇐34(1)

A complaint must be liberally construed.

17. Pleading ⇐67

Plaintiff need not negative or anticipate defenses.

18. Libel and Slander ⇐98

In action for libel, addition of new causes of action by reason of a second publication should have been by supplemental rather than amended complaint.

19. Pleading ⇐420(2)

Where defendants in libel action did not object, at time of filing of second amended complaint, that addition of new causes of action should have been by supplemental rather than amended complaint, they waived this objection in respect to fourth amended complaint.

20. Libel and Slander ⇐86(2)

Complaint in libel action was not subject to claimed objection of giving to the accused matter, which allegedly imputed to plaintiffs communism or communist sympathies, a broader meaning than the accused words could bear.

21. Libel and Slander ⇐6(1)

The imputation of communism or communist sympathies is libelous.

22. Libel and Slander ⇐89(2)

Complaint in libel action did not plead special damages with sufficient certainty.

23. Pleading ⇐225(1)

Ordinarily, leave to amend must be availed of if a demurrer is good on any ground.

24. Pleading ⇐417

By filing amended complaint, a party waives the right to question the sustaining of a demurrer to his previous complaint.

Thompson & Thompson, Monterey, Farr & Millard, Frederick S. Farr, Carmel, Elizabeth Palmer, Piedmont, for appellants.

Ross & Harris, Santa Barbara, Church & Abramson, Salinas, Norris Montgomery,

Clarence A. Rogers, Santa Barbara, for respondents.

DOOLING, Justice.

This is an action for libel by newspaper advertisements during the 1950 election campaign of defendant Bramblett as congressman for the Eleventh (now Thirteenth) Congressional District of California. With Bramblett active members of his campaign committee and of the Eleventh Congressional District Republican Committee are made defendants. Plaintiffs are Fredrick S. Farr, an attorney, and his wife, both at that time active in the campaign for the democratic candidate in that district, Marion R. Walker.

With respect to plaintiffs' fourth amended complaint the trial court granted motions to strike all allegations of general and exemplary damages, sustained general demurrers without leave to amend insofar as the complaint purported to set up actions for the recovery of general or exemplary damages and otherwise sustained special demurrers to each cause of action on the grounds of ambiguity, uncertainty and unintelligibility with ten days to amend. Plaintiffs declined to amend and appeal from the judgment of dismissal was entered accordingly. The basic facts alleged in the fourth amended complaint are that the defendants conspired to support the candidacy of defendant Bramblett and to oppose the candidacy of Marion R. Walker among other things by knowingly and maliciously annoying and degrading plaintiffs by the publication of false statements concerning them with the malicious intent to damage their reputations so as to further opposition to their candidate Marion R. Walker.

In carrying out said conspiracy certain of the defendants acting for all composed an advertisement and had a matrix made of it reading as follows:

"Get the Reds out of America. Get America out of the Red.

"Marion

"Look Behind You!

"Frederick S. Farr is listed as the 11th Democratic Congressional District Chairman. This is the man who is directing your campaign—who is putting words in your mouth.

"Is This the Same Frederick S. Farr who lived in San Francisco and was a subscriber to the Communist Peoples World? Is this the same Frederick S. Farr who with his wife was involved in the Communist Front organization, the American Friends of the Chinese People? (Cited twice by the California Un-American Activities Committee). Is this the same Frederick S. Farr who was on the Voluntary defense committee for the notorious Raymond Schultz-Betty Morris case of the San Francisco 'peace poll', Co-Ordinating Council for Peace at the outbreak of the war?

"Is This the Reason why 3 elected members of the Monterey Democratic Central Committee resigned?

"Whose Advice would you take, Marion, if elected, 'in fighting Communism and keeping this nation free'?

"Voters! Heed Governor Warren's Warning * * * 'May I suggest that you carefully analyze the record of every candidate for public office, and determine his background and the identity of his supporters * * *' (1948)

"Marion R. Walker, these questions are asked at this date, giving you ample time to make a reply before election day, Nov. 7. In the interest of Americanism, we and the public want to know.

"11th Congressional District Republican Committee

"Harry Crean—S. V. Christierson
"Re-Elect to Congress
"E. K. 'Ernie' Bramblett Nov. 7"

They caused said matrix to be displayed to the editors, publishers, managers and employees of eight named newspapers, thereby publishing the statements therein. These statements were untrue as alleged in detail; the defendants had no cause to believe them true, and made them with the intent to vex, annoy and injure plaintiffs and in a state of mind arising from hatred and ill will toward them.

They caused this advertisement to be published in six of the named newspapers, the advertisement appearing on the 1st or 2nd of November, 1950. On the 2nd of November plaintiffs' attorneys sent the following telegram to each of the defendants and to the editor of each of the papers which had published the advertisement:

"Monterey, California
November 2, 1950

"We Represent Frederick S. Farr and His Wife About Whom You Have Published False, Malicious and Libelous Statements In Paid Political Newspaper Advertisements By and On Behalf of Congressman E. K. Bramblett. These Statements Published Throughout the 11th Congressional District Accuse Mr. Farr and His Wife of Communist Activities Each Without Foundation In Fact. Perhaps In the Strain of Your Campaign, You Did Not Realize the Seriousness of These Charges, Consequently An Opportunity Will Be Afforded and Demand Is Made Upon You Individually and As a Member of the Bramblett Committee That You or Your Representative Meet In Our Office Before Five p. m. Today November 3rd To Arrange Full Details of Immediate and Satisfactory and Full Retraction of These False and Libelous Statements. Failing This, Immediate Proceedings Will Be Initiated.

"Thompson and Thompson,
Attorneys at Law
126 Bonifacio Street,
Monterey, California"

The next day plaintiff Fredrick S. Farr sent an additional telegram to the same informing them that no action was contemplated against any newspaper.

No correction followed. As early as November 4th, 1950, the original complaint in this action was filed. (The election day November 7, 1950 was in sight.)

After the above first telegram had been sent the defendants in pursuance of the same conspiracy and with the same malicious intent drew up a second advertisement and made advertising copy of it which read as follows:

"Is This a Reply To Our Questions?

"A few days ago we published a newspaper advertisement, asking Marion R. Walker the following questions about his campaign manager, Frederick S. Farr:

"1. Is this the same Frederick S. Farr who lived in San Francisco and was a subscriber to the Communist Peoples World?

"2. Is this the same Frederick S. Farr who with his wife was involved in the Communist Front organization, the American Friends of the Chinese People? (Cited twice by the California Un-American Activities Committee).

"3. Is this the same Frederick S. Farr who was on the Voluntary defense committee for the notorious Raymond Schultz-Betty Morris case of the San Francisco 'peace poll', Coordinating Council for Peace at the outbreak of the war?

"Why Did We Ask These Questions?

"Because certain documents in the files of the California Un-American Activities Committee, plus other documented sources, present conclusive evidence that a Frederick S. Farr has a record justifying the questions listed above.

"The evidence is clear!

"Mr. Farr's Answer is a threatened libel suit—but, in a statement to the Monterey Peninsula-Herald, he said in part, 'As for the American Friends of the Chinese People, it is true that my wife was a member and I attended several meetings.'

(Voters! See question Number 2 above)

"We have not accused anyone of being a Communist. Because of documented evidence we have asked the questions. We believe the voters should have the Truth!

"11th Congressional District Republican Committee

"Leon Harthorn—Paul Leavens"

They caused this advertisement copy to be displayed on the 4th of November, 1950, to the editors etc. of four named newspapers, thereby publishing it. (There are again the allegations as to falsity, absence of probable cause, intent and state of mind with respect to the first advertisement.)

They caused this second advertisement to be published in two of the newspapers to which it was shown, which papers printed it on November 6, 1950.

The fourth amended complaint contains 80 causes of action, 40 for plaintiff Mr. Farr and 40 similar ones for plaintiff Mrs. Farr. Each relates to one of twenty acts; 8 acts of displaying the matrix of the first advertisement to the personnel of 8 different newspapers; 6 acts of publishing the first advertisement in 6 of these newspapers; 4 acts of displaying the copy of the second advertisement to the personnel of 4 different newspapers and 2 acts of publishing the second advertisement in 2 of these newspapers. Each such cause of action is duplicated, one alleging the advertisement without innuendo (as libel per se) the other adding an innuendo. Each of these 80 counts contain directly or by reference allegations for general damages, special damages and punitive damages.

Respondents in their brief assert the following grounds upon which they rely in support of the order sustaining the general demurrers (these are copied verbatim from the headings in their brief):

"A. The publication was a privileged communication.

"B. The publication, the basis of the alleged action for libel, was without malice.

"C. Plaintiffs failed to comply with the provisions of Section 48a of the Civil Code.

"D. Plaintiffs' original complaint was filed prematurely, and cannot be cured by amendment.

"E. Plaintiffs' causes of action, if any, are barred by the Statute of Limitations."

We will first consider the specification numbered "C", since insofar as it is good it is a complete defense to the action for general damages and renders the other specifications unimportant.

The question presented is in how far under the above alleged facts sec. 48a, Civil Code, prevents recovery of general and punitive damages in these several counts. There is no contention that if amendment in this respect had been permitted a stronger case for appellants could have been formulated.

Section 48a, Civil Code, reads insofar as applicable to the point: "1. In any action for damages for the publication of a libel in a newspaper, * * * plaintiff shall recover no more than special damages unless a correction be demanded and be not published * * * as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication * * * a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication * * * of the statements claimed to be libelous.

"2. If a correction be demanded within said period and be not published * * * in substantially as conspicuous a manner in said newspaper * * * as were the statements claimed to be libelous, in a regular issue thereof published * * * within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages * * *."

[1] It is contended by appellants that this section does not apply to persons placing paid advertisements. Although this position has been accepted in some other jurisdictions, see note 13 A.L.R.2d 277, 293, and cases there cited, the text of our statute ("In any action for damages for the publication of a libel in a newspaper") is so wide that it necessarily includes the publication of a libelous advertisement. In Pridonoff v. Balokovich, 36 Cal.2d 788, 791, 228 P.2d 6, it was held that the section because of its language applies to any author of a libel in a newspaper. We cannot distinguish the authors of printed newspaper advertisements from other authors who have the products of their pen placed in a newspaper. While there would appear to be

good reasons why the provisions of sec. 48a should not apply to the person furnishing and paying for the publication of a libelous advertisement in a newspaper, the language of the section is all-embracing and leaves room for no exceptions. In the Pridonoff case the court expressly cited and refused to follow Comer v. Louisville, etc., R. Co., 151 Ala. 622, 44 So. 676, a case holding that the Alabama statute did not apply to an advertiser. 36 Cal.2d at page 791, 228 P. 2d 6.

[2] The next question is whether the stated telegrams of November 2, 1950, fulfilled the requirements of a demand for correction provided for in sec. 48a, supra. We answer the question in the negative. The telegrams did not demand correction but demanded the attendance on November 3rd at a meeting in the office of plaintiffs' attorney to arrange for a retraction. The difference between this and the statutory demand is accentuated by the statement that failing such meeting immediate proceedings would be initiated. Accordingly they were instituted the day after the one appointed for the meeting, whereas the statute gives three weeks for retraction. It is understandable that plaintiffs wished to take measures counteracting the advertisement prior to election day, which was imminent, but sec. 48a, Civil Code contains no provision for cases where immediate retraction is essential. Those who received the telegrams could reasonably conclude that something more and different than the correction of sec. 48a was demanded from them. They were under no duty to attend the meeting to which they were summoned and the institution of legal action immediately thereafter could well strengthen their belief that no demand under sec. 48a was intended. Compare Harris v. Curtis Pub. Co., 49 Cal.App.2d 340, 354, 121 P.2d 761. Moreover the demand was not served on the publishers as required by sec. 48a but was addressed to the editors of the newspapers, without any mention of the publishers. We conclude that no demand in accordance with sec. 48a was made and that therefore the court below correctly held that plaintiffs have no action for more than special damages with respect to the published advertisements.

[3] However there are in the fourth amended complaint many causes of action not based on the publication of the advertisements in a newspaper but on the displaying of the matrix or the copy of said advertisements to editors, publishers, managers and employees of newspapers. Such in itself also constitutes publication and in a literal sense it is not publication "in a newspaper". Nevertheless insofar as such displaying is preparatory only to the printing in the newspaper it must be considered covered by sec. 48a, Civil Code. The printing of any matter in a newspaper requires its display to editors and personnel of the newspaper and if for said display there remained a liability in general and exemplary damages notwithstanding lack of demand for correction much of the intended effect of sec. 48a would be lost. There are no allegations showing that the display was different or more than that required in preparation of the printing. We therefore hold that in the causes of action relating to the display of matrix or copy followed by printing of the advertisement in the paper in question appellants are not entitled to general or exemplary damages.

But not with respect to all newspapers as to which display of matrix or copy is alleged is there an allegation of publication by printing. Sec. 48a by its terms only applies where there has been a "publication in a newspaper". Where the newspaper fails or refuses to publish the libelous matter its exhibition to the persons connected with the newspaper cannot fall within its terms. When there has been no publication in a newspaper, how could there be a demand upon the publisher of the newspaper for a retraction of something which the newspaper never published? The exhibition of the libelous matter to the newspaper personnel is protected when the libel is afterwards published in the newspaper as a part of the necessary process of publication, but where the libel is not afterwards printed in the newspaper its exhibition to the newspaper personnel is no part of such

process of publication and sec. 48a can have no application to it. Such situation is alleged as to the showing of the matrix of the first advertisement to the editor, etc., of the Peninsula Herald (1st and 2d, 41st and 42nd causes of action) and the Seaside News Sentinel (15th, 17th, 55th and 57th causes of action); and as to the showing of the copy of the second advertisement to the editor, etc., of the Salinas Californian (29th, 30th, 69th and 70th causes of action) and the Ventura County Star Free Press (31st, 32nd, 71st and 72nd causes of action). With respect to all other counts the allegations as to general and exemplary damages were correctly stricken because of the failure of plaintiffs to comply with sec. 48a, Civil Code.

[4] Respondents contend that the dismissal of the whole action is at any rate justified because it appeared on the face of the complaint that their publications were privileged under sec. 47, subd. 3, as a communication without malice to persons interested therein by one who is also interested. This contention is based on plaintiff Fredrick Farr's position as a public officer as Chairman of the California 11th Congressional District of the Democratic party, so that his official conduct was of public concern. Snively v. Record Pub. Co., 185 Cal. 565, 571, 198 P. 1. It is not clear why the same could apply to Mrs. Farr who had no public function and of whom it is only alleged that she was and is active in civic affairs in her city. However, the contention as to both is without merit. The privilege invoked is a qualified privilege only which expressly does not cover publications made with malice in fact. Sec. 47, subd. 3, Civ.Code; 16 Cal. Jur. 67, et seq.

[5] In the complaint it is alleged that the statements were published by defendants "well knowing they had no probable, or any cause, for believing said statements, or any of them, to be true; and said statements were so published with the intent and design to injure, disgrace and defame this plaintiff; and further, such statements, so made by defendants, exhibited a state of mind arising from hatred or ill will for this plaintiff evidencing a willingness to vex, annoy, or injure this plaintiff, in order to further said opposition to Marion R. Walker and promote their mutual interest in electing defendant E. K. Bramblett." These allegations are a sufficient pleading of actual malice to exclude the alleged libels from the privilege claimed. Washer v. Bank of America, 21 Cal.2d 822, 831, 136 P.2d 297, 155 A.L.R. 1338.

[6, 7] It is next contended that plaintiffs' causes of action are barred by the statute of limitations. This is not so. It is conceded that the causes of action contained in the fourth amended complaint were in substance introduced in the second amended complaint filed August 28, 1951, well within the one year term of sec. 340, subd. 3, Code of Civil Procedure. It is not contended that when they were first introduced defendants moved to strike them out on the ground that they were entirely foreign to the cause of action set out in the original complaint. If this is not done the objection is waived. Groom v. Bangs, 153 Cal. 456, 459, 96 P. 503.

[8] The claim that the action was prematurely brought rests on the fact that it was filed before the time for printing a retraction provided in sec. 48a had expired. As to those counts pleading the exhibition of a matrix without a subsequent publication in the particular newspaper sec. 48a is not applicable and this argument as to those counts is for that reason unwarranted.

[9, 10] It was suggested on oral argument that the pleading of the publication of the matrixes is insufficient because it is not alleged that those to whom they were exhibited read them. It is alleged that the matrix was "published" to such persons. The verb "publish" is a term of art in the law of libel, Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505, and "in itself imports that communication to others which is essential to the tort." Wilcox v. Moon, 63 Vt. 481, 22 A. 80, 81; State v. Elder, 19 N.M. 393, 143 P. 482, 485; Morgan v. Black, 132 Ga. 67, 63 S.E. 821, 822; Hamilton v. Lowery, 33 Ind.App. 184, 71 N.E. 54, 56; McLaughlin v. Schnellbacher, 65 Ill.App. 50, 55; Sproul v. Pillsbury, 72 Me. 20; see sec. 460

Code Civ Proc. "It is sufficient to state, generally, that the same was published * *."

[11] We would be justified in ignoring the special demurrers, since respondents have not complied in their brief with Rule 15(a), Rules on Appeal, with regard to headings. The only headings in their brief in support of the special demurrers read "Specification Number 1", "Specification No. 2" etc., up to No. 9. These are not, as the rule requires, "generally descriptive of the subject matter covered." However since the judgment must be reversed as to the counts mentioned we consider some of them briefly for the benefit of court and counsel.

The first ground is important only on the claim of privilege and it becomes unimportant, in view of our holding that actual malice is well pleaded, whether it clearly appears whether or not plaintiff Farr was chairman of the Eleventh California District of the Democratic Party.

[12] The second specification is directed to allegations that the various defendants were members of the "Re-elect E. K. 'Ernie' Bramblett Committee" organized and responsible for the republican congressional campaign. The allegation is one of ultimate fact. The allegation that defendant Hardaway "acted as their servant and agent" is a sufficient pleading of the fact of his agency. General Mill & Lumber Co. v. Robertson, 126 Cal.App. 118, 14 P.2d 327; Phillips v. Reserve Life Ins. Co., 128 Cal. App.2d 540, 275 P.2d 554; Cochran v. Goodman, 3 Cal. 244.

[13, 14] There is an objection that the alleged conspiracy among defendants is not clearly pleaded. It is alleged that defendants "did agree together" to further the candidacy of Bramblett by libeling plaintiffs and in pursuance thereof they published the articles complained of. This is a pleading of ultimate facts with the tortious purpose of the conspiracy and the tortious overt acts carried out in pursuance thereof. It may be admitted that a conspiracy to elect Bramblett would not be actionable, but a conspiracy to commit libel followed by the publication of libelous matter by the conspirators is as clearly an actionable tort. Plaintiffs could not more clearly allege the ultimate fact of conspiracy than by pleading that defendants "did agree together". Doudell v. Shoo, 20 Cal.App. 424, 438, 129 P. 478; Poly v. Williams, 101 Cal. 648, 650, 36 P. 102.

[15–17] The claim that it cannot be ascertained whether the matrixes were displayed in connection only with their publication in a newspaper is not good as to those counts in which there is no allegation of newspaper publication. The complaint must be liberally construed. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867. The plaintiffs are not required to plead negative facts (that the advertisement was not published in the particular newspaper) since "the salutary rule of pleading frowns upon averments negativing or anticipating defenses, and requires that such matters be left to the answer." Jaffe v. Stone, 18 Cal.2d 146, 158–159, 114 P.2d 335, 342, 135 A.L.R. 775.

[18, 19] The addition of new causes of action by the second publication should have been by supplemental rather than amended complaint but by not making timely objection on that ground when they were pleaded in the second amended complaint respondents must be held to have waived this objection. Groom v. Bangs, supra, 153 Cal. 456, 459, 96 P. 503.

[20, 21] The complaint that those counts pleading an innuendo ascribe a broader meaning to the words than they can bear in that there is nothing in the advertisements giving "room for any contention as set forth in the innuendo that plaintiffs were or had been Reds or Communists or Communist sympathizers" overlooks the caption of the first advertisement: "Get the Reds out of America. Get America out of the Red." The second advertisement takes its color from the first. We cannot say that the innuendos are not reasonable ones. The imputation of communism or communist sympathies is a reasonable conclusion to be drawn and must certainly be held libelous as tantamount to calling plaintiffs traitors to their country. See Black v. Cutter Laboratories, 43 Cal.2d 788, 278 P.2d 905.

[22–24] We agree with respondents that the special damages were not pleaded with

sufficient certainty. Peabody v. Barham, 52 Cal.App.2d 581, 585, 126 P.2d 668. However the court erred in sustaining the demurrers *as to general and punitive damages*, as to those counts which we hold stated a cause of action, *without leave to amend.* While ordinarily leave to amend must be availed of if a demurrer is good on any ground the order in this case left appellants no choice but to stand on their complaint if they desired to assert the right to general and punitive damages since they were denied leave to amend in those particulars. If they had amended to assert only the right to special damages they would have waived their right to general damages, since by filing an amended complaint a party waives the right to question the sustaining of a demurrer to his previous complaint. Rolley, Inc., v. Merle Norman Cosmetics, 129 Cal.App.2d 844, 278 P.2d 63.

The judgment is reversed as to counts 1, 2, 15, 17, 29, 30, 31, 32, 41, 42, 55, 57, 69, 70, 71 and 72 with directions to the trial court to permit appellants to file an amended complaint as to such counts; as to all other counts the judgment is affirmed. Appellants are awarded costs on appeal.

KAUFMAN, J., concurs.

131 Cal.App.2d Supp. 892

Herbert L. ABRAMOWITZ, Plaintiff and Respondent,

v.

BANK OF AMERICA, a National Trust and Savings Association, Defendant and Appellant.

C. A. 8420.

Appellate Department, Superior Court, Los Angeles County, California.

March 14, 1955.

Rehearing Denied March 22, 1955.

Depositor's action for injury resulting from bank's wrongful dishonor of check drawn by depositor for payment of monthly installment due under conditional sales contract, pursuant to which depositor was purchasing automobile. The Municipal Court, Los Angeles Judicial District, R. Morgan Galbreth, J., rendered judgment adverse to defendant, and defendant appealed. The Appellate Department, Patrosso, J., confronted with a question of first impression in the state, held that depositor was entitled to recover for automobile loss, which proximately resulted from wrongful dishonor of check, but held that measure of his recovery therefor was market value of automobile rather than difference between (1) reasonable value of depositor's use of automobile and (2) sum of amount paid on purchase price and deficiency resulting from vendor's sale of automobile.

Affirmed.

1. Banks and Banking ⇐143(7)

A depositor, whether a trader or a nontrader, is not entitled to recover substantial damages, upon mere proof of dishonor of his check, but may recover only for actual damage proved to have been sustained as result thereof. West's Ann.Civ. Code, § 3320.

2. Action ⇐27(2)

Depositor whose check had been wrongfully dishonored could have brought his action upon contract, but he was not restricted to that remedy and could sue for injury resulting from refusal to pay check, in which case action would sound in tort. West's Ann.Civ.Code, § 3320.

3. Banks and Banking ⇐143(7)

In depositor's action for injury resulting from refusal to pay check, applicable measure of damages was that prescribed by Civil Code section for tort actions, and Civil Code section providing that detriment caused by breach of obligation to pay money only should be deemed the amount due by terms of obligation, with interest thereon, was without application. West's Ann.Civ.Code, §§ 3302, 3320, 3333.

4. Damages ⇐23, 26, 103

Measure of damages for breach of contract is not substantially same as that

for tort; distinction between measure of damages in tort cases and that obtaining in actions for breach of contract being that damages not even anticipated are recoverable in tort while only such damages as were reasonably contemplated by parties at time of entering into contract are recoverable for breach thereof. West's Ann. Civ.Code, §§ 3300, 3302, 3320, 3333.

5. Negligence ⇐136(25)

Issue of proximate cause is essentially one of fact unless but one conclusion may reasonably be drawn from evidence.

6. Banks and Banking ⇐143(5)

In depositor's action for injury resulting from bank's wrongful dishonor of check drawn by depositor for payment of monthly installment due under conditional sales contract, pursuant to which depositor was purchasing automobile, evidence sustained finding that loss of automobile had resulted proximately from wrongful dishonor of check.

7. Banks and Banking ⇐143(7)

In depositor's action for injury resulting from bank's wrongful dishonor of check drawn by depositor for payment of monthly installment due under conditional sales contract, pursuant to which depositor was purchasing automobile, depositor was entitled to recover for automobile loss, which proximately resulted from wrongful dishonor of check, but measure of his recovery therefor was market value of automobile rather than difference between (1) reasonable value of depositor's use of automobile and (2) sum of amount paid on purchase price and deficiency resulting from vendor's sale of automobile. West's Ann.Civ.Code, §§ 3302, 3320.

8. Appeal and Error ⇐1033(7)

No complaint could be made on appeal of wrong measure of damages which operated to advantage of appellant.

9. Sales ⇐481

One owning a qualified interest as conditional vendee in personal property who is wrongfully deprived thereof is entitled to recover its full value as against one having no ownership in property where one having qualified interest is liable over to conditional vendor.

Hugh A. Steinmeyer & George L. Beckwith, Los Angeles, for appellant.

Bertram S. Harris, Los Angeles, for respondent.

PATROSSO, Judge.

Plaintiff instituted this action to recover damages for the wrongful dishonor of a check drawn by him upon his account with the defendant bank at a time when he had standing to his credit an amount in excess of the face of the check. From a judgment in favor of plaintiff, defendant appeals, and for the reasons hereinafter stated, we are affirming the judgment.

The check in question was drawn in favor of the vendor under a conditional sales contract, pursuant to which plaintiff was purchasing an automobile, in payment of a monthly installment due thereunder, and as a result of the dishonor of the check and the defendant being otherwise unable to make payment, the seller repossessed the automobile and sold the same pursuant to the terms of the contract. The trial court awarded damages in the sum of $731.80, and $45.82 interest, the principal sum representing the amount paid upon the contract by plaintiff ($935), plus the resulting deficiency between the amount realized upon the sale by the vendor ($1,600) and the balance due upon the contract or the sum of $596.80, less $800 found by the trial court to be the reasonable value of the use of the vehicle during the time that it was in plaintiff's possession. The sole question presented is whether, under the circumstances, the award of such damages was proper.

The precise question with which we are confronted is one of first impression in this state, and the authorities elsewhere are neither harmonious nor particularly helpful. (See Annotations in 4 A.L.R. 947; 13 A.L.R. 305; 34 A.L.R. 205; 58 A.L.R. 732; 126 A.L.R. 206; 153 A.L.R. 1035.)

The rule at common law was that substantial damages—"temperate in amount" —were recoverable against a bank for wrongfully dishonoring a check of its depositor; but a distinction was made between traders and nontraders, in that in the case of the former it was presumed, without further proof, that substantial damages had been sustained, "the rule proceeding upon the fact commonly recognized that the credit of a person engaged in such a calling is essential to the prosperity of his business and that the dishonoring of his checks was plainly calculated to impair such credit and to inflict a most serious injury." 8 Cal.Jur.2d p. 52, sec. 88; see also 9 C.J.S., Banks and Banking, § 365, p. 778. And such was the rule in this State, Siminoff v. Jas. H. Goodman & Co. Bank, 1912, 18 Cal.App. 5, 11 et seq., 121 P. 939, until the enactment in 1917 of Civil Code section 3320, which reads as follows: "No bank shall be liable to a depositor because of the nonpayment through mistake or error, and without malice, of a check which should have been paid unless the depositor shall allege and prove actual damage by reason of such nonpayment and in such event the liability shall not exceed the amount of damage so proved."

[1] This statute is substantially identical with that formulated and sponsored by the American Bankers' Association, and which has been adopted in a number of states. (1 Paton's Digest (1940 ed.) pp. 1117–1118), the purpose and effect of which was to abolish the distinction obtaining at common law between traders and nontraders. Allen v. Bank of America, 1943, 58 Cal.App.2d 124, 130–131, 136 P.2d 345. As a result, a depositor (whether trader or nontrader) whose check has been wrongfully dishonored is not entitled to recover substantial damages by mere proof of dishonor, but only actual damage proved to have been sustained as a result thereof.

[2] The problem, therefore, is as to what is comprehended by the words "actual damage" as used in section 3320. Relevant to the solution of this problem is a determination as to the character of the action here involved. Defendant's argument proceeds upon the thesis that the action is only upon contract, but we do not agree. While it is true that plaintiff might have brought his action upon contract, he was not restricted to this remedy. The prevailing view and that obtaining in this State is that in such circumstances he may, as plaintiff has done here, sue for damages for the injury resulting from the refusal to pay the check, in which case the action sounds in tort. See Allen v. Bank of America, supra, 58 Cal.App.2d 124, 127, 136 P.2d 345, and compare Rubino v. Utah Canning Co., 1954, 123 Cal.App.2d 18, 23–24, 266 P.2d 163.

[3] From the foregoing, it would appear to necessarily follow that the rule of damages applicable is that prescribed by Civil Code section 3333 unless it be that Civil Code section 3302, which provides that "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon", is controlling here. In Hartford v. All Night & Day Bank, 1915, 170 Cal. 538, 540–541, 150 P. 356, L.R.A.1916A, 1220, decided prior to the enactment of section 3320, it was held that section 3302 prescribes the measure of recovery in cases of this character, but this view was expressly rejected in Siminoff v. Jas. H. Goodman & Co. Bank, supra, 18 Cal.App. 5, 14, 121 P. 939, which although decided prior to the Hartford case and a petition for hearing was denied by the Supreme Court, is not mentioned in the latter case. And in Allen v. Bank of America, supra, 58 Cal.App.2d 124, 131, 136 P.2d 345, 349, it was held that "recoverable items of damage" were pleaded in a complaint alleging that by reason of the wrongful dishonor of plaintiff's check, business transactions which were being negotiated by plaintiff with others "which would have returned to him gains and profits" failed of consummation. 58 Cal.App.2d at page 126, 136 P.2d at page 347. Whatever may have been the rule prior to the enactment of section 3320, we are of the view that section 3302 is without application to actions of the character here involved, and that

the measure of damages is that prescribed by section 3333 for tort actions.

[4] While there are decisions in this State which undertake to declare that the measure of damages for breach of contract are substantially the same as for tort, Siminoff v. Jas. H. Goodman & Co. Bank, supra, 18 Cal.App. 5, 15, 121 P. 939; Ruzanoff v. Retailers Credit Ass'n, 1929, 97 Cal. App. 682, 687, 276 P. 156, this statement is not accurate, for as the contrasting language of sections 3300 and 3333 clearly indicates, and as our Supreme Court has observed, there is a recognized distinction between the measure of damages in tort cases and that obtaining in actions for breach of contract, in that damages not even anticipated are recoverable in tort while only such damages as were reasonably contemplated by the parties at the time of entering into the agreement are recoverable for a breach thereof. Hunt Bros. Co. v. San Lorenzo Water Co., 1906, 150 Cal. 51, 56, 87 P. 1093, 7 L.R.A.,N.S., 913; Bartlett v. Federal Outfitting Co., 1933, 133 Cal.App. 747, 750–751, 24 P.2d 877; Zvolanek v. Bodger Seeds, 1935, 5 Cal.App.2d 106, 108, 42 P.2d 92; Lacy Mfg. Co. v. Gold Crown Min. Co., 1942, 52 Cal.App.2d 568, 574, 126 P.2d 644. We find it necessary to emphasize this distinction because of the insistence of defendant that damages for the loss of plaintiff's automobile are not recoverable because they may not be said to have been reasonably contemplated by the parties at the time the bank account was opened, as well as its bearing upon the discussion which follows.

[5, 6] We have concluded that the rule of damages applicable here is that prescribed by section 3333, Civil Code, and that the trial court was warranted in finding that the loss of the automobile resulted proximately from the wrongful dishonor of plaintiff's check. "(T)he issue of proximate cause is essentially one of fact", Mosley v. Arden Farms Co., 1945, 26 Cal.2d 213, 219, 157 P.2d 372, 375, 158 A.L.R. 872, except where but one conclusion may reasonably be drawn from the facts. Gallichotte v. California Mut. Bldg. & Loan Ass'n, 1935, 4 Cal.App.2d 503, 509, 41 P.2d 349. The latter is not the situation here.

We are confirmed as to the correctness of this view by a reading of the Supreme Court's decision in Union Const. Co. v. Western Union Tel. Co., 1912, 163 Cal. 298, 311–312, 125 P. 242. That was an action for damages for delay in delivering a telegram. The evidence disclosed that as a result of the delay plaintiff lost an optional right that it had of contracting for the doing of certain work for it at a stated price, and that subsequently, under the best terms it could obtain for doing the work, it had to pay a substantially higher price, and it was held that the damage thus sustained was recoverable. While not expressly so stated therein, it is clear that, as here, although the obligation breached by the defendant arose out of contract, the action was in tort and the rule of damages in such cases applied. See Nester v. Western Union Tel. Co., 1938, D.C., 25 F.Supp. 478, 480.

[7–9] Defendant, however, contends that a different result is dictated by Hartford v. All Night & Day Bank, supra, 170 Cal. 538, 150 P. 356, L.R.A.1916A, 1220, and Bearden v. Bank of Italy, 1922, 57 Cal.App. 377, 207 P. 270, wherein it is held that the arrest of the plaintiff for the offense of issuing a check without sufficient funds was not the proximate result of the defendant bank's wrongful refusal to honor the check. As previously noted, however, the Hartford case was decided prior to the enactment of section 3320, and the District Court of Appeal, in the Bearden case, seemingly was not mindful of the fact that section 3320 had been enacted in the meantime, for no mention thereof appears in its opinion. Moreover, it would appear that both courts assumed that the action before it was one in contract, for otherwise section 3302 could in no event be applicable as it was there held. We need not, however, undertake to consider the soundness of the conclusion there reached, see, however, Collins v. City Nat. Bk. & Tr. Co., 1944, 131 Conn. 167, 38 A.2d 582, 153 A.L.R. 1030, in view of section 3320, which is a legislative recognition that a depositor whose check is

wrongfully dishonored may thereby sustain "actual damage" beyond the amount of the check. The loss of plaintiff's automobile was no less the proximate result of the dishonor of the check than the detriment occasioned by the delay in the delivery of the telegram which was held recoverable in Union Const. Co. v. Western Union Tel. Co., supra. Indeed, unless damages in cases of this character are to be confined to the amount of the check, if the detriment occasioned by the loss of property proximately resulting from the wrongful dishonor of a check is not recoverable as "actual damage," section 3320 is in effect rendered meaningless, for it is difficult to conceive of a situation wherein a loss could be sustained more directly related to the dishonor of a check than that sustained by plaintiff here.

Defendant further contends that if plaintiff is entitled to recover at all, the damages should be confined to the market value of the car, and that by this standard the judgment is excessive. We agree that the measure of plaintiff's recovery is the market value of the automobile, and that the court erred in computing the damages on the basis previously stated, namely, the amount paid on account of the purchase price of the car plus the deficiency resulting upon its sale by the vendor less the reasonable value of the use of the car while plaintiff had possession thereof; but, as will presently appear, this operated to the advantage of the defendant, and hence it may not be heard to complain thereof. Here there was no direct evidence as to the market value of the car at the time it was sold by the conditional vendor. It does, however, appear that upon such sale it brought the sum of $1,600, which, as defendant suggests, is some evidence of its then market value. From this premise defendant argues that, inasmuch as plaintiff then owed a balance upon the car of $2,196.80, he sustained no loss, and if the conditional vendor had wrongfully repossessed the car, in a suit for conversion against it by plaintiff, the latter could recover nothing and the vendor would be entitled to recover the difference between the market value of the car and the balance due upon the contract. Zarillo v. Le Mesnager, 1921, 51 Cal.App. 442, 443–444, 196 P. 902. In the circumstances stated, the contention is sound, but it does not apply in the instant case, for it is settled that one owning a qualified interest as conditional vendee in personal property who is wrongfully deprived thereof is entitled to recover its full value as against one having no ownership in the property where, as here, the one having the qualified interest is liable over to the conditional vendor. Goldberg v. List, 1938, 11 Cal.2d 389, 392–393, 79 P.2d 1087, 116 A.L.R. 900, and cases there cited. Thus, under the evidence, plaintiff was entitled to recover a substantially greater sum than that awarded him by the judgment—$1,600 rather than $777.62.

The judgment is affirmed.

BISHOP, Acting P. J., concurs.

131 Cal.App.2d Supp. 853

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

John Lloyd WRIGHT, Defendant and Respondent.

Nos. 191979, 191980.

Appellate Department, Superior Court, San Diego County, California.

Feb. 15, 1955.

Defendant, who was not certified or licensed under the Architects' Act or under the Civil Engineers' Act, was charged in two separate actions with violations of those acts. The Municipal Court, Oceanside Judicial District, County of San Diego, State of California, L. W. Cottingham, J., entered judgments of dismissal, and the People of the State of California appealed. The Superior Court, Appellate Department, Burch, J., held that two of the charges in the com-

plaint involving the Architects' Act stated public offenses, but that complaint dealing with the Civil Engineers' Act failed to state a public offense.

Judgment of dismissal as to complaint dealing with the Architects' Act reversed, and judgment of dismissal with respect to complaint charging violation of the Civil Engineers' Act affirmed.

1. Licenses ⇐7(1)

Provision of the Architects' Act forbidding a non-registered practitioner to advertise or put out any sign or card or other device, which might indicate to the public that he is an architect, is justified as a regulatory measure. West's Ann.Bus. & Prof.Code, §§ 5500–5604, 5536.

2. Criminal Law ⇐13

Provision of the Architects' Act forbidding a non-registered practitioner to advertise or put out any sign or card or other device which "might indicate" to the public that he is an architect, is not unconstitutionally vague because of the use of the words "might indicate." West's Ann.Bus. & Prof. Code, § 5536.

3. Licenses ⇐42(3)

Complaint charging that defendant did wilfully and unlawfully put out, place, and display a sign, card, and other device, which might indicate to the public that he was an architect, though he was not certified or licensed under the act, charged a public offense under the act. West's Ann.Bus. & Prof.Code, §§ 5500–5604, 5536.

4. Licenses ⇐39.40

The Architects' Act authorizes a non-registered practitioner to practice architecture by furnishing to other persons plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans, he furnishes statutory notice. West's Ann.Bus. & Prof.Code, § 5537.

5. Licenses ⇐42(3)

Charge of complaint that defendant engaged in the practice of architecture and did practice architecture without a certificate and without having obtained a certificate from Board of Architectural Examiners in the state authorizing him to practice architecture failed to state a public offense. West's Ann.Bus. & Prof.Code, § 5537.

6. Licenses ⇐42(3)

Charge in complaint that defendant agreed with another to execute and design and furnish plans and did so furnish plans without having informed such other person, in writing, that defendant was not an architect licensed by the state, stated a public offense. West's Ann.Bus. & Prof.Code, § 5537.

7. Licenses ⇐39.40

The Civil Engineers' Act does not prohibit drawing of plans by uncertificated persons for concrete building over one story in height, unless such building be neither a single or multiple dwelling, not over two stories and basement in height, nor a garage or other appurtenant structure, nor a farm or ranch building. West's Ann.Bus. & Prof.Code, § 6731.

8. Licenses ⇐39.40

Under the Civil Engineers' Act, an uncertificated person may draw plans for a single or multiple dwelling, or a garage or other appurtenant structure thereto, or a farm or ranch building, though the same be made of concrete and be over one story in height. West's Ann.Bus. & Prof.Code, § 6731.

9. Statutes ⇐181(1)

Purpose of court in construing statute is to find Legislature's intent.

10. Constitutional Law ⇐48

Court should so construe statute, without doing violence to its words, as to manifest constitutional purpose on part of Legislature.

11. Licenses ⇐42(3)

Charge in complaint that defendant, who was not certified or licensed under the Civil Engineers' Act, engaged in activities in connection with a concrete building, over one story in height, failed to state a public offense. West's Ann.Bus. & Prof.Code, § 6731.

12. Licenses ⇐39.40

Provision of the Civil Engineers' Act that the act does not prohibit preparation of

plans, drawings, specifications, estimates, or instruments of service by an unlicensed person for buildings, except steel frame "and" concrete buildings, not over one story in height, where span between bearing walls does not exceed 25 feet, should be construed to mean steel frame buildings and concrete buildings. West's Ann.Bus. & Prof.Code, § 6731.

See publication Words and Phrases, for other judicial constructions and definitions of "And".

13. Statutes ⇐197

The word "and" in a statute may be read as "or," and conversely, when necessary to harmonize provisions of a statute or give effect to all of its provisions.

See publication Words and Phrases, for other judicial constructions and definitions of "Or".

James Don Keller, Dist. Atty., by Marvin J. Mizeur, Deputy Dist. Atty., San Diego, for appellant.

Louis M. Welsh, Los Angeles, and Higgs, Fletcher & Mack, San Diego, for respondent.

BURCH, Judge.

Defendant was charged in two separate actions with the violation of the Civil Engineers' Act and the Architects' Act respectively. The defendant is not certified or licensed under either Act. The court below sustained a demurrer to each amended complaint without leave to amend. The People have appealed and make no point that they were denied leave to further amend. They contend that in each case the amended complaint stated a public offense. We will, therefore, consider on this appeal only the sufficiency of the respective complaints to state a public offense whether it be as a matter of pleading or as a matter of constitutional law.

Architect's Case
Superior Court No. 191979

The amended complaint charges the defendant with the violation of Sections 5536 and 5537 of the Business and Professions Code of California, and specifies that he—

"* * * did wilfully and unlawfully put out, place, and display a sign, card and other device which might indicate to the public that he was an Architect and that he is and was qualified to engage in the practice of architecture; advertise that he was an Architect and that he is and was qualified to engage in the practice of architecture; and engaged in the practice of architecture and did practice architecture without a Certificate and without having obtained a Certificate from the Board of Architectural Examiners in the State of California authorizing him to practice architecture; and that the Defendant, John Lloyd Wright, agreed with Salvadore Villiasenor to execute and design and furnish plans, drawings, and specifications, and did execute, design and furnish plans, drawings, and specifications to Salvadore Villiasenor, having failed to inform said Salvadore Villiasenor, in writing, that he, the said John Lloyd Wright, was not an Architect licensed by the State of California to practice architecture in violation of Section 5537 of the Business and Professions Code of California."

The Architects' Act, Sections 5500 to 5604 of the Business and Professions Code, sets out a comprehensive plan of regulation, including the creation of a State board composed of five architects selected from architects of good standing, licensed to practice in this State. Section 5514. This board is authorized to prosecute all persons guilty of violating the provisions of the Act. Section 5525. The board is further authorized to formulate and adopt a code of rules and regulations for its government in the examination of applicants for certificates to practice architecture in this State, and to formulate and adopt such other rules and regulations as may be necessary and proper. "No rule or regulation shall be inconsistent with this chapter." Section 5526. The Act defines an architect, Section 5500, as follows:

"As used in this chapter, architect refers to a person who holds a certificate to practice architecture in this State under authority of this chapter."

Section 5536 reads as follows:

"It is a misdemeanor, punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, for any person, without a certificate, to practice architecture in this State or to advertise or put out any sign or card or other device which might indicate to the public that he is an architect or that he is qualified to engage in the practice of architecture."

Section 5537 provides:

"This chapter does not prevent any person from making plans or drawings for his own buildings or from furnishing to other persons plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans, drawings, specifications, instruments of service, or other data, the person, so furnishing such plans, drawings, specifications, instruments of service, or data, fully informs such other person or persons, in writing, that he, the person proposing to furnish such plans, drawings, specifications, instruments of service, or data, is not an architect."

Sections 5536 and 5537 were adopted as part of the Business and Professions Code in 1939, Stats.1939, Ch. 33, p. 343, from Section 5 of the original Act, Stats.1901, Ch. 212, p. 644, as amended April 6, 1929, Stats. 1929, Ch. 68, p. 142. The 1929 amendment added the following words to the first sentence of old Section 5, now Section 5536: "or that he is qualified to engage in the practice of architecture" immediately following the clause "that he is an architect." The 1929 amendment also changed the requirement of notification from the direction that he "fully inform" his employer to the present requirement that he furnish written notice. The 1929 amendment also substituted for the words in the original Section 5 "plans or other data for buildings" the present words "plans, drawings, specifications, instruments of service, or other data for buildings." The new words "'instruments of service'" were held in Joseph v. Drew, 36 Cal.2d 575, 225 P.2d 504, 507, to signify to the profession the final plans and specifications utilized for the actual construction of the building as distinguished from preliminary sketches and drawings.

The validity of the original Act was judicially determined in Ex parte McManus, 151 Cal. 331, 90 P. 702. It was there held that, as then constituted, the Act did not violate Sections 11 or 21 of Article I of the State Constitution, and that the Act was uniform in its operation as to all architects who have not a certificate, and makes no arbitrary or other discrimination as to members of that class, nor does it grant any special privileges or immunities to any of that class which are not possessed by or extended to all.

[1–3] The constitutionality of the Act, as amended in 1929, requiring the unlicensed architect to give written notice to his employer, was adjudicated in Baer v. Tippett, 34 Cal.App.2d 33, 92 P.2d 1028. It was there argued that the dangers which might arise to the public from defects in plans or construction would be met by requiring merely an oral notice. The court said, 34 Cal.App.2d on page 40, 92 P.2d on page 1032:

"* * * it cannot be said that the object sought to be attained is not furthered by providing that the required notice shall be given in a definite form that may remove any doubt as to whether or not it was given."

Defendant, however, contends that in other respects the code sections are vague, an unlawful delegation of legislative power to the courts, and an abridgment of the right of free speech. These objections are directed to the prohibition contained in Section 5536 with regard to any advertisement or the use of business cards which "might indicate" to the public that he is an architect or that he is qualified to engage in the practice of architecture. Insofar as a non-registered practitioner is forbidden "to advertise or put out any sign or card or other device which might indicate to the public that he is an architect", we think the Act is clear and justified as a regulatory

measure in view of the provisions of Section 5500 quoted above, since the "architect" is by law one "who holds a certificate to practice architecture in this state under authority of this chapter." In this respect, the mandate does no more than forbid deceptive advertising. In Serve Yourself Gas Stations Ass'n v. Brock, 39 Cal.2d 813, 818, 249 P.2d 545, the legislative control of misleading advertising is deemed a proper exercise of the police power. Defendant makes the contention that the statute is unconstitutionally vague because of the descriptive words therein contained, to wit, "might indicate." In this context, we think the objection is not sound; that the words have a definite meaning. They reasonably warn one that the force and substance of his publication shall not carry the implication that he is a registered architect under the Act. Any type of advertisement which might indicate that the petitioner was an architect as defined in the Act is reasonably forbidden by the Act, and need cause no concern to a person desirous of conforming to the requirement. We, therefore, conclude that a public offense is stated in the complaint insofar as the complaint charges that the defendant "did wilfully and unlawfully put out, place, and display a sign, card and other device which might indicate to the public that he was an Architect." Whether the defendant employed an advertisement which did so indicate as alleged will be a question of fact to be proved by the People at the trial. He makes the same contention with respect to that portion of the complaint which charges that he "engaged in the practice of architecture and did practice architecture without a Certificate and without having obtained a Certificate from the Board of Architectural Examiners in the State of California authorizing him to practice architecture." Section 5537 specifically authorizes a person without a certificate to furnish "to other persons plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans" he furnishes the statutory notice. In McDowell v. City of Long Beach, 12 Cal.App. 2d 634, 638, 55 P.2d 934, 936, it was settled that the reference now in Section 5536 to the practice of architecture is used in no broader sense than the expression now in Section 5537, to wit, furnishing plans or other data for buildings. The court holds:

> "When the statute refers to the 'practice of architecture' and to 'furnishing plans or other data for buildings', the former expression is not used in any broader sense than the latter; in other words, the preparation of plans and data is used as synonymous with 'practice of architecture.'"

[4, 5] The prohibitions of Section 5536 relate to (1) the practice of architecture and (2) advertising by a noncertificated person either that he is an architect or that the State has licensed him as one having the qualifications for a certificate set up in the Act. The permissions granted by Section 5537 in no way release the controls on deceptive advertising, as we have shown above. In view of the McDowell case, supra, our question is narrowed to whether the 1929 amendments alter the legal effect given Section 5 of the 1901 law by that case. If, as held in the McDowell case "plans or other data for buildings" is no less or other than "the 'practice of architecture'" as those terms were employed in Section 5 of the original Act, we find no more restricted grant in the related amendment in 1929. "Plans, drawings, specifications, instruments of service, or other data for buildings" constitute the practice in as large a sense as do the words "plans or other data for buildings." It therefore must follow that Section 5537 in the respect mentioned authorizes the person who does not possess the certificate "to practice architecture." In this view the charge of the amended complaint that the defendant "engaged in the practice of architecture and did practice architecture without a Certificate and without having obtained a Certificate from the Board of Architectural Examiners in the State of California authorizing him to practice architecture" fails to state a public offense. Defendant's short answer is that he does not require the certificate from the board because Section 5537 expressly authorizes him to perform those services which constitute the practice of architecture

without possessing the certificate. The People suggest, in support of this charge, that the right conferred is made subject to the statutory notice. So it is. They contend further that the giving of the notice is a matter of defense and need not be charged.

We are not dealing here with an exception or justification of an unlawful act. Instead, we have a case where the criminal sanction depends upon the failure to comply with a statutory condition upon a fundamental right. Unless the failure to perform the condition is charged, no offense is charged. See Harris v. Bucher, 25 Cal.App. 380, 143 P. 796. The statutory notice is provided for the benefit of the owner merely to place him on his guard as to whether or not he wishes to employ an uncertificated person, Van Doren v. Burns, 106 Cal.App. 224, 226, 288 P. 1107. The matter is between the defendant and his employer. The sanction is for failure to inform the employer, Palmer v. Brown, 127 Cal.App.2d 44, 273 P.2d 306.

[6] The complaint also charges that the defendant, John Lloyd Wright, agreed with Salvadore Villiasenor to execute and design and furnish plans, etc., and did so furnish plans, etc., "having failed to inform said Salvadore Villiasenor, in writing," that Wright was not an architect licensed by the State, etc. Since these allegations charge the defendant with a crime defined in the Act they state a public offense. Because at least two of the several charges or counts in the complaint do state a public offense, the demurrer should have been overruled. The judgment of dismissal must be reversed.

Civil Engineer's Case
Superior Court No. 191980

The People have appealed from a judgment for defendant after demurrer sustained to the amended complaint which charged defendant with violation of Sections 6787(a) and 6731, Business and Professions Code, part of the Civil Engineers' Act. Section 6787(a) provides that:

"Every person is guilty of a misdemeanor * * *:

"(a) Who, unless he is exempt from registration under this chapter, practices or offers to practice civil engineering in this State according to the provisions of this chapter without legal authorization."

Section 6731 provides:

"Civil engineering embraces the following studies or activities in connection with fixed works for irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, framed and homogeneous structures, buildings, or bridges:

"(a) The economics of, the use and design of, materials of construction and the determination of their physical qualities.

"(b) The supervision of the construction of engineering structures.

"(c) The investigation of the laws, phenomena and forces of nature.

"(d) Appraisals or valuations.

"(e) The preparation and/or submission of designs, plans and specifications and engineering reports.

"Nothing in this chapter shall prohibit the preparation of plans, drawings, specifications, estimates, or instruments of service for single or multiple dwellings not more than two stories and basement in height; garages or other structures appurtenant to such dwellings; farm or ranch buildings; or any other buildings, except steel frame and concrete buildings, not over one story in height, where the span between bearing walls does not exceed twenty-five (25) feet.

"Civil engineering also includes city and regional planning insofar as any of the above features are concerned therein, and geodetic, municipal and topographic surveying."

[7, 8] The charging part of the amended complaint specifies defendant's engineering activities in connection with "a concrete building, over one story in height." The People contend the language forbids such activities. The defendant contends that the

language in its context is not subject to such a construction, or, at least, is so ambiguous, indefinite and vague as to render it repugnant to the concept of due process of law. Insofar as material to this issue, we conclude that the proper and grammatical construction of the statute does not prohibit the drawing of plans, etc. by an uncertificated person for a concrete building over one story in height unless such building be neither (1) a single or multiple dwelling, not over two stories and basement in height, nor (2) a garage or other appurtenant structure, nor (3) a farm or ranch building. Stated otherwise, the uncertificated person may draw plans, etc. for a single or multiple dwelling, etc. or garage or other appurtenant structure thereto, or a farm or ranch building, though the same be made of concrete and be over one story in height. In construing the statute, we think that no confusion need arise in respect to a fourth category, namely, "any other buildings," for the reason that any limitations in this category have no bearing upon the first three categories mentioned above. In the permitted class of "any other buildings," there are excluded, as we construe the words used, steel frame buildings and concrete buildings, and also buildings over one story in height and also one story buildings where the span between the bearing walls exceeds 25 feet. However, since the limitation upon concrete buildings is limited to the category of "any other buildings," the criminal conduct is not stated unless the concrete building over one story in height is alleged not to be within the stated permissions in the first three categories.

[9–11] It is our purpose in construing the statute to find the intent of the legislature, Helping Hand Home for Children v. San Diego, 26 Cal.App.2d 452, 455, 79 P.2d 778, and to so construe the statute without doing violence to its words as to manifest a constitutional purpose on the part of the legislature. Franklin v. Peterson, 87 Cal. App.2d 727, 730, 197 P.2d 788; City of Los Angeles v. Belridge Oil Co., 42 Cal.2d 823, 832, 271 P.2d 5; United States v. Harriss, 347 U.S. 612, 617, 618, 74 S.Ct. 808, 98 L.Ed. 989. The amended complaint in this case fails to state a public offense in the terms of the statute, or otherwise, because defendant's activities with respect to a concrete building over one story in height are not *ad hoc* prohibited.

[12, 13] The defendant contends that the phrase "steel frame and concrete buildings" refers to a single type of building constructed by steel frame filled with concrete. Such a construction is grammatically possible, but not necessary. In the context in which the phrase is used, it is the clear intent of the legislature, and a reasonable construction without violence to the words used, to construe the phrase as meaning steel frame buildings and concrete buildings. This is the construction we place upon the phrase.

> "When necessary to harmonize the provisions of a statute or give effect to all of its provisions, the word 'and' may be read as 'or,' and conversely. State v. Brandt, 41 Iowa 593." 3 Words and Phrases, "And," p. 595.
>
> See, also, Carlsen v. State, 127 Neb. 11, 254 N.W. 744; Bania v. Town of New Hartford, 138 Conn. 172, 83 A.2d 165; Rolland v. Commonwealth, 82 Pa. 306; Bird v. State, 131 Tenn. 518, 175 S.W. 554; State v. Steiner, 160 Wis. 175, 151 N.W. 256; Williams v. State, 99 Ark. 149, 137 S.W. 927; Proprietary Ass'n v. Board of Pharmacy, 27 N.J. Super. 204, 99 A.2d 52, 59.
>
> See, also, collation of cases in 3 Words and Phrases, under the title "And," subheading Criminal Statutes, p. 596, and previous.

Upon these considerations, the complaint in the engineer's case fails to state a public offense.

TURRENTINE, P. J.

I concur.

GLEN, J., did not participate in this opinion.

44 Cal.2d 191

Ray A. GARDNER and W. E. Gardner, Plaintiffs-Respondents,

v.

BASICH BROTHERS CONSTRUCTION CO., a corporation; Basich Brothers, a copartnership, composed of Risto L. Basich, Nikola L. Basich, Jesse S. Smith, George L. Popovich, and George W. Kovick, Defendants-Appellants.

L. A. 23339.

Supreme Court of California.
In Bank.
March 29, 1955.

Action by highway carrier for freight undercharges. The Superior Court, Los Angeles County, Samuel R. Blake, J., gave judgment for carrier. Shipper appealed. The Supreme Court, Spence, J., held that where highway carrier made oral agreement for hauling services, action for undercharges was based on contract and not upon statute which gave power to Public Utilities Commission to establish rates applicable, and since contract was in parol, two year period of limitations governed.

Reversed.

Opinion, 272 P.2d 793, vacated.

1. Automobiles ⇐121

The rules and rate regulations prescribed by Public Utilities Commission become a part of every contract between a highway contract carrier and the shipper. Public Utilities Code, §§ 3501–3809.

2. Limitation of Actions ⇐34(1)

A "liability created by statute" within three year statute of limitations is one in which no element of agreement enters and is an obligation which the law creates in the absence of an agreement. West's Ann. Code Civ.Proc. § 338, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Liability Created by Statute".

3. Limitation of Actions ⇐21(4)

The substantive right of action on a contract between contract carrier and shipper stems from the performance of services pursuant to agreement of parties, and limitations period for commencement of action by carrier for freight undercharge depends on the nature of the contract and whether it is in writing or rests in parol. Public Utilities Code, §§ 3501–3809; West's Ann.Code Civ.Proc. §§ 338, subd. 1, 339, subd. 1.

4. Limitation of Actions ⇐27

If carrier, which had not been notified in writing of shipper's intention to ship under hourly rates, was entitled to payment based upon ton-mileage rates under Public Utilities Commission rule, action for difference between paid hourly rate and amount allegedly due under ton-mileage rate was not based upon liability created by statute and was not subject to three year statute of limitations but was action based on oral contract subject to two-year statute of limitations. West's Ann.Code Civ.Proc. §§ 338, subd. 1, 339, subd. 1; Public Utilities Code, §§ 3501–3809.

Stephen Monteleone and Walter Atkinson, Los Angeles, for appellents.

Ernest W. Pitney, Los Angeles, for respondents.

SPENCE, Justice.

Defendants appeal from a judgment awarding plaintiffs the difference between the amount defendants paid plaintiffs, for a trucking job at the hourly rate and the larger amount allegedly due at the ton-mileage rate. Both minimum rates were fixed in public tariffs issued by the Railroad Commission (now the Public Utilities Commission), pursuant to the Highway Carriers' Act. Stats.1935, ch. 223, p. 878, 2 Deering's Gen.Laws, Act 5129a, now Public Utilities Code, §§ 3501–3809. As grounds for reversal, defendants rely on these two principal contentions: (1) that plaintiffs waived the higher rate; and (2) that plaintiffs' action is barred by the statute of limitations Code Civ.Proc. § 339, subd. 1.

In 1948 defendants were engaged in constructing a state highway. They employed plaintiffs, licensed highway carriers, to haul

certain materials by dump trucks. The hauling was done during the period from April 1 to early in July, 1948. Pursuant to its power to make rules and regulations establishing rate schedules for transportation services and to provide for their enforcement, the Railroad Commission, Highway Carriers' Act, supra, § 10, now Pub. Util.Code, § 3665, had established two minimum rates which might be applied to the type of hauling here involved: (1) ton-mileage; and (2) hourly. Section No. 4, page 40, Highway Carriers' Tariff No. 7, issued by the commission in October, 1947, and applicable here, provided: "Rates in this section are Hourly Rates and * * * will apply only when notice in writing is given to the carrier, before the transportation commences, of the shippers' intention to ship under such rates. When such notice is given rates in Sections Nos. 2 and 3 will not apply." Section 2 concerned ton-mileage rates.

In the perliminary discussions of the parties, plaintiffs told defendants that they would prefer to work at the ton-mileage rate rather than on an hourly basis; and that in the absence of a written requisition, the hauling would be based on the commission's standard rate, fixed on the minimum ton-mileage scale. No written requisition or work order was given either before or after the work started April 1, 1948. However, defendants daily furnished cards to plaintiffs' drivers and the latter completed them so as to show the hours worked. On May 18, June 10, and July 9, 1948, defendants gave plaintiffs written schedules of the number of hours worked during the preceding month with checks attached payable to plaintiffs based on the hourly rate. Plaintiffs accepted the schedules and checks without objection.

Plaintiffs commenced this action on April 30, 1951, to recover the alleged balance due for the hauling service computed on the ton-mileage rather than the hourly rate. Defendants relied on two main points in resisting plaintiffs claim: (1) waiver, and (2) the statute of limitations.

[1] Defendants first argue that since plaintiffs accepted payment at the hourly rate and at no time notified defendants that they intended to claim the ton-mileage rate, they thereby waived the requirement that the lower hourly rate applies only when the shipper gives the carrier prior written notice of intention to so ship. However, as stated in Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 730, 158 P.2d 23, 25, the prescribed rules and rate regulations "become a part of every contract between a highway contract carrier and the shipper." Therefore, plaintiffs maintain that since the above-cited rule requires written notice for application of the hourly rate, which notice was not here given, it was not incumbent on them to notify defendants that they were relying on the ton-mileage rate, and their acceptance of payment on the lesser hourly rate does not preclude enforcement of their claim according to the commission's rule. But assuming that plaintiffs' position is correct on this point of waiver, they still may not prevail. Defendants properly maintain that the applicable statute of limitations is the two-year period governing an action on an oral contract, Code Civ.Proc. § 339, subd. 1, rather than the three-year period for an action upon a liability created by statute, Code Civ.Proc. § 338, subd. 1.

[2, 3] A liability created by statute is one in which no element of agreement enters. It is an obligation which the law creates in the absence of an agreement. 16 Cal.Jur. p. 473, § 76; 53 C.J.S., Limitations of Actions, § 83, p. 1051; Higby v. Calaveras County, 18 Cal. 176, 179–180; Churchill v. Pac. Improvement Co., 96 Cal. 490, 492–493, 31 P. 560; Abram v. San Joaquin Cotton Oil Co., D.C., 46 F.Supp. 969, 976. But the present liability is not of that sort. While the minimum hauling rates to be charged on either an hourly or ton-mileage basis are fixed by law, and any charge less than the established rate is "unlawful" Highway Carriers' Act, § 10, now Pub.Util. Code, § 3664, the law does not create the liability. Rather the law only determines the amount of the liability created by the agreement of the parties. The prescribed rate provisions and regulations are deemed a part of every such contract, and the

parties are deemed to have contracted with such provisions in mind, for otherwise the state's rate-making policy expressed in the Highway Carriers' Act would not be effectual. Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 729–730, 158 P.2d 23. But the substantive right of action stems from the performance of services pursuant to the contractual agreement of the parties. Accordingly, the limitations period is determined by the nature of the contract of the parties, and depends upon whether the agreement is in writing or rests in parol. Oregon-Washington R. & Nav. Co. v. Seattle Grain Co., 106 Wash. 1, 178 P. 648, 650–651; Chicago, M. & St. P. R. Co. v. Frye & Co., 109 Wash. 68, 186 P. 668, 671; Baldwin v. Fenimore, 149 Kan. 825, 89 P.2d 883, 886–888; Gulf, M. & N. R. Co. v. Hunt Bros. Furniture Co., 173 Tenn. 327, 117 S.W.2d 12, 13–14; Bottemueller v. Wilson & Co., D.C.Mo., 57 F.Supp. 766, 767–768.

This conclusion is in nowise contrary to the California cases on which plaintiffs rely in urging application of the limitations period governing a liability created by statute. Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 158 P.2d 23, merely recognized that the commission's legally prescribed rates become a part of the parties' contract and "the carrier * * * is entitled to collect the proper rate", 68 Cal. App.2d at page 730, 158 P.2d at page 25, but the statute of limitations point was not involved. Sunset Pac. Oil Co. v. Los Angeles & S. L. Railroad Co., 110 Cal.App. Supp. 773, 290 P. 434, was an action to recover an overcharge collected in violation of the "long and short haul" provision of the Constitution, Art. XII, § 21, and the Public Utilities Act, § 24. Plaintiff there contended that the action was founded on a written instrument and that the four-year statute of limitations, Code Civ.Proc. § 337, applied. In rejecting this claim, the court observed that "no written agreement to repay overcharges is alleged" and therefore "the liability which the plaintiff seeks to enforce seems to arise by virtue of statute", with the three-year period of limitations, Code Civ.Proc. § 338, subd. 1, held applicable. 110 Cal.App.Supp. at page 782, 290 P. at page 438. In so concluding, the court stated 110 Cal.App.Supp. at page 781, 290 P. at page 438: "In many cases it has been held that an action brought by a carrier to recover the full tariff charge, where an undercharge has been made, is an action founded on an instrument in writing" (citing cases from other jurisdictions) but in construing such cases, "a distinction should be made between a suit brought to enforce the obligation of a contract as expressed in a written instrument and a suit brought to enforce an obligation which may in some remote way arise out of or be defined by a written instrument." The Sunset case relied on California Adj. Co. v. Atchison, etc. R. Co., 179 Cal. 140, 175 P. 682, 13 A.L.R. 274, also an action to recover overcharges. In the latter case, defendant contended that "neither by common law nor statute is an action for damages for a violation of a long and short haul clause given." 179 Cal. at page 146, 175 P. at page 684. But the court held that the "right of action is conferred" by the Public Utilities Act and it was unnecessary to consider "whether a right of action existed at common law or not." 179 Cal. at page 148, 175 P. at page 685.

[4] As here appears from the record, it was clearly the parties' contract, rather than the statute, which created the liability; and since the agreement was in parol, the two-year period of limitations governed. Code Civ.Proc. § 339, subd. 1.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

131 Cal.App.2d 821

V. O. MATCHETT, Plaintiff and Appellant,

v.

Jerry GOULD and Henry Matthews, doing business as firm style and fictitious name of G & M Brick Co., Jerry Gould and Henry Matthews, individually, G & M Brick Co. and association composed of Jerry Gould and Henry Matthews, Defendants and Respondents.

Civ. 20491.

District Court of Appeal, Second District, Division 3, California.

March 28, 1955.

Hearing Denied May 25, 1955.

Action by plaintiff, as assignee of unlicensed contractor, to recover for work and materials furnished defendants, unlicensed contractors, in razing a school building and grading site. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where plaintiff's assignor had completed his job and conferred value upon defendants, plaintiff might recover the amount due its assignor for the work and materials furnished, even though plaintiff's assignor was an unlicensed contractor.

Reversed with instructions.

1. Licenses ⇐39.1

One person in possession of property belonging to himself and another cannot deny claim of other to his share because property was acquired in transaction which was unlawful only because had without the sanction of a licensing statute.

2. Licenses ⇐39.43

In determining whether contractor's failure to procure license precludes his recovery for work and materials furnished under agreement to another contractor who was also unlicensed, the exact legal status of arrangement between parties was not a determinant, and it was not necessary that there be a partnership or joint venture or any other specifically named relationship, and the necessity of doing justice through forestalling unjust enrichment was the controlling situation. West's Ann.Bus. & Prof.Code, § 7031.

3. Assignments ⇐31

Where plaintiff's assignor and defendants agreed that if assignor was successful in obtaining bid from school district for razing school buildings, defendants would pay amount of bid to school district and would be entitled to all salvage from building, and plaintiff's assignor would perform certain services for defendant in razing buildings for which he would be paid by defendants, the arrangement constituted an assignment of contract to defendants so far as parties were concerned, and plaintiff's assignor became a subcontractor under the new agreement, even though plaintiff's assignor remained liable to school district upon his contract and posted bonds.

4. Licenses ⇐39.43

The contractor's licensing statute is designed, inter alia, for the prevention of fraudulent acts by contractors resulting in loss to subcontractors, materialmen, employees, and owners of structures. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7029, 7031.

5. Licenses ⇐39.43

When subcontractor is placed in class of those for whom protection of contractor's licensing statute was enacted, he is removed from the imputation of pari delicto and thus is enabled to maintain an action to recover what is justly due him under an agreement with contractor, even though subcontractor is unlicensed. West's Ann. Bus. & Prof.Code, § 7031.

6. Licenses ⇐39.43

In action by plaintiff, as assignee of contractor, to recover for work and materials furnished defendants, unlicensed contractors, in razing a school and grading site, plaintiff could recover the amount due its assignor from defendants for work performed and for which value had been bestowed upon defendants, even though plaintiff's assignor was unlicensed contractor. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7029, 7031.

7. Licenses ⇐39.43

Statute, which provides that unlicensed contractor could not bring an action for

compensation due for performance of work for which license is required, operates for protection of unlicensed contractor from time of completion of work and does not defeat enforcement of his just claim against another unlicensed contractor. West's Bus. & Prof.Code, § 7031.

Benjamin P. Riskin, Los Angeles, for appellant.

Louis Ballenger, Glendale, for respondents.

ASHBURN, Justice pro tem.

This question is determinative of the instant appeal: Did the trial judge correctly rule that plaintiff's failure to procure a contractor's license pursuant to Business & Professions Code, §§ 7026, 7028, 7029, precludes his recovery for work and materials furnished to another contractor under an agreement with that other contractor, who was also unlicensed?

Plaintiff sues as assignee of Frank B. Gotham who conducted business under the name Crane Service Co. (herein referred to as Crane). Defendants Jerry Gould and Henry Matthews operate under the name G & M Brick Co. (later designated herein as G & M). Crane was in "the equipment and demolition equipment rental business" and G & M in the "business of buying and selling salvage brick." The Glendale Unified School District was the owner of two brick buildings which it desired to raze. Bids for demolition and removal of same were invited. The representatives of Crane and G & M conferred together and arrived at an oral agreement that Crane should make a bid of $3,349.99, said sum to be a payment to the School District for all salvage; this amount apparently represented the excess of the estimated value of all salvageable material over the cost of recovering the same and disposing of materials which could not be salvaged. Under their agreement G & M were to furnish the $3,349.99 for payment to the District. The bid was made and accepted, whereupon Crane entered into a written contract with the District and also paid for and posted a Public Works Bond and a Faithful Performance Bond. G & M supplied the $3,349.99 as agreed. Crane thus became the contractor so far as the School District was concerned. But Crane and G & M rearranged the deal between themselves. All salvageable bricks and other materials were to belong to G & M. They hired Crane Service Co. cranes "by the hour to take down the brick and load them out on the G & M trucks for transportation to G & M yard." These were "manned and maintained" cranes, for whose services Crane was to be paid by G & M the reasonable value. G & M were to supply their own labor to strip the building of other salvageable materials and haul them away; G & M to own all salvage and "receive the revenue therefrom in its entirety." It was also agreed that Crane would remove and dispose of all concrete and rough grade the site, for which G & M were to pay Crane $5,500. The job was completed. Each of the parties "worked on their respective portions of the job independently, and * * * they did not share control." The reasonable value of the hire of the crane was $817.65 of which Crane received $200 from G & M. Crane also furnished additional labor and services, "which included dumping fees and cost of replacing personal property removed in the amount of $680.67." Neither Crane nor G & M had a contractor's license to do the work. Defendant G & M refused to pay the balance of $617.65 for crane hire, or any part of the $680.67 or the $5,500, relying upon the fact that Crane had no contractor's license. This position was upheld by the trial court, judgment went for defendants, and hence this appeal.

Plaintiff sued upon the contract, seeking recovery according to its terms. The trial judge found all the facts in his favor as alleged, but denied any recovery. Respondents' brief says: "There is no question that the building in question was demolished and the salvage was carried away * * *"; it also appears that it was sold by G & M. Defendants' counsel argues that § 7031, Bus. § Prof.Code forbids recovery. This poses a serious question for plaintiff does not proceed in *quantum meruit* nor directly invoke the

doctrine of unjust enrichment. His right to recover depends, we think, upon whether defendant was within the class of persons for whose protection the statute was enacted. §§ 7026, 7028, 7029 and 7031 are set out in the footnote.[1]

Appellant's counsel relies largely upon cases involving the rights of a partner or joint venturer to enforce a disgorgement of a share of profit or other property derived from activities conducted without a requisite license and withheld by another partner or venturer. Referring to such a situation the opinion in Norwood v. Judd, 93 Cal.App.2d 276, 286, 209 P.2d 24, 30, says: "It must be remembered that these licensing statutes are passed primarily for the protection and safety of the public. They are not passed for the benefit of a greedy partner who seeks to keep for himself all of the fruits of the partnership enterprise to the exclusion of another partner entitled to share therein. Where the illegal transaction has been terminated, public policy is not protected or served by denying one partner relief against the other."

Fraenkel v. Bank of America, 40 Cal.2d 845, 848, 256 P.2d 569, 571, states the purpose of the legislation more broadly: "That law was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work, and for the prevention of fraudulent acts by contractors resulting in loss to subcontractors, materialmen, employees, and owners of structures. Loving & Evans v. Blick, 33 Cal.2d 603, 609, 204 P.2d 23; Franklin v. Nat. C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37." Moreover, "'The invasions it makes on constitutional rights are not to be carried farther than is necessary to protect the public from the evils intended to be removed, unless the language compels such meaning and such effect is reasonably calculated to secure the legitimate objects for which the power is exercised.'" Joseph v. Drew, 36 Cal.2d 575, 581, 225 P.2d 504, 508. Indeed, the statute is to be strictly construed. Oddo v. Hedde, 101 Cal.App.2d 375, 383, 225 P.2d 929.

Cases which uphold the right of one partner to recover his share of moneys earned in a venture conducted without the required license are: Denning v. Taber, 70 Cal.App.2d 253, 257, 160 P.2d 900; Norwood v. Judd, 93 Cal.App.2d 276, 286, 209 P.2d 24; Galich v. Brkich, 103 Cal.App.2d 187, 191, 229 P.2d 89; Wold v. Luigi Consentino & Sons, 109 Cal.App.2d 854, 857–885, 241 P.2d 1032; Wilson v. Stearns, 123 Cal.App.2d 472, 481, 267 P.2d 59. In each of them, except the Wold case, a hearing was denied by the Supreme Court; no ap-

1. "§ 7026. The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

"§ 7028. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter."

"§ 7029. It is unlawful for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this State, to jointly submit a bid or otherwise act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation."

"§ 7031. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

plication was made in Wold. The Denning and Norwood cases proceed upon the basis that the illegality has spent its force when the point of dissolution and accounting is reached and that enforcement of a promise, express or implied, to divide the partnership assets does not require the court to lend its aid to enforcing the illegal feature of the partnership. The Galich decision marks a departure from the concept that there must be an express or implied promise to divide. That was an action for dissolution of a partnership or joint venture. In rejecting the claim that the relation between the parties was completely illegal because of absence of a license, the court, 103 Cal.App.2d at page 191, 229 P.2d at page 91, quoted from the Norwood case and added: "The contract in question was not *per se* contrary to any statute; public welfare and safety were not threatened, and public policy would not be protected or served by denying one partner relief against the other. Appellants' endeavor to distinguish the Norwood case from that here involved is not persuasive, for, while the facts are not identical, the principle announced is clearly applicable to the instant controversy."

Wold v. Luigi Consentino & Sons, supra, 109 Cal.App.2d 854, 241 P.2d 1032, dealt with a joint venture whose weakness lay in the fact that, although each individual was licensed, there was no license to act jointly as required by § 7029, Bus. & Prof. Code. 109 Cal.App.2d at page 857, 241 P.2d at page 1035: "Remembering that each of the joint venturers was duly licensed as a contractor and that only the license to act jointly was lacking, that the contract which the joint venturers were to perform was completed and paid for by the owners, that the defendant partnership received into its possession, and still retains, the profits of the venture, and that this is an action, not against the owners for whose protection in the main part the statute requiring the license was enacted, and that because the joint venturers were licensed so as to bring to the performance of the contract the skill, knowledge and responsibility which in main part the licensing statute was enacted to assure to those with whom they dealt, we think that the decision must be controlled by application of the rule laid down in Galich v. Brkich, 103 Cal.App.2d 187, 229 P.2d 89, which was decided after the trial court's decision in this case."

[1] Respondent argues that these cases are not controlling because no joint venture was alleged or proved at bar. Certainly there was no such allegation or finding; at least not in specific terms. And there is no fund to be divided. But defendants received and disposed of all salvage and kept all profits derived therefrom. They have also had materials and labor worth $6,683.57 furnished by plaintiff for their benefit and for which they refuse to pay. We apprehend that the presence of a partnership or joint venture in the cases above reviewed is not the determinative feature; it merely affords the basis for application of the equitable concept that one person in possession of property belonging to himself and another cannot deny the claim of that other to his share because the property was acquired in a transaction which was unlawful only because had without the sanction of a licensing statute. In other words, those cases hold that the recalcitrant partner is not one of the public for whose protection the statute was enacted. To some extent those cases are pertinent here. But they do not fully sustain appellant's position, for he stands upon a contract, not upon a right to division of assets after completion of a contract, and it is one which would not be enforceable if the action were brought against the School District. Mansfield v. Hyde, 112 Cal.App.2d 133, 245 P.2d 577; Grant v. Weatherholt, 123 Cal.App.2d 34, 266 P.2d 185.

However, Wilson v. Stearns, supra, 123 Cal.App.2d 472, 267 P.2d 59, 64, does support appellant. That case takes a step in advance of the partnership rulings and upholds the right to recover *on the contract* when equity and good conscience so dictate, notwithstanding the absence of a required license. That was an action to recover a real estate broker's commissions upon a written contract with a subdivider. Defendant resisted plaintiff's claim on the ground that he had violated subd. (f) of § 10176, Bus. & Prof.Code, which is set

forth in the margin.[2] The court first held that plaintiff had not been engaged in the proscribed practice, 123 Cal. at page 479, 267 P.2d 59, then turned to the question of alleged illegality on the part of a violator of that law, and upheld plaintiff's right of recovery though assuming his transgression of the statute. At page 481 of 123 Cal., at page 66 of 267 P.2d, it said that "unjust enrichment results for respondent Stearns if appellant Wilson is barred from recovering commissions on executed sales." At page 480 of 123 Cal., at page 65 of 267 P.2d: "In determining whether a contract is invalid the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the legislature and to a wise public policy. And, in determining whether a real estate broker may be deprived of the value of his services, already admittedly earned, his contract will not be declared invalid upon the basis of anything not embraced within the terms of the applicable statute." And 123 Cal. at page 481, 267 P.2d at page 66: "This court has, on previous occasions, enunciated the doctrine that law and good morals should be one and inseparable. Based on this philosophy it must be assumed that statutes such as the one now engaging our attention are enacted, as heretofore stated, for the protection and safety of the public. They are not adopted for the benefit of a greedy and avaricious participant in a venture or enterprise who seeks to keep for himself the fruits of the enterprise to the exclusion of a real estate broker who has fully performed all of his obligations under the agreement, and is entitled to share therein. Where, as here, the alleged illegal transaction has been terminated, public policy is not served or public policy protected by denying one party to the contract relief against the other. Rather than permit the unjust enrichment of respondent George Stearns, we are disposed to apply the rule announced in the case of Norwood v. Judd, 93 Cal.App. 2d 276, 288, 209 P.2d 24, 31, wherein, as Mr. Presiding Justice Peters, speaking for the court, in a well reasoned and considered opinion, said '* * * The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. *Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.*'" As to Stearns and his alter ego Alamo Development Company the judgment was reversed with instructions to enter judgment for plaintiff.

The court relied in part upon Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, which does support the Wilson ruling. Plaintiffs there sued for the reasonable value of services rendered in furnishing carpenter labor for the construction of certain houses. Plaintiffs Albert Gatti and Charles D. Moore were partners or joint venturers and as such did the work under a written contract. Each had an individual contractor's license but they had failed to procure a separate partnership license as required by § 7029, Bus. & Prof.Code. However, a predecessor firm consisting of Albert Gatti, Chas. D. Moore

2. "§ 10176. Investigation of actions of licensees: Grounds for suspension or revocation of licenses. The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

* * * * * * *

"(f) The practice of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange real estate for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination."

and Delbert Moore had taken out a joint license. Defendant relied upon the absence of a joint license running to the two plaintiffs and upon the terms of § 7031 forbidding an action by unlicensed contractor or contractors. Plaintiffs' judgment was affirmed. At page 690 of 27 Cal.2d, at page 266 of 166 P.2d: "A reasonable interpretation of the above code sections, regulating the business of a builder and contractor and enacted 'for the safety and protection of the public' by prohibiting inexperienced persons from engaging in such work, compels the conclusion that plaintiffs have substantially complied with the statutory requirements. Defendant approved of the partnership arrangement for the completion of the work and makes no contention that the labor performed was in any way unsatisfactory or that the monetary demand was excessive. The inequity of defendant's position stands out markedly when we consider that defendant would have plaintiffs—who are licensed individually and are also licensed as copartners with a third person, and who have satisfactorily performed work of the reasonable value of $3,435.50—go out of court with nothing, on the ground that they did not have a separate partnership license issued to them in consequence of the modified arrangement made with defendant for completion of the work under the admittedly valid contract originally made with Gatti individually. If defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." Broad equity thus sustained a recovery which was in the teeth of the exact terms of § 7029. The case was factually distinguished in Loving & Evans v. Blick, 33 Cal.2d 603, 608, 204 P.2d 23, but the Supreme Court has never departed from the basic ruling. And it does support the proposition that recovery can be had upon the contract in the absence of a license when equity and good conscience dictate such relief as an alternative to a judgment which would convert a law intended "for the safety and protection of the public" into "an unwarranted shield for the avoidance of a just obligation." Quoting at page 690 of 27 Cal.2d, at page 266 of 166 P.2d.

[2] As above indicated, the exact legal status of the arrangement between the parties is not a determinant in these situations; it is not necessary that there be a partnership or joint venture or any other specifically named relationship. The necessity of doing justice through forestalling unjust enrichment is the controlling consideration.

[3–5] While this is true, another approach to the problem is equally satisfying in its result. The parties in effect assigned the School District contract to G & M and made Crane a subcontractor; the subcontractor has done his job and defendant refuses to pay. While there was no formal assignment, defendant put up the money and took over the ultimate benefit of the contract,—the ownership and disposition of the salvageable material. While Crane remained liable to the city upon his contract and the posted bonds, he ceased to have any control over the operation except to work for G & M in the salvaging of brick, removing concrete, rough grading the site, etc. This he did independently, "and they did not share control." All the profits went to G & M; Crane was entitled to nothing except the agreed price for labor and materials furnished by him. That this arrangement constituted an assignment so far as they were concerned is indicated by the holding in Bergin v. Van Der Steen, 107 Cal.App.2d 8, 16, 236 P.2d 613, 618, for "it is the substance and not the form of a transaction which determines whether an assignment was intended." The contractor's licensing statute is designed *inter alia* "for the prevention of fraudulent acts by contractors resulting in loss to *subcontractors*, materialmen, employees, and owners of structures." Fraenkel v. Bank of

America, supra, 40 Cal.2d 845 at page 848, 256 P.2d 569, at page 571. (Emphasis added.) When a subcontractor is placed in the class of those for whose protection the law was enacted, he is removed from the imputation of *pari delicto*, Hedlund v. Sutter Medical Service Co., 51 Cal.App.2d 327, 333, 124 P.2d 878; Robertson v. Hyde, 58 Cal.App.2d 667, 672, 137 P.2d 703; 12 Cal.Jur.2d, § 103, p. 302, and thus enabled to maintain an action for recovery of what is justly due him.

Dow v. United States, 10 Cir., 154 F.2d 707, so holds. The action was brought by the United States for the use of Ben J. Holley to recover from L. F. Dow Trading Co. et al., a balance due on a subcontract, Dow being the prime contractor. The matter was governed by the law of Utah. Holley did not have the license required by statute, and the general contractor sought to defeat recovery on that ground. At page 710 of 154 F.2d the court disposed of the contention in this manner: "* * * it is the well settled general rule that in ordinary circumstances, a contract entered into by an unlicensed person in contravention of the statutory provisions of this kind will not be enforced. * * * But that general rule does not have application in a case of this kind in which an unlicensed member of a profession or trade seeks to recover from a licensed member for services rendered or labor performed pursuant to a contract entered into by them. Martindale v. Shaha, 51 Okl. 670, 151 P. 1019; White v. Little, 131 Okl. 132, 268 P. 221; Ferris v. Snively, 172 Wash. 167, 19 P.2d 942, 90 A.L.R. 278; Cf. John E. Rosasco Creameries v. Cohen, 276 N.Y. 274, 11 N.E. 2d 908, 118 A.L.R. 641. Moreover, here the primary contract obligated Dow to construct the buildings, including the excavating for the footings. He could do all of the work himself or let some of it to subcontractors. The subcontract let to Holley was illegal, but he has completed the work under it. The prime contract also has been completed, and Dow has received from the United States payment in full for the buildings, including the amount attributable under such contract to the excavating for the footings. Both contracts having been completed and Dow having received payment in full, it would not further the letter or the spirit of the law to allow him to escape liability for the unpaid balance due Holley by asserting the illegality of the subcontract. Cf. Brooks v. Martin, 2 Wall. 70, 17 L.Ed. 732; Overholt v. Burbridge, 28 Utah 408, 79 P. 561." See, also Ferris v. Snively, 172 Wash. 167, 19 P.2d 942, 90 A.L.R. 278, which involves a matter of splitting attorney fees with an unlicensed lawyer. It holds that the claim can be enforced against the employing lawyer after completion of the services, but not against his estate as the heirs and personal representative have the status of third parties for whose protection the licensing law was passed.

[6, 7] The trial court did not decide and it is not necessary for us to determine the exact relationship which the parties bore toward each other. We need go no further than to hold that one of two unlicensed contractors who has completed his job and conferred value upon the other may recover the amount due him for the same. The statute from the time of completion operates for his protection and does not defeat the enforcement of his just claim. We are constrained to hold that the judgment herein is erroneous.

The judgment is reversed with instructions to render judgment for plaintiff as prayed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; SPENCE, J., dissenting.

132 Cal.App.2d 142

Russell E. BRUNS, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC RAILROAD CO., a corporation, C. M. Dollarhide, and W. L. Powell, Defendants and Appellants.

Civ. 8543.

District Court of Appeal, Third District, California.

April 6, 1955.

Action for damages resulting from a collision between plaintiff's truck and trailer and defendant railroad company's locomotive and tender at a railroad crossing. From an order of the Superior Court, San Joaquin County, George F. Buck, J., granting plaintiff's motion for new trial after entry of judgment on a jury's verdict for defendants, defendants appealed. The District Court of Appeal, Schottky, J., held that evidence did not show that plaintiff was guilty of contributory negligence as matter of law and that trial court did not abuse its discretion in granting motion, in view of conflicting evidence and inferences therefrom.

Order affirmed.

1. Appeal and Error ⇐977(3)

Granting of motion for new trial rests within trial judge's discretion to such extent that appellate court will not interfere, unless abuse of discretion clearly appears.

2. Appeal and Error ⇐854(6), 933(1)

On appeal from order granting motion for new trial after judgment on jury's verdict, all presumptions are in favor of order, which will be affirmed, if sustainable on any ground.

3. New Trial ⇐71

The trial court, in considering motion for new trial, is not bound by conflict in evidence and does not abuse its discretion in granting motion where there is any evidence to support judgment for moving party.

4. New Trial ⇐71

Where only conflict in evidence is opposing inferences deducible from uncontradicted probative facts, trial court, on motion for new trial after judgment on jury's verdict, may draw inferences opposed to those accepted by jury and thus resolve conflicting inferences in moving party's favor.

5. Appeal and Error ⇐1015(1)

An appellate court will reverse trial court's order granting motion for new trial after judgment on jury's verdict only where, as matter of law, there is no substantial evidence to support contrary judgment.

6. Negligence ⇐136(9)

Contributory negligence is not established as matter of law, unless only reasonable hypothesis is that such negligence exists, reasonable or sensible men could draw no other conclusion from evidence, and evidence points unerringly to such conclusion, and where different inferences for and against existence of such negligence may be drawn, inference against it will be followed.

7. Railroads ⇐350(17)

In action for damages resulting from collision of backing freight locomotive and tender with plaintiff's truck and trailer at railroad crossing, evidence did not show that plaintiff was contributorily negligent as matter of law in voluntarily driving behind another truck, so that he could not see wigwag signal at crossing or hear warning whistle or bell, and crossing tracks at speed of twenty-five miles per hour while two floodlights and wigwag signal at crossing were operating.

8. Railroads ⇐350(18)

In action for damages resulting from collision of backing freight locomotive and tender with plaintiff's truck and trailer at railroad crossing, plaintiff was not guilty of contributory negligence as matter of law in violating statute requiring vehicle driver, approaching railway grade crossing at which clearly visible electric or mechanical signal gives warning of train's immediate approach, to stop within ten feet from nearest track, in absence of proof that wigwag signal at crossing was operating before accident or within such time as to give warning of approaching engine or that

such signal, if operating gave any more warning than presence of tender and engine itself on crossing. Vehicle Code, § 575.

9. New Trial ⇦72

The trial court, in passing on plaintiff's motion for new trial after entry of judgment on jury's verdict for defendants, was entitled to weigh evidence.

10. New Trial ⇦71

Where there was conflict in evidence and inferences therefrom, trial court did not abuse its discretion in granting plaintiff's motion for new trial after entry of judgment on jury's verdict for defendants.

Jones, Lane, Weaver & Daley by Richard Daley, Stockton, for appellants.

Casey C. Carr, Stockton, for respondent.

SHOTTKY, Justice.

Respondent commenced this action against appellant railroad company and its employees for damages resulting from a collision between his truck and trailer and a locomotive and tender of appellant railroad company at a crossing in the city of Lodi. The jury returned a verdict in favor of appellants and judgment was entered upon said verdict. Respondent made a motion for a new trial upon the grounds of (1) insufficiency of the evidence; (2) that the verdict is against law; and (3) errors in law occurring at the trial. The trial court granted respondent's motion upon all of said grounds and this appeal is from said order.

The only ground urged by appellants for a reversal of the order is that the trial court abused its discretion in granting the motion for a new trial because respondent's own testimony and nonconflicting evidence established that he was guilty of contributory negligence as a matter of law, in that his conduct shows that he exercised no care.

[1–5] The rules applicable to an appeal from an order of the trial court granting a motion for a new trial on the ground of the insufficiency of the evidence are well settled and are succinctly expressed in the recent case of Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, at page 358, 170 P.2d 465, at page 467, as follows:

> "* * * the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062."

It appears from the record that the accident involved in the instant case occurred about 5:20 a. m., standard time, on September 7, 1950, within the city limits of Lodi, California. It had been raining, but at the time of the accident was clearing and possibly slightly misty. The light condition was dawn, just as the dark of night is giving way to the light of day, but it was still fairly dark when the accident occurred.

The scene of the accident was on the north side of Lodi where Highway 99, running north and south, crosses a railroad track, which runs east and west, hereafter referred to as the crossing. The highway

is approximately 84 feet wide at the crossing, two traffic lanes for northbound traffic, two lanes for southbound traffic, and a parking lane on either side. Several hundred feet north of the crossing the traffic lanes narrow to a two-lane highway. Approximately 200 feet south of the crossing is an intersection controlled by traffic lights; the street intersecting Highway 99 at such point is known as Lockeford Road, hereafter referred to as the intersection. The distance from the south rail of the crossing to the north edge of the intersection is approximately 150 feet and the south edge of the intersection is approximately another 66 feet to the south. The crossing was protected by standard warning marks painted on the highway, by standard crossing signs and by a single wigwag signal located at the edge of the pavement on the southeast corner of the crossing. There are insulated joints in the railroad track located 12 feet east of the easterly edge of the highway which actuate the wigwag signal, therefore when the wheels of an engine or freight car across the insulated joint, the wigwag should immediately begin to operate. (There is one circuit west of the highway about 875 feet and one east of the highway about 1000 feet which also actuate the signal.) This particular railroad track was not used for passenger trains, but apparently was a line primarily used for local freight service and for picking up freight cars loaded with grapes and other fruits from points east of Lodi. This accident occurred during the grape season. Approximately 23 feet east of the east edge of the highway and 51 feet south of the nearest rail stand several storage tanks of the Union Oil Company, which are high enough to prevent one in an engine from seeing over them and blocking vision of anyone on the engine until it is close enough to the highway to see past them. Of course the angle of vision to the south increases as the viewer gets closer to the edge of the highway and beyond the obstruction of the tanks.

The train crew of the engine involved included C. M. Dollarhide, the conductor, W. L. Powell, the engineer, who was not present at the time of the accident, Hurley E. Bishop, a brakeman, Gordon Thompson, the fireman, and Smith, a brakeman. The entire crew with the exception of Smith testified at the trial. The engine was actually operated at the time of the collision by John L. Harrison, the assistant trainmaster.

The crew went on duty at approximately 11 p.m. the night before the accident occurred and were engaged in picking up loaded cars of grapes in the vicinity of Lodi. At about 1:00 a. m. the next morning, Powell, the engineer, started to feel ill and his condition "continued getting worse through the morning." At about 5:00 a. m. he saw Mr. Harrison, the assistant trainmaster, who instructed him to stop operating the locomotive and to lie down in Harrison's automobile, which was parked near the yard office. Harrison then began to operate the engine and was operating it at the time of the accident.

Under Harrison's control the engine left the Lodi station and proceeded in an easterly direction across Highway 99. At that time the wigwag signal was in operation and the two floodlights located at the crossing were on. The engine traveled 250 to 300 feet east of the crossing until the wigwag signal stopped operating, then the engine was reversed and backed to a location 30 to 35 feet east of the easterly edge of Highway 99 and stopped. The then members of the crew left the engine and went to a nearby restaurant for breakfast. After breakfast the crew returned to the engine. Harrison, acting as the engineer, was sitting on the south side of the engine. He testified that the bell was put into operation by the fireman as the reverse movement began and that he started sounding a standard whistle crossing signal as the engine started to move. The engine proceeded at the rate of 2 to 4 miles per hour into the crossing and the collision occurred with respondent's truck on the west side of the highway center dividing line and the train came to a complete stop about 10 feet to the west of the dividing line, therefore the train traveled a distance of approximately 82 feet from the time the re-

verse movement began until the accident occurred and the engine ceased its movement.

At the time of the collision respondent was driving his own truck and semi-trailer, which was approximately 45 feet long and carrying a load of concrete blocks weighing slightly more than 21 tons, within the legal load limits for the road. Respondent was driving north on the inside lane, the one next to the center dividing line, of Highway 99; a truck and trailer approximately 60 feet long, being driven by a Mr. Bostwick, was also proceeding north on Highway 99 in the outside lane. This latter truck and trailer were owned by a Swanson Trucking Service and are hereafter referred to as the Swanson truck. As the two trucks approached the intersection they were running along side by side and respondent's truck was toward the rear portion of the Swanson truck. Just before the accident respondent was slowing down a little so that the Swanson truck could get ahead of him because it was less heavily loaded and otherwise the Swanson truck would have to pass respondent on the two-lane highway that they were approaching.

As respondent approached the intersection he saw the traffic lights turn green. Both trucks proceeded to cross the intersection and continue toward the crossing. The speed of the trucks at this time was between 25 and 30 miles per hour, but respondent was beginning to decrease his speed as stated above. Respondent stated that at this time the wigwag signal was definitely not operating and that he saw the wigwag arm standing still. When about in the middle of the intersection respondent saw the wigwag signal for the last time and noticed that it was not in operation. Respondent could not tell whether or not the signal started operating while he was driving the last 200 feet from the middle of the intersection to the crossing as the Swanson truck obstructed his vision of it. When fairly close to the crossing the Swanson truck swerved to its left into respondent's lane of traffic, respondent also swerved his truck to the left across the center dividing line so that the rear end of the Swanson truck would not hit his truck. Just after the Swanson truck veered over, respondent heard a crash as the tender hit the Swanson truck, and, as the Swanson truck cleared the tracks, respondent's truck and the tender collided. Respondent did not see the engine and tender or know of its presence until it hit the Swanson truck, immediately prior to its colliding with his own truck, nor did he hear any warning whistles or bells. When the tender and respondent's truck collided, the side of the truck cab and front portion of the semi-trailer and load came in contact with the end of the tender, the west end of the tender being about 10 feet to the west of the center dividing line of the highway when all movement ceased. The rear wheels of the tender, the most westerly ones, were knocked a few inches off the rails. Respondent was stuck in the cab of his truck and someone helped pry him loose and get him out. After he was removed he noticed that the arm of the wigwag signal was swinging, but he does not remember hearing any sound of a bell from it and his position was such that he could not see whether or not the red light in it was lit.

Mr. Bostwick, driver of the Swanson truck, testified that he did not remember specifically looking at the wigwag signal as he was proceeding from the intersection to the crossing, but that he was watching the road ahead and that as such it was in his field of vision and that if it had been operating he was sure he would have noticed it. He said that when he was about 75 feet from the tracks the side of the tender appeared in the light from his headlights and that he immediately veered to his left to try to get around the tender, since he knew that he was too close to stop without hitting the side of the tender. The first portion of his truck cleared the tender, but the tender struck his trailer about in the middle. The load on this trailer consisted of another trailer being carried upside down; it was secured to the bed of the trailer upon which it was being carried by means of two chains and a cable. The force of this collision was sufficient to tear

the trailer being carried loose from its mooring and throw it across the street where it struck another automobile approximately 100 feet away. The point of impact with the tender was somewhere east of the center dividing line in the lane in which respondent was driving. He did not hear any warning whistle, did not remember hearing any bell sound from the engine, and did not remember anything about any floodlights at the crossing. He was familiar with the crossing and knew the location of the single wigwag signal; he did not see it operating before the accident, but at a time after the accident and after respondent had been removed from his truck Bostwick saw the signal arm swinging, but doesn't remember any bell sound from it and he was not in a position to determine whether or not the red light in the signal was on. After the accident he did hear the engine bell ringing.

Located at the crossing were two 500 watt floodlights. There was a conflict in the evidence as to whether or not these floodlights were on at the time of the accident. Bostwick did not recall them at all, one of the investigating police officers did not know if they were on or off when he arrived at the scene, and the P. G. & E. maintenance man, Kalk, who had charge of the time clock which turned the lights off could not say whether or not the lights were on between 5:14 and 5:25 a. m., the morning and time in which the accident occurred. Dollarhide stated that the lights were on when the engine crossed the highway going east, but did not remember if they were on at the time of the accident. Bishop, one of the train crew, stated that the lights were on that morning, but no reference was made as to whether it was before or after the accident.

Appellants make a lengthy argument in support of their contention that the undisputed evidence shows that respondent was guilty of contributory negligence as a matter of law. They argue (1) that respondent was familiar with the crossing and knew that there was a single wigwag signal protecting it; (2) that he voluntarily placed himself in a position behind the Swanson truck so that he could not see the wigwag signal for the last 200 feet of his approach to the crossing; (3) that from his position he knew that he probably could not hear a warning whistle or bell; (4) that his speed was at least 25 miles per hour when he crossed the intersection and that he maintained the same speed up to the time of the collision; (5) that the speed of the engine was two to four miles per hour; (6) that the two floodlights were on at the time of the collision, and (7) that the wigwag signal was in operation at the time of the accident.

There is no conflict in regard to respondent's familiarity with the crossing and to his position. However, there is a conflict on most of the other points set forth by appellants. The record does not show that plaintiff *knew* that because of his position and the noise of the trucks that he *probably could not hear* a warning signal; instead, he testified that he *did not* hear any whistle and that he could not say whether or not the locomotive bell was ringing, but he did not say that he *knew* that he *could not have heard* a whistle or bell if either had been sounded. With regard to the speed of respondent's truck, he testified that he had been going about 25 miles per hour, but that he was slowing up as he approached the crossing to allow the other truck to get in front of him, so that he did not maintain that speed up to the time of collision. In respect to the speed of the engine, there does not seem to be any conflict that it was proceeding into the crossing at the rate of two to four miles per hour; however, there is a great conflict among appellants' own witnesses as to the respective location of the engine and the trucks when they were first seen, and as to the location of the train when the brakes were applied. Again, there is a conflict as to whether or not the floodlights were on at the time of the accident, as hereinbefore pointed out. And lastly, the only witness to positively state that the wigwag signal was in operation at the time of the accident was Harrison, the operator of the engine at the time of the accident. None of the other witnesses, called by either appellants or respondent, who were in a position to see the wigwag signal operating, remembered that it was operating before the accident, although most of them saw the

wigwag arm operating at some time after the accident. None of such witnesses testified that the red light in the signal was on. As stated, the record shows a conflict on this point and Harrison's testimony was only entitled to be given such weight as the trial court felt was due in the light of all the other evidence.

We are satisfied that not only is there a conflict in the evidence as to several of the points urged by appellants as sustaining the contention that respondent was contributorily negligent as a matter of law, but also that the conduct of respondent was *not* such that is can be said as a matter of law that he was contributorily negligent. His conduct must be viewed in the light of the surrounding circumstances, and his relative position and speed under the circumstances, mainly relied on by appellants, were not such as to enable an appellate court to rule as a matter of law that he was contributorily negligent. Respondent definitely saw that the wigwag signal was *not* operating when he was approximately 200 feet from the crossing; he was familiar with the crossing and knew that it was not used for fast passenger or freight trains, but that its use was mainly local freight service; he saw the Swanson truck continue to approach the crossing at a speed in excess of his own; immediately after the Swanson truck swerved in front of him and was hit by the tender, he then saw the tender for the first time and could not avoid the collision; he never heard any warning whistle. Also, considering that the speed of the train was two to four miles per hour, that the wigwag signal was activated when it crossed the point 12 feet east of the highway, that such signal had not been activated when respondent was 200 feet south of the crossing and that he was going 25 miles per hour, it appears that respondent would cover the distance to the tracks in 5 to 6 seconds and in the same length of time the west end of the tender would then be only about 27 feet onto the highway, approximately 15 to 25 feet from the point of impact with respondent's truck; this is so even though the wigwag signal began operating the moment respondent lost sight of it. Either the train was moving faster than two to four miles per hour, or the wigwag signal was not working at the time warning the approaching traffic that the tender was then entering the crossing or upon it and not visible because of the darkness.

[6, 7] Bearing in mind the familiar rule so often stated by our appellate courts "that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion," we think it is clear that appellants' contention that the undisputed evidence shows that respondent was guilty of contributory negligence as a matter of law cannot be sustained.

[8] Appellants in their reply brief for the first time make the further contention that the respondent was guilty of contributory negligence per se for violation of California Vehicle Code section 575 which provides:

> "Obedience to Signal Indicating Approach of Train:
>
> "(a) Whenever any person driving a vehicle upon a highway approaches an interurban electric or steam railway grade crossing and a clearly visible electric or mechanical signal device gives warning of the immediate approach of a railway train or interurban car, the driver of such vehicle shall stop within 50 feet but not less than 10 feet from the nearest track of such railway but need not remain standing if he can proceed in safety."

Section 575 is applicable where the mechanical signal is in operation, but since it was not proven that the wigwag signal was in operation before the accident occurred, or within such time as to give any warning at all of the approaching engine, such section is not applicable to this factual situation. There is no proof that the signal in the instant case, if in operation, gave any more

warning than the presence of the tender and engine itself upon the crossing, and there is no proof that there ever was any violation of such section by respondent as would enable the court to say that he was negligent as a matter of law.

[9, 10] The trial court in passing on the respondent's motion for a new trial was entitled to weigh the evidence, and in the instant case, where, as hereinbefore pointed out, there was a conflict in the evidence and the inferences to be drawn therefrom, it cannot be held that the trial court abused its discretion in granting respondent's motion for a new trial.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Katie MARTINEZ and Della C. Martinez, Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC COMPANY et al., Defendants,

William Lopez Martinez and Carmen R. Martinez, Defendants and Appellants.

Civ. 4948.

District Court of Appeal, Fourth District, California.

April 8, 1955.

Hearing Granted June 2, 1955.*

Daughter and daughter-in-law brought action against father, his minor son, and railroad to recover for injuries sustained in collision between automobile and switch engine. The Superior Court of Fresno County, Edward L. Kellas, J., entered judgment against father and minor son, and they appealed. The District Court of Appeal, Barnard, P. J., held that where father, minor son, daughter, married son, and daughter-in-law were members of same family, and daughter, married son, and daughter-in-law contributed money to father to help pay household expenses, and, when daughter and daughter-in-law lost usual means of transportation to work two weeks before accident, married son, using his automobile, or father or minor son using father's automobile, took daughter and daughter-in-law to work, and they were injured as result of negligent operation of father's automobile by minor son while taking them to work, father did not receive "compensation" from them within meaning of automobile guest statute, and statute was applicable.

Judgment reversed.

1. Automobiles ⇐181(2)

Where special tangible benefit to automobile driver was motivating influence for furnishing transportation to another, "compensation" may be said to have been given within meaning of automobile guest statute, and statute is not applicable. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

2. Automobiles ⇐181(2)

Mere payment to driver of automobile by person transported of a portion of the expense as for gasoline consumed, is merely incidental, and is not payment of "compensation" within meaning of automobile guest statute, and statute is applicable. Vehicle Code, § 403.

3. Automobiles ⇐181(2)

Where ride in automobile is offered in hope of future business gain, and acceptance of ride furnishes opportunity for such gain, there is "compensation" within meaning of automobile guest statute, and the statute is not applicable. Vehicle Code, § 403.

4. Automobiles ⇐181(2)

To constitute "compensation" within meaning of automobile guest statute, so that the statute is not applicable, actual money need not pass. Vehicle Code, § 403.

5. Automobiles ⇐244(20)

Where automobile trip was primarily for business rather than social purpose, it

* Opinion vacated 288 P.2d 868.

is sufficient, in order to establish "compensation" within meaning of automobile guest statute, to show that driver was to derive benefit from the transportation. Vehicle Code, § 403.

6. Automobiles ⇐244(20)

Where any inference of tangible benefit to driver of automobile from transportation of another in automobile, amounting to a motivating influence, rests solely on conjecture, there is no sufficient showing of "compensation" within meaning of automobile guest statute, and statute is applicable. Vehicle Code, § 403.

7. Automobiles ⇐181(1)

Purpose of automobile guest statute is to limit liability for carrying guest by providing that mere invited guest cannot recover for simple negligence, and also to avoid collusive suits between members of the same family or friends, where driver admits negligence in order to force his insurer to bear loss resulting from accident. Vehicle Code, § 403.

8. Automobiles ⇐181(2)

Where father, minor son, daughter, married son, and daughter-in-law were members of same family, and daughter, married son, and daughter-in-law contributed money to father to help pay household expenses, and, when daughter and daughter-in-law lost usual means of transportation to work two weeks before accident, married son, using his automobile, or father or minor son using father's automobile, took daughter and daughter-in-law to work, and they were injured as result of negligent operation of father's automobile by minor son while taking them to work, father did not receive "compensation" from them within meaning of automobile guest statute, and statute was applicable in their action against father and minor son for injuries. Vehicle Code, §§ 402, 403.

9. Automobiles ⇐181(2)

Provision of automobile guest statute should not be so interpreted as to permit recovery where automobile ride is furnished merely as part of ordinary courtesy and helpfulness normally extended by one member of a family to other members. Vehicle Code, § 403.

John Said, Fresno, for appellants.

John D. Chinello, Lawrence E. Viau, Jr., Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiffs were injured on February 27, 1952, when an automobile in which they were riding collided with a Southern Pacific switch engine. The automobile was owned by the defendant Carmen Martinez, and was being driven by his son William Martinez. The complaint in this action alleged that the automobile was being driven by William Martinez with the permission of its owner, Carmen; that each plaintiff "was a passenger for consideration in this automobile"; and that the collision was caused and brought about by the joint and concurrent negligence of William Martinez and the engineer operating the switch engine. The answers of the defendants William and Carmen Martinez denied that the plaintiffs were passengers for consideration in this automobile, denied that it was being driven by William with the permission of Carmen, and denied the allegations of negligence on the part of William.

The case was tried without a jury. The court found that this automobile was owned by Carmen Martinez and, with his permission, was being operated by William Martinez; that the plaintiffs were riding as passengers therein; that the plaintiffs gave compensation to William and Carmen for the privilege of riding as passengers in this automobile; and that the accident was caused solely by the negligence of William Martinez, and not through any negligence on the part of the engineer operating the switch engine. Judgment was entered in favor of the Southern Pacific Company and its engineer, and awarding $5,961 to the plaintiff Martinez and $5,281.50 to the plaintiff Delia Martinez as against the defendants William Martinez and Carmen Martinez. William and Carmen have appealed from this judgment.

There is little conflict in the evidence. The appellants and respondents are members of the same family. Carmen Martinez is the father of the appellant William and the respondent Katie. The respondent Delia is his daughter-in-law.

Katie and William lived with Carmen and his wife at their home in Fresno. Katie was 20 years of age and William was 18 years old. The respondent Delia is the wife of Carmen's son Cypriano, and they lived in a small house in the rear of Carmen's home and on the same lot.

For some eight months prior to the accident Katie and Delia had been working at a packing house. During most of this period they were taken to work by a Miss Borella, who also worked there. They each paid Miss Borella $1 to $1.25 a week for transportation. Two weeks before the accident Miss Borella quit her work at this packing house and ceased taking respondents to work. During this two weeks' period they were taken to work by Carmen, William or Cypriano, whichever one happened to be available. When Cypriano took them he used his own car, and when Carmen or William took them Carmen's car was used.

The respondent Katie Martinez testified that this family lived more or less as a unit, and those who were working put so much money into the family each week; that she was making $30 to $40 a week; that she gave her father $10 to $12 a week to help pay for groceries, power and lights; that "If he needed more, why I used to put in some more"; that if they needed "more money in the house than $10 or $12, why I used to give it to them, to the house, to him"; that during the two weeks before the accident she didn't pay any more money to her father than she had been paying before; and that she had bought gas when Cypriano was driving "to help him with gas". While she testified at one time that she had never paid her brother William any money or anything prior to this accident, she also testified that ever since William was 14 she would occasionally give him 15¢ so he could go to the movies; that whenever he needed money to pay his bills he would come to her and she would give him some; that "Oh, when he used to ask me, he used to ask for $2.00 or $3.00—I mean, it depends how, or when—I never paid any attention, I just expected a favor returned"; that it was two months before the accident when she last paid a bill for him; that during these two weeks she was taken to work sometimes by her father, sometimes by William, and sometimes by Cypriano; and that "the one that was home" would take her.

Respondent Delia Martinez testified that at the time of the accident she was living at her father-in-law's in a little house in the back; that during the two weeks preceding the accident she and Katie were taken to work either by her husband Cypriano in their car or by William or Carmen in Carmen's car; that while she and her husband lived there her husband from time to time gave his father certain money for household expenses, utilities and power; and that during the two weeks when she rode to work with her husband, with Carmen or with William, she never gave any one of them any money or anything for the rides. Her husband Cypriano testified that while they were living there he paid his father something to help him out with the bills to pay for the lights, gas and water; that these were bills for lights, gas and water on the whole premises; that he did this "in place of rent"; that during the two weeks preceding the accident he used his own automobile a few times to take his wife and sister to the packing house; that his brother William and his father Carmen also took them to work a few times; and that there were no arrangements among the drivers of the family as to the use of the cars.

William Martinez testified that he had used his father's car before; that he took the girls to work that morning; that who took the girls to work depended upon who happened to be around; that he had had no conversation with his father before he left that morning; that he had had no conversation with his sister Katie or sister-in-law Delia prior to taking them to work that day; and that he simply jumped in the car, behind the wheel, and they jumped in to be taken to work. When asked if either of the respondents paid him anything for taking them to work during these two weeks he replied: "Not for taking them to work, no, not directly." When asked whether at the time he simply did it as a favor to them he replied: "Yes, as a favor but I expected oth-

er favors right back." When asked if he had any arrangements with his sister or sister-in-law, he replied: "No, we had it as if it was understood between me and them. Of course, I wouldn't do nobody any favors if I didn't get any favors back." When asked if they had ever paid him anything for these rides he replied: "No, not directly for as payment, for my favors to them." When asked whether they had given him anything for those rides he replied: "They gave me something, but I wouldn't, well, not cash and carry, you know, right away. They didn't done something for me. I mean they didn't pay me right there and then, if that is what you mean." When asked "Did they do anything for the rides?" he replied: "Not exactly for the rides, no." When asked "Is it a fact that you simply took your sister and your sister-in-law to work that morning as a favor to them?", he replied: "Yes, that part is". When asked if they had ever done anything for him for the ride on that morning, he replied: "Not, no, not that particular ride, no." Prior to the trial, William had signed a sworn statement in which he said:

> "I used to take them to work almost every morning. Neither one of them ever paid me anything for taking them to work. Nor did either one of them do anything for me. I simply took them to work as a favor since one of them was my sister and the other was my sister-in-law."

Carmen Martinez testified that they all lived at the same address, and that he had never received anything of any kind or nature from Katie or Delia as payment for the rides.

[1–6] The main question presented on this appeal is whether the evidence is sufficient to support the findings that the respondents were riding as passengers in this automobile, and that they gave compensation to the appellants for the privilege of riding as such passengers, within the meaning and intent of section 403 of the Vehicle Code. The general rules relating to the applicability of that section are well established. The cases hold that where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given; but that the mere payment of a portion of the expense, as for gasoline consumed, is merely incidental and does not constitute the motivating influence for the transportation. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909; Whitmore v. French, 37 Cal.2d 744, 235 P.2d 3. Where a ride is offered in the hope of future business gain and the acceptance of the ride furnishes an opportunity for such gain, a tangible benefit appears justifying the inference that a business rather than a social purpose was the motivating influence for the ride. Follansbee v. Benzenberg, 122 Cal.App.2d 466, 265 P.2d 183. To constitute compensation within the meaning of the statute actual money need not pass. Where the trip was primarily for a business rather than a social purpose it is sufficient to show that the driver was to derive benefit from the transportation, Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704; Brandis v. Goldanski, 117 Cal.App.2d 42, 255 P.2d 36. It is not sufficient, however, where any inference of a tangible benefit amounting to a motivating influence rests solely upon conjecture. Lyon v. City of Long Beach, 92 Cal.App.2d 472, 207 P.2d 73.

[7, 8] While each case must rest upon its own facts, the purpose and intent of the statute itself should not be lost sight of. It has been pointed out that in adopting this statute the purpose of the legislature was to limit liability for carrying guests by providing that a mere invited guest could not recover for simple negligence, and further "to avoid collusive suits between members of the same family or friends, where the driver admits negligence in order to force his insurer to bear the loss resulting from the accident." Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P.2d 714, 716; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841. The evidence in the instant case indicates that the driver of the car, William Martinez, whose negligence caused the injury, was trying as best he could to assist his sisters in recovering a judgment against his father and himself. In interpreting this statute the courts have gone a long way in permitting a recovery where the ride involved any business transaction, where a

hope of profit or benefit could fairly be said to be the motivating influence for the ride. In most, if not all, of the cases where some sort of business or economic benefit was involved, a practical and tangible benefit closely identified with the business of the driver, which was being furthered by the ride, has been required in order to establish a passenger relationship. Halbert v. Berlinger, 127 Cal.App.2d 6, 273 P.2d 274; Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1. None of the cases of which we are aware have gone so far, in upholding a claim of tangible benefits as constituting the motivating influence for a ride, as would be required if this judgment were to be affirmed. To so hold where a minor is transporting other members of his family for their convenience, rather than in connection with any business in which he is interested, and under such evidence as here appears would in our opinion largely destroy the beneficial affect of this statute with respect to one of its main purposes.

[9] This was not a business transaction in the ordinary sense of the word, and any hope of future benefit in taking other members of the family to work, if it existed at all, was merely incidental and decidedly secondary. While these riders contributed something to the family expenses no more was paid to, or expected by, the father than had previously been paid when other transportation was available. Nothing was given to or expected by the brother other than his later expressed hope for a continuance of the same favors he had received from his sister for some years, and long before any such transportation was furnished. Even this hope was clearly based upon the family relationship, rather than upon an expectation of receiving a tangible benefit from this ride. A hope of reward is not usually even thought of in connection with such a trip, and the evidence indicates that it was not considered here except as an afterthought. This trip was taken as a matter of accommodation and helpfulness between members of a family, and can fairly be considered only as a part of the customary use of family cars, and as a part of the common courtesy of family life. In our opinion, there was no substantial evidence of a tangible benefit to the driver or owner of this car which could be considered as the motivating influence for this ride, and the evidence is not sufficient to establish the giving of compensation for this ride within the meaning of section 403 of the Vehicle Code.

[9] The respondents argue that the fact that they were being taken to work was for the economic benefit of the appellants and that this, with the interchangeable use of the two automobiles, is sufficient to support a reasonable conclusion that compensation was given for this ride. Assuming that the ability of the appellants to get to their work was of some economic benefit to other members of the family this should not, under the facts of this case, be held to be a special and tangible benefit, which was the motivating influence for furnishing this ride, within the meaning and intent of this statute. At best, it was a general and incidental benefit arising from the employment, and not from the driver's service on this particular trip. The provisions of this statute should not be so interpreted as to permit a recovery where the ride is furnished merely as a part of the ordinary courtesy and helpfulness normally extended by one member of a family to other members. The rendering of an occasional service of this nature by a minor to another member of the family is but a part of normal family life, and is done for a social purpose rather than as a business matter with an eye to present or future benefits.

The only other point raised is that the liability of the owner of the car, Carmen Martinez, for the imputed negligence of the driver was limited by section 402 of the Vehicle Code to $5,000 for the injury to each of the appellants and to $10,000 for the injury to both, and that the damages awarded were thus excessive as to him. While this contention appears to have merit, it is unnecessary to consider the matter under our views with respect to the main point raised.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

131 Cal.App.2d 837

William B. McCRANIE, Plaintiff and Respondent,

v.

Ellery Everett MOOREHEAD, Defendant and Appellant.

Civ. 8565.

District Court of Appeal, Third District, California.

March 28, 1955.

Action for automobile passenger's personal injuries, consolidated for trial with action for wrongful death of his wife who had been driving the automobile. After return of a jury verdict for defendant in each case, the Superior Court, Lake County, Benjamin C. Jones, J., denied motion for new trial in the death case but granted motion for new trial in the injury action. From the order in the injury action only, an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that inconsistency in the action of the trial court upon the two motions was not a ground for reversal where the order appealed from was not shown to be otherwise erroneous.

Affirmed.

1. Negligence ⇐93(2)

Where automobile was registered in name of husband and his wife, and wife drove while husband was passenger on trip to visit one of their children, any contributory negligence on her part was imputable to him and would bar his recovery for his personal injuries and would bar her heirs from recovering for her death.

2. New Trial ⇐71

Where evidence in combined trial of personal injury action and wrongful death action was conflicting, trial court could without abuse of discretion have granted or denied new trial in each case.

3. Appeal and Error ⇐977(3)

Where trial court denied motion for new trial in wrongful death case, but granted motion for new trial in personal injury action tried together therewith, and no appeal was taken in death case, any inconsistency in court's action was not ground for reversal of order granting new trial in injury case in absence of showing that such order was otherwise improper.

4. Automobiles ⇐245(15, 43)

In automobile negligence action, it did not appear as matter of law that driver violated statute prohibiting passing within 100 feet of intersection or statute prohibiting unreasonable speed or statute providing speed limit on highways where persons are at work. Vehicle Code, §§ 510, 512, 530.

Schofield & Hannegan, Oakland, for appellant.

Mitchell & Henderson, Eureka, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from the order granting a new trial on the ground that the evidence was insufficient to sustain the verdict in favor of the defendant in an action brought by respondent to recover damages for personal injuries sustained when the automobile in which he was riding came into collision with that being driven by defendant and appellant. Respondent's wife was killed in the accident. She was driving a car in which respondent was riding. This car was registered in the names of respondent and of his wife and the two were en route to Nebraska to visit one of their children. They had journeyed from Eureka to Lucerne in Lake County, at which latter location the accident occurred. Respondent testified that while the car was so registered in both names his wife generally did the driving, that she had been driving from the time they started their journey at Eureka until they arrived at Lucerne and that she drove with his permission. Respondent and the children of the couple filed a second action in which they sought as heirs to recover damages from appellant for the wrongful death of the wife and mother. The two actions were consolidated for trial and the jury in both cases returned verdicts in favor of the defendant. Motions for new trial were made in both actions and the trial judge denied the motion for new trial in the death case, but granted the motion for new trial in the respondent's personal injury

action. From that order this appeal was taken. The plaintiffs in the death action did not appeal from the judgment that they take nothing from defendant by reason of that action.

The evidence as to what occurred when the two cars came together was conflicting, but it appears without conflict that the cars collided while respondent's wife was driving their car in a passing maneuver. It also appears without conflict that appellant intended to turn left and enter an intersecting street, that he made some movement to do this, and that it was during this period of time that the collision occurred; further that after the collision respondent's car went diagonally across the road to its left, across the intersection, and up over a curb where it struck a power pole. Respondent testified that just before the collision he had not been looking down the road ahead of them and only saw appellant's automobile as his wife was passing or was about to pass it, at which time appellant's automobile headed toward them and struck their car near the front on the right side. At that time he said their car was going about 30 miles an hour. Another witness, a 12-year old schoolboy, testified that he saw the collision, that the cars were moving at nearly the same rate of speed, with the respondent's car moving faster than the appellant's car, but neither going fast; that as the respondent's car pulled alongside the appellant's car the latter car pulled right into it and stopped and the other car went on into the power pole. Appellant testified that as he drove along approaching the intersection, where he intended to turn, he had his hand out to indicate he intended to turn, he had looked back and saw no car following, that his companion shouted to him and he again looked into the rear view mirror and saw respondent's car about 100 feet back of him and coming at 40 to 50 miles an hour, so that he straightened up and attempted to get out of the way. He said he was going about 15 miles an hour. His companion gave similar testimony.

[1–4] The jury's two verdicts must have been based upon a finding either that appellant was without negligence or that if negligent respondent's wife was contributorily negligent. Under the facts any contributory negligence of respondent's wife was imputable to him and would bar his recovery in his personal action. Krum v. Malloy, 22 Cal.2d 132, 137 P.2d 18; Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10; Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414. Her contributory negligence would likewise bar her heirs in the death action. In view of the conflict in the testimony, the question of the negligence of each driver was for the jury, and the evidence being much in conflict the record presents a case where the trial court on motion for new trial could, without abuse of discretion, have either granted or denied a new trial in each case. As to the case on appeal, the trial judge granted the motion for new trial and it cannot be said from this record that in doing so he committed error.

Appellants argue that the negligence of respondent's wife was shown as a matter of law because it was shown that she was attempting to pass appellant's car within 100 feet of an intersection in violation of section 530 of the Vehicle Code, and that her driving violated sections 510 and 512 of that code. However, it does not appear as a matter of law that she was violating any of the three sections referred to, and the trial court as to the alleged violations of any or all of these sections could act within the limits of his discretion in granting or denying new trials.

Appellant argues that not only does the record show that respondent's wife was guilty of contributory negligence, but further that the trial court so ruled when it denied the motion for new trial in the death action. However, it is not material on this appeal that the trial judge might have granted a new trial in the death action or that the trial judge's order denying a new trial in that action is inconsistent with its order granting a new trial in the respondent's personal injury suit. If we assume such inconsistency to exist, we could not for that reason disturb the proper order of the trial court granting a new trial in respondent's suit.

The order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

131 Cal.App.2d 812

Albert MARSHALL, Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES, Eugene Biscailuz, Ambrose Stewart, Henry Storlie, Maurice Marshall, Theodore Davis, Meza Leobijildo, et al., Defendants,

COUNTY OF LOS ANGELES and Eugene Biscailuz, Respondents.

Civ. 20600.

District Court of Appeal, Second District, Division 1, California.

March 28, 1955.

Action against county and others to recover for personal injuries sustained by county prisoner while working on truck which was being driven on prison farm by another prisoner. The Superior Court, Los Angeles County, James G. Whyte, J., sustained defendants' demurrer to complaint and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that complaint stated cause of action against county and driver of truck.

Reversed and remanded with directions.

1. Automobiles ⇦187

Truck used for county business in maintenance of its penal farm and driven by prisoner, who, even though not a paid county employee, was in control of vehicle by direction of county employees, was in "operation" within statute imposing liability on county for damages when exercise of governmental functions in operation of motor vehicles results in injury. Vehicle Code, § 400.

See publication Words and Phrases, for other judicial constructions and definitions of "Operation".

2. Automobiles ⇦187

Statute making county responsible to person sustaining injury from negligent operation of county's motor vehicle by officer, agent or employee, imposes liability for damages when the exercise of governmental functions in operation of motor vehicle results in injury to its people, and was designed to end common-law rule of governmental non-liability so far as operation of motor vehicles by public agencies is concerned. Vehicle Code, § 400.

3. Automobiles ⇦187

To be in "operation" within statute imposing liability on county for damages when the exercise of governmental functions in "operation" of motor vehicle results in injury, vehicle must be in a state of being at work or in the active exercise of some specific function. Vehicle Code, § 400.

4. Convicts ⇦2

Complaint seeking recovery from county for injuries sustained by county prisoner, which alleged that at time of injury, prisoner was working on prison farm truck used for county business in maintenance of its penal farm and driven by other prisoner, who, even though not a paid county employee, was in control of vehicle by direction of county employees, stated cause of action against driver of truck and against county under doctrine of respondeat superior. Vehicle Code, § 400.

5. Convicts ⇦2

In absence of statute imposing liability, county is not liable for failure to furnish prisoners with medical assistance for treatment of injuries.

6. Officers ⇦118

Public officers are not liable for torts of their subordinates unless the officers know that the subordinates are unfit or vicious persons.

7. Officers ⇦118

Sound public policy supports general rule of non-liability of superior public officers for torts of inferior civil service officers and employees and exceptions to that rule should not be extended.

William A. Tookey, Pasadena, for appellant.

Harold W. Kennedy, County Counsel, and Robert C. Lynch and Lloyd S. Davis, Deputies County Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

This is an appeal from a judgment that followed an order sustaining defendants' demurrer to plaintiff's second amended complaint.

It appears by the averments of the complaint that plaintiff was a prisoner at the sheriff's Wayside Honor Farm of the County of Los Angeles. He had been convicted of a misdemeanor, sentenced to the county jail, and transferred to the farm.

He was working with other prisoners on a dump truck owned by the county, and driven by one of the prisoners. No employee of the county was with the truck.

The men were hauling lumber from one place to another on the farm grounds. Plaintiff was assigned to ride in the truck. When it came time to unload it all of the men got into the truck. While the men were thus at work, the prisoner driver climbed into the cab of the truck, tilted its bed at an acute angle, and made it go rapidly backward and forward. The idea was to shake out the lumber remaining in the bottom of the truck. Unfortunately plaintiff was still in the truck when this operation was commenced. He tried to get out, but fell between the bed of the truck and the cab, and sustained serious injuries to his ankle and leg.

He was taken to the camp infirmary, treated for bruises and sprains, kept there for a week, and then transferred to the General Hospital in Los Angeles. At the hospital it was found that he had suffered a broken leg. The bones were set and the leg put in a cast, but before the man fully recovered he was discharged from the hospital and turned out to shift for himself. If this allegation be true, that would seem to have been a needless cruelty.

Plaintiff names as defendants the county, its Board of Supervisors, the sheriff and his deputies, and the prisoner who drove the truck.

Plaintiff's brief on appeal argues that the doctrine of sovereign immunity should not be applied in his case; that the county and the sheriff are liable for aggravation of his injuries by reason of negligent care and treatment furnished him; and that in any event he is entitled to compensation under Section 400 of the Vehicle Code for his injuries, pain, and suffering.

As stated in defendants' brief, the complaint contains four causes of action. The first is based upon a claim of negligent operation of the truck by fellow prisoners. The second is based upon the failure to furnish adequate medical equipment and personnel. The third is based upon the employment of an alleged incompetent and unqualified person at the honor farm to treat sick or injured prisoners. The fourth cause of action is substantially the same as the second.

These causes of action will be discussed separately.

The first cause of action—the claim of negligent operation of the truck:

That part of Section 400 of the Vehicle Code applicable to this situation may be epitomized as follows:

> "* * * every county * * * owning any motor vehicle is responsible to every person who sustains any damage by reason of * * * injury to person * * * as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee * * *."

[1] This Court is unable to agree with the argument of the county that the truck was not in "operation" when the accident occurred, as that word is used in the statute.

[2] In the enactment of Section 400 of the Vehicle Code the state imposed liability for damages when the exercise of governmental functions in the operation of motor vehicles results in injury to its people. Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397.

It was designed to end the common-law rule of governmental non-liability so far as the operation of motor vehicles by public agencies is concerned. Willoughby v. Zylstra, 5 Cal.App.2d 297, 42 P.2d 685.

[3] To be in operation within the meaning of the law the vehicle must be in a "'state of being at work'" or "'in the active exercise of some specific function'".

Chilcote v. San Bernardino County, 218 Cal. 444, 23 P.2d 748, 749.

[4] Applying these rules, it seems clear that the dump truck was in operation within the meaning of Section 400 of the Vehicle Code. Therefore the complaint states a cause of action against the County of Los Angeles, and the driver of the truck. While the driver was not a paid employee of the county, he was in control of the vehicle, and he had been directed to drive it by employees of the county. This is sufficient to establish liability of the county under the doctrine of *respondeat superior*. Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054; Eddy v. City of Los Angeles, 28 Cal. App.2d 89, 82 P.2d 25.

The case of Brindamour v. Murray, 7 Cal. 2d 73, 59 P.2d 1099, relied upon by the county, is not controlling here. In that case a municipally owned car was being used in the private business of a captain of police when an accident happened. In this case the truck was being used for county business in the maintenance of the county's penal farm.

[5] The demurrer was properly sustained as to the other three cause of action. In the absence of a statute imposing liability, a county is not liable for failure to furnish prisoners with medical assistance for treatment of injuries. Bryant v. County of Monterey, 125 Cal.App.2d 470, 270 P.2d 897.

[6] Moreover, it is not alleged in any of these three causes of action that any of the county employees or sheriff's deputies was known by the sheriff to be an unfit or vicious person. Without such an allegation public officers are not liable for the torts of subordinates. Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12, 24.

[7] As observed by Mr. Justice Shenk in his concurring opinion in the Fernelius case: "A sound public policy supports the general rule of nonliability of superior public officers for the torts of inferior civil service officers and employees and exceptions to that rule should not be extended".

If this were not the policy of the law, no one in his right mind would undertake the responsibility of sheriff or chief of police. Under civil service such officers have limited power of appointment of subordinates, less control over their tenure of office, and great difficulty in getting rid of incompetents and misfits. To permit legal actions to recover damages from sheriffs or chiefs of police for every tort of a deputy or police officer lacks the leaven of realistic thinking under increasing complexities of public service.

The judgment insofar as it sustains the demurrer of the defendant County of Los Angeles is reversed and the cause remanded with directions to the court below to overrule the demurrer of said defendant, and to allow the defendant County of Los Angeles to file an answer to the complaint if it be so advised. In all other respects the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 185

Helen McLaughlin ROGERS, Plaintiff and Appellant,

v.

J. L. RIHN, also known as John Rihn, Administrator of the Estate of W. E. Whitehead, also known as William E. Whitehead, deceased; John Doe, as administrator of the estate of Hazel L. Rihn, deceased; J. L. Rihn, also known as John Rihn; and Idele R. Rickard, Defendants and Respondents.

Civ. 8581.

District Court of Appeal, Third District, California.

April 8, 1955.

Hearing Denied June 2, 1955.

Action by former minor ward against administrator of estate of deceased guardian, individually and in his representative capacity, and others to impress a trust on realty and require defendants to account as trustees of real and personal property. The Superior Court, Amador County, Ralph McGee, J., entered an order granting

motion for change of place of trial, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that place of trial of action was properly changed from county in which none of defendants resided, though guardianship proceeding was pending therein, to county in which two defendants resided, realty in question was situated and estate of deceased guardian was being probated.

Order affirmed.

1. Venue ⇐22(1)

That administrator of estate of deceased guardian of person and estate of a minor might be required under Probate Code to file an accounting in guardianship proceeding did not justify requiring that action by former ward against administrator, individually and in his representative capacity, and others, none of whom resided in county in which guardianship proceeding was pending, to impress a trust on realty situated in another county and to require defendants to account as trustees of real and personal property be tried in county having jurisdiction of guardianship estate. West's Ann.Code Civ. Proc. §§ 392, 395, 395.1; Probate Code, § 1555.

2. Venue ⇐46

Place of trial of action by former minor ward against administrator of estate of deceased guardian, individually and in his representative capacity as administrator, and others to impress a trust on realty and require defendants to account as trustees of real and personal property was properly changed from county in which none of defendants resided, though guardianship proceeding was pending therein, to county in which two defendants resided, realty in question was situated and estate of deceased guardian was being probated. West's Ann. Code Civ.Proc. §§ 392, 395, 395.1; Probate Code, § 1555.

Leo C. Dunnell, William H. Herbert & Adey May Dunnell, Fairfield, for appellant.

Tinning & DeLap and J. Vance Porlier, Richmond, for respondents.

SCHOTTKY, Justice.

This is an appeal from an order granting a motion of certain defendants for change of place of trial from Amador County to Contra Costa County. The motion was made upon the grounds (1) that they are residents of Contra Costa County; (2) that the cause of action concerns real property which is situate in Contra Costa County; (3) that defendant Rihn is administrator of the estate of W. E. Whitehead, deceased, which estate is being probated in Contra Costa County; and (4) that none of the defendants resides in Amador County. Plaintiff opposed the motion for change of place of trial from Amador County, contending that under section 1555 of the Probate Code, Amador County was the proper place for trial.

The amended complaint alleged in substance that Jesse M. McLaughlin, the father of the plaintiff, died in Oakland, California, in 1896 and that thereafter his will which was probated in Alameda County, California, devised a portion of his estate to the plaintiff; that in 1897, W. E. Whitehead was appointed guardian of the person and estate of the plaintiff, who was then a minor, in a proceeding numbered 640 in Amador County, California; that following his appointment as such guardian, Whitehead received funds from the estate of plaintiff's father which properly belonged to plaintiff, but that Whitehead converted these funds to his own use and never made an accounting of property received by him as such guardian. Said complaint alleged further that in 1929 the guardian, who had bought certain real property in Contra Costa County with these funds, conveyed this property to his daughter, Hazel L. Rihn, and that Hazel L. Rihn and Idele Rickard, in 1929, came into possession of some of these funds and divided the same between them; that the Contra Costa County property is now held by Hazel L. Rihn and J. L. Rihn, but that they hold this property in trust for the plaintiff; that with this property Hazel

L. Rihn and J. L. Rihn have purchased additional real property in Contra Costa County, and, in addition, have purchased shares of Pacific Gas & Electric Company, Transamerica and Bank of America, and also hold cash in bank, all of which it is alleged they hold in trust for the plaintiff.

The complaint alleged further that W. E. Whitehead died on July 4, 1929; that he had never been discharged as guardian; that on March 18, 1953, J. L. Rihn was appointed administrator of the estate of W. E. Whitehead in Contra Costa County and that plaintiff filed her claim against said estate with said administrator, who rejected it.

The prayer of the complaint asks for an order restraining J. L. Rihn, individually and also as administrator, and also restraining Idele R. Rickard, from transferring the real and personal property described above. The prayer also prays that the defendants give an accounting as trustees of the real and personal property referred to in the complaint, and also prays for a money judgment against these defendants.

The trial judge in granting the motion for changing the place of trial stated in his memorandum opinion:

> "None of the named defendants in this cause is a resident of Amador County. Therefore they are entitled to have the cause transferred to the county where they reside, either on the ground of residence (C.C.P. Section 395) or because the cause affects real property in that county, (C.C.P. Section 392) or because it joins as one of the defendants J. L. Rihn in his official capacity as administrator in the same county (C.C.P. Section 395.1).
>
> "The case does not fall within the scope of Probate Code, Section 1555. That section simply says that the guardianship court does not lose jurisdiction of the guardianship proceeding for the purpose of settling the accounts of the guardian, if the guardian dies. And, that the account of a deceased guardian shall be presented by his administrator. It may be that if this proceeding were one simply to require the administrator of the deceased guardian to settle his accounts, venue might lie in Amador County. However, as to this, I express no opinion.
>
> "The complaint on file herein goes much further. It seeks to establish a cause of action for fraud and deceit involving several individuals, including the administrator of the deceased guardian in his official capacity but also as an individual. It also seeks to impress a trust upon real and personal property in the possession of several defendants. It also seeks an accounting from several defendants and it seeks a money judgment against several defendants. A judgment in plaintiff's favor in this action on these issues and against these defendants would go far beyond the purview of Probate Code, Section 1555."

We agree with this analysis and adopt it as a part of the opinion of this court.

[1] We are unable to agree with appellant's contention that, because section 1555 of the Probate Code provides that upon the death of a guardian the court does not lose jurisdiction of the proceeding for the purpose of settling the accounts of the guardian and that the accounts of a deceased guardian shall be presented by his executor or administrator, the county which has jurisdiction of the guardianship estate is the proper county for the trial of this action. The fact that the administrator of the estate of W. E. Whitehead might be required under said section 1555 to file an accounting in the guardianship proceeding in Amador County does not compel or justify the conclusion that the action against these respondents, as alleged in the complaint, must be tried in Amador County.

Code of Civil Procedure, section 395, provides that subject to the power of the court to transfer actions or proceedings as provided in Part 2, Title 4, of the Code of Civil Procedure, the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action.

Code of Civil Procedure, section 392, provides that subject to the power of the court to transfer actions and proceedings, the county in which the real property which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

"(a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property".

In Keithly v. Lacey, 1946, 77 Cal.App.2d 339, 175 P.2d 235, 236, plaintiffs alleged that defendant held in trust for them an undivided one-half interest in real property in Los Angeles, Tulare and Inyo Counties and personal property consisting of ten first mortgage bonds having a par value of $1,000 each. They prayed for a decree establishing the trust and directing defendant to execute such conveyances as would be necessary to convey to plaintiffs their respective interests. A motion for change of venue from Los Angeles County to Inyo County, where defendant resided, was denied by the trial court. The appellate court reversed the decision and said:

"* * * Where real and personal actions are joined in the same complaint the case must be tried in the county in which defendant resides if he so demands. [Citing cases.]"

In the instant case two of the defendants reside in Contra Costa County and none resides in Amador County. The real property upon which appellant's complaint seeks to impress a trust is situated in Contra Costa County.

Appellant's complaint shows that defendant J. L. Rihn was appointed administrator of the estate of W. E. Whitehead, deceased, and that said probate proceedings are pending in Contra Costa County. Section 395.1 of the Code of Civil Procedure provides:

"When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

[2] In view of the foregoing we are satisfied that the trial court correctly determined that respondents were entitled to have the action transferred to Contra Costa County.

The order is affirmed.

VAN DYKE, P. J., and FINLEY, J. pro tem., concur.

Bertha J. MESSENGER, Plaintiff and Appellant,

v.

Thomas T. MESSENGER, Defendant and Respondent.

Civ. 4933.

District Court of Appeal, Fourth District, California.

March 28, 1955.

Rehearing Denied April 22, 1955.

Hearing Granted May 25, 1955.*

Divorced wife's action to obtain execution for arrears owing under decree and to have husband held in contempt. Husband obtained order to show cause why monthly payments under decree should not be reduced. The Superior Court, Kings County, Clark Clement, J., denied relief to wife, and reduced amounts payable by husband, and wife appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that husband was not in contempt, but that where support payments were an integral part of property settlement and divorce court approved property settlement agreement, incorporating it in decree and ordering payments to be made, divorce court did not thereafter have power to modify agreement so

* Opinion vacated 297 P.2d 988.

as to reduce amount of support and maintenance.

Affirmed in part; reversed in part.

1. Divorce ⇐245(1), 309

Where support and maintenance payments were an integral part of property settlement and divorce court approved property settlement agreement, incorporating it in decree and ordering payments to be made as provided, court did not thereafter have power to modify agreement so as to reduce amount of support and maintenance payments.

2. Divorce ⇐263

Claim that allowing wife execution for arrears of alimony would require placing a constable in charge of husband's receipts, resulting in discredit and a reduction of his earning ability, was not such showing of equitable grounds as would disentitle wife to have execution.

3. Execution ⇐7

Issuance of execution upon judgment requiring monthly payments may be denied on equitable grounds.

4. Divorce ⇐269(11), 311

In wife's action to have divorced husband held in contempt for failure to comply with monthly payment provisions of divorce decree, evidence of husband's ability to comply sustained holding that husband was not in contempt.

Sidney J. W. Sharp, Herbert M. Braden and Lawrence W. Clawson, Hanford, for appellant.

Daniel M. Fadenrecht, Hanford, for respondent.

MUSSELL, Justice.

Plaintiff and defendant were married on September 11, 1936, and separated on or about November 14, 1950. On January 3, 1951, they entered into a property settlement agreement for the "purpose of fixing and adjusting their personal and property rights." The agreement provides that for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature, whether separate or community property, the parties agree in part as follows: The husband transfers to the wife certain real property and household furniture; he agrees to pay her $18,350 in cash, receipt of which is acknowledged. She is to have miscellaneous personal belongings and one 1948 Chrysler automobile. He agrees to keep a government insurance policy in good standing and that he will not change the beneficiary in a life insurance policy which he has or borrow thereon except for the purpose of paying the alimony specified in the agreement. The husband further agrees to pay concurrently with the signing of the agreement the sum of $1,000 attorney's fees and costs. The wife agrees that the husband shall have $18,350 then in his possession, together with miscellaneous personal belongings, office furniture, one 1949 Chrysler automobile and United States government bonds not exceeding $1,500 in value and as to these bonds, the husband agrees not to change payees thereon or cash said bonds except at maturity, it being the understanding that if he should die before the maturity date of any of said bonds, the proceeds therefrom shall be the separate property of the wife. Accounts receivable of approximately $15,000 are transferred to the husband, together with $2,650 due and owing from one Dorothy E. Cowels. The agreement in paragraph three thereof provides "That the husband agrees to pay the wife for her care, maintenance and support, the sum of Five Hundred ($500.00) Dollars per month, payable monthly in advance, commencing on January 3, 1951, receipt of which first month's alimony is hereby acknowledged, such obligation to pay to continue until the wife dies or remarries." Each party waives all their respective rights to property awarded to the other and any other future division of property or support and maintenance except as provided in the agreement. The agreement also contained the provision for the payment of income tax on alimony awarded to the wife.

On January 5, 1951, plaintiff filed an amended complaint for divorce alleging

extreme cruelty and asking for $500 per month for her support and maintenance. Findings of fact and conclusions of law were waived by the defendant and on January 8, 1951, the property settlement agreement was submitted to the trial court for approval. It was approved and incorporated in an interlocutory decree of divorce, in which it was made a part thereof and incorporated therein as if set forth in full. Defendant was ordered to pay plaintiff the sum of $500 per month for her care, maintenance and support as agreed in the property settlement agreement. On January 16, 1952, a final judgment of divorce was granted to plaintiff. In the decree the court ordered that the community property of the parties be divided in accordance with the property settlement agreement approved in the interlocutory decree and the order for support payments as provided for therein was ratified and confirmed. No appeal was taken from the interlocutory or final decrees of divorce and both became final judgments.

On December 23, 1953, plaintiff applied for an order for the issuance of an execution on the grounds that defendant had failed to make the payments as provided in the decree in the sum of $6,700. Plaintiff also secured an order to show cause why the defendant should not be punished for contempt. On December 31, 1953, defendant obtained an order to show cause why the payments provided for in the decree should not be reduced to the sum of $300 per month by reason of a change in his financial status. The motion for issuance of an execution and the orders to show cause were heard at the same time. The trial court reduced the alimony payments, held that the defendant was not in contempt of court for failure to make the payments as ordered in the decree and found that an execution should not be issued against the defendant as he "has no properties or monies against which such execution could be successfully levied, that the only manner in which such execution could be served would be by placing a constable in charge of the daily receipts of defendant, and, as the defendant is a professional man, this court finds that such an action would result in considerable discredit to the defendant; and the court further believes that if such action were taken, that the earning ability of the defendant would be reduced to such a degree that it would materially affect the ability of the defendant to pay to the plaintiff the reduced alimony as set by this court." The court ordered that the property settlement agreement be amended to provide for the payment of $375 per month, plus income tax due and payable on an income of $4,500 per year, to plaintiff for her support and maintenance instead of the sum of $500 per month and income tax on an income of $6,000 per year. It was decreed that the delinquency owing by defendant to plaintiff to March 10, 1954, is $5,668 and that defendant pay $800 of that amount on or before March 10, 1954; that defendant pay on account of such delinquency in addition to the monthly alimony the sum of $50 per month, commencing March 10, 1955. The issuance of an execution was then suspended so long as defendant made said payments and in default thereof it was ordered that an execution should issue forthwith.

Plaintiff appeals from certain parts of the order and judgment and the principal question to be here decided is whether the payments provided for in the property settlement agreement and final decree of divorce were subject to modification by the trial court.

In Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873, 875, as here, a property settlement agreement had been executed by the parties. The agreement was approved in the interlocutory decree and the court ordered the defendant to comply with it and to make the monthly payments therein set forth. The agreement recited that the parties were separated and had lived apart for some time, that the separation appeared to be permanent, and that " 'The said parties desire to effect a division of their community property and to provide for the support and maintenance of (plaintiff) and said children by friendly agreement, instead of resorting to court for said purpose.' " It then provided that certain enumerated property should be conveyed to

and become the separate property of plaintiff. The next paragraphs provided that "'(defendant) agrees to pay to (plaintiff) for her support and maintenance and the support of their adult daughter and minor son, the sum of one hundred fifty dollars ($150.00) per month. * * * In addition thereto first party agrees to pay for the daughter's Sorority dues and other expenses the sum of twenty-five ($25.00) per month, commencing June 1, 1944, and continuing thereafter so long as said daughter remains an undergraduate in college, and unmarried, but not to exceed (2) years from June 1, 1944.'" A reduction in the monthly payments was agreed upon in the event that the minor son of the parties left school, either to work or enter the military forces of the United States. It was then provided that upon the marriage of plaintiff all payments to her for her support and maintenance should cease. There, as here, the agreement provided that the respective parties released each other from any and all rights for support, care and maintenance other than as therein provided. The court held:

> "A husband and wife may contract with respect to their property, Civil Code, § 158, and if they are living separate and apart they may provide for the support and maintenance of either of them and their children. Civil Code, § 159. Moreover, as between the husband and wife, if the provisions for support and maintenance have been made an integral or inseverable part of the division of their property, and the court in a divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both of the parties. (Citing cases.)
>
> "It is clear that the parties executed such an agreement in this case. They expressly stated that they intended finally to settle both the division of their property and their rights and duties with respect to support and maintenance, and each party waived 'any and all right to support, care and maintenance' other 'than as expressly provided for herein.' It would be contrary to the clearly expressed intention of the parties to hold that the provision for monthly payments constituted a separable agreement for the payment of alimony subject to the continuing jurisdiction of the court to modify."

In Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881, plaintiff sought to increase the monthly payments set forth in a property settlement agreement and incorporated in the final decree of divorce. It was there held that the provisions for the support and maintenance of plaintiff were an integral and inseverable part of the property settlement agreement and were not subject to the modification sought by the plaintiff.

In Flynn v. Flynn, 42 Cal.2d 55, 265 P. 2d 865, 867, the parties executed a separation agreement providing for a division of their community property and the support and maintenance of plaintiff and the minor child of the parties. Plaintiff was awarded a divorce from defendant and the property settlement agreement was approved, confirmed and specifically incorporated in the interlocutory decree. The defendant was ordered to make all of the payments provided therein to be paid by him and to comply with all the terms and conditions of said agreement. The court held that "An examination of the property settlement incorporated by reference in the interlocutory decree makes clear that it is an integrated bargain of the type considered in Dexter v. Dexter, [42 Cal.2d 36] 265 P.2d 873, and Fox v. Fox, [42 Cal.2d 49] 265 P.2d 881. Accordingly, the provision for monthly payments may not be modified contrary to its terms."

In Finnegan v. Finnegan, 42 Cal.2d 762, 765, 269 P.2d 873, it is held that where the husband and wife while living separate and apart entered into a valid contract settling both their property and support rights and secured its approval and adoption by the court, and where the wife has accepted the benefits of the agreement, the husband has at all times performed his obligations thereunder, and neither party has given the other grounds for abrogating the agreement, the agreement is binding on them and on the court, and the court can-

not modify the payments or award costs and attorneys' fees contrary to its terms.

[1] In the instant case, as in Dexter v. Dexter, supra, the provisions for support and maintenance were made an integral part of the division of the property of the parties and the court approved the property settlement agreement, incorporating it in the decree, and ordering the payments to be made as provided in the agreement. Under the circumstances shown by the record the provision for monthly payments in the property settlement agreement and in the decree may not be modified contrary to the terms thereof.

[2] Appellant argues that the court erred in refusing to grant plaintiff's motion for the issuance of an execution for the delinquent payments found by the court to have amounted to the sum of $5,668 as of March 10, 1954. The installments accrued within five years after the entry of the judgment and plaintiff was entitled to have an execution issued and levied for the delinquent support payments. Steele v. Steele, 108 Cal.App.2d 595, 596, 239 P.2d 63; Wolfe v. Wolfe, 30 Cal.2d 1, 4, 180 P.2d 345; Di Corpo v. Di Corpo, 33 Cal.2d 195, 201, 200 P.2d 529; Millard v. Millard, 102 Cal.App.2d 249, 250, 227 P.2d 477. In Di Corpo v. Di Corpo, supra, the court held that a writ of execution will issue under section 681 of the Code of Civil Procedure as a matter of right upon installments accruing within the five year period on an ex parte application by the judgment creditor merely showing that such installments remain unpaid, and that upon proof by plaintiff that installments have accrued within five years, the burden was upon defendant to justify an order recalling the writ. In that case the defendant in his affidavit in support of his motion to recall the execution alleged that the children involved were boys seventeen and eighteen years of age and capable of earning their own support and that in view of an injury to his back, he was unable to work and support himself and that to permit an execution on his home would compel him to become a public charge of the county and state. The court concluded that defendant did not make a sufficient showing to entitle him to recall the writ.

[3] In the instant case the reason given by the trial court in its order and judgment for denying the issuance of the writ was that the only manner in which it could be served was by placing a constable in charge of the daily receipts of the defendant, resulting in discredit to him and a reduction of his earning ability. Although issuance of an execution upon a judgment requiring monthly payments may be denied on equitable grounds, Lohman v. Lohman, 29 Cal. 2d 144, 150, 173 P.2d 657, it does not appear that such grounds were established herein by the defendant.

[4] Finally it is argued that the trial court abused its discretion in failing to find the defendant in contempt of court for failing to make the payments ordered in the divorce decree. In this connection the court found that the defendant "while in arrears is not in contempt of court" and that "the financial obligations of said defendant have been of such a nature so as to have prevented the payment of the sum of $500.00 each and every month." In Bailey v. Superior Court, 215 Cal. 548, 552, 11 P. 2d 865, it is held that a husband who is unable to obey a decree for the payment of alimony cannot be adjudged in contempt for not obeying such decree unless he has voluntarily created the disability for the purpose of avoiding such payment. In the instant case there was a conflict in the evidence concerning the ability of the defendant to comply with the court's order and since there is substantial evidence to support the trial court's judgment in this respect, it will not be here disturbed.

The trial court's order and judgment is reversed in so far as it purports to amend the property settlement agreement. The order and judgment that defendant is not in contempt of court is affirmed and the order and judgment suspending the issuance of an execution is reversed. Each party to pay his own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

131 Cal.App.2d 808

E. O. HUTTLINGER, Plaintiff and Appellant,

v.

FAR WEST ENTERPRISES, Inc., a corporation, Defendant and Respondent.

Civ. 16115.

District Court of Appeal, First District, Division 2, California.

March 28, 1955.

Action by broker against vendor for broker's commission on real estate transaction. The Superior Court, Santa Clara County, John D. Foley, J., entered judgment adverse to broker, and broker appealed. The District Court of Appeal, Nourse, P. J., held that, where deposit receipt and agreement for sale provided that, upon forfeit by purchaser, one half of deposit was to constitute broker's commission, broker, who consented to return of deposit and money placed in escrow, and who actively urged and procured such return upon purchaser's default, waived by conduct his right to commission based on such deposit.

Judgment affirmed.

1. Appeal and Error ⇐999(1), 1008(1)

Unless but one inference can be drawn from evidence, questions of waiver and estoppel are for jury or trial court.

2. Appeal and Error ⇐1010(1)

Trial court's finding of waiver, which was supported by substantial evidence, was binding upon the district court of appeal.

3. Brokers ⇐76

Where deposit receipt and agreement for sale provided that, upon forfeit by purchaser, one half of deposit was to constitute broker's commission, broker, who consented to return of deposit and money placed in escrow, and who actively urged and procured such return upon purchaser's default, waived by conduct his right to commission based on such deposit.

DiMaria, DiMaria & Daschbach, Palo Alto, for appellant.

Crist, Peters & Donegan, Elton F. Martin, Palo Alto, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover a broker's commission of 5% on a real estate transaction of $175,000. He appeals from an adverse judgment based on findings of fact and conclusions of law showing the following grounds for the denial of the commission:

(1) that the agreement of sale procured by plaintiff was unenforceable because fatally uncertain and illusory;

(2) that plaintiff and defendant signed said agreement in the mutual mistaken belief that the purchaser procured by plaintiff was ready, able and willing to perform the agreement as signed, that said purchaser never was so ready, able and willing and that the agreement was not consummated because of said purchaser's failure to perform;

(3) that in case of such failure to perform the agreement of the parties provided for a commission for plaintiff of one half of the deposit of $2,000 to be forfeited, that, however, plaintiff actively prepared and procured the return of said deposit to the defaulting purchaser without making any claim for commission and thereby waived his commission and entered into a modifying agreement with defendant to that effect.

The last of these three propositions is mainly factual in character and supported by substantial evidence. Although on certain points not without conflict, the record contains evidence to the following effect: The deposit receipt and agreement for sale was signed on July 8–9, 1952 and provided for a purchase price of $175,000 of which $2,000 had been deposited, $123,000 was to be paid within 45 days from the acceptance of the offer, and the balance to be covered by a promissory note; defendant agreed to pay as broker's commission 5% of the purchase price, or one half of the deposit in case same was forfeited by purchasers; seller's right to declare the forfeiture of said deposit as liquidated damages in case buyer failed to pay the balance of the purchase price was expressly stipulated. Subsequent to the

signing of said agreement, the purchaser, a certain Gamel or his corporation, met with difficulty in raising the $123,000 to be paid. Plaintiff so informed defendant and with defendant's consent tried to bring about a deal regarding the same property for the same total price but in which besides Gamel three additional persons procured by plaintiff would be purchasers of parts of said property and would receive deeds direct from defendant. Documents relating to said deal were drawn up by plaintiff's attorney, but the deal did not go through. The three intended new purchasers placed in escrow over $60,000 but Gamel paid only $11,000 to plaintiff over the original deposit of $2,000 and for the rest tried to obtain permission from the holders of deeds of trust on seller's property, on which incumbrances there were arrears, to assume part of said obligations, which permission was not obtained. On October 23, 1952 plaintiff by his salesman Dan Huttlinger informed defendant that one of the three new purchasers, Bertrand, wished to get out of the deal and Dan dictated a letter authorizing the return of Bertrand's funds out of the escrow, which letter was signed by defendant. When Gamel heard of this release he told plaintiff that he also wanted his money back. Plaintiff was informed by his attorney that he could not return the money without the consent of defendant. With advice of his attorney he drew up a release of the money deposited or placed in escrow by Gamel and offered it for signature to Mr. Peters, defendant's agent and attorney advising him that he thought the money should be released. Mr. Peters signed it for defendant.

[1, 2] The above evidence supports the finding that the agreement on which plaintiff bases his claim of commission "was not consummated due to the failure of the proposed purchaser, Gamel Construction Company, to perform", which finding moreover is not attacked on appeal. Therefore the provisions of said agreement which gave respondent the right to declare the deposit of $2,000 forfeited and restricted appellant's commission to half of said deposit became effective. When under these circumstances appellant urged the return of the deposit without mentioning any claim of commission such conduct could reasonably be understood as waiver of any commission. "'Waiver' has been repeatedly defined as 'the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive.' (Citations.)" Panno v. Russo, 82 Cal.App. 2d 408, 412, 186 P.2d 452, 454. "'Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court.'" Krobitzsch v. Middleton, 72 Cal.App.2d 804, 815, 165 P.2d 729, 735; 25 Cal.Jur. p. 32. The finding of waiver by conduct in this case is binding on this court.

[3] Appellant strongly relies on White v. Reskin, 90 Cal.App. 512, 517, 265 P. 1016. In that action for broker's commission a judgment for the broker was affirmed, the court holding that when all parties for reasons satisfactory to themselves decided to cancel the contract of sale and all, including the broker, were requested to and did sign a consent to the cancellation of the escrow and the return of a deposit of $1,000 such did not imply that the broker consented to surrender his right to the commission. It is also stated that there was no default of the purchaser. The distinguishing features are obvious. Here the broker did not only consent to the return of the deposit and the money placed in escrow but actively urged and procured the return, the termination of the contract was not by voluntary consent but forced by the purchaser's default, so that the return of the deposit acquired a special importance and finally the judgment in the court below was here adverse to the broker so that all intendments are against him whereas they were in his favor in the White case.

The finding of an implied agreement to cancel the commission contract is another form only of stating the above waiver by conduct and must be upheld on the same grounds.

As the upholding of the waiver fully decides the case, we need not discuss the other two grounds stated.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

132 Cal.App.2d 49

Lorin BESS, Lorin Bess doing business under the name and style of Bess Agency, Plaintiff-Respondent,

v.

Edward P. PARK, Labor Commissioner of the State of California, Defendant-Appellant.

Civ. 20456.

District Court of Appeal, Second District, Division 1, California.

March 30, 1955.

Rehearing Denied April 25, 1955.

Hearing Denied May 25, 1955.

Declaratory judgment action by private employment agency against Labor Commissioner to determine whether, in controversy between employment agency and applicant for work, Labor Commissioner could postpone action until applicant was on job for more than ninety days. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment adverse to Commissioner, and Commissioner appealed. The District Court of Appeal, White, P. J., held that fact that legislature had provided, through complete trial de novo in the Superior Court, for review of Labor Commissioner's action in determining controversy between employment agency and applicant would not preclude judicial review of such action through declaratory relief procedure.

Judgment affirmed.

1. Declaratory Judgment ⇐205

Fact that legislature had provided, through complete trial de novo in the Superior Court, for review of labor commissioner's action in determining controversy between employment agency and applicant would not preclude judicial review of such action through declaratory relief procedure. Labor Code, §§ 1550–1663, 1624(h), 1647; West's Ann.Code Civ.Proc. § 1060.

2. Declaratory Judgment ⇐253

Declaratory judgment action is an equitable proceeding. West's Ann.Code Civ. Proc. § 1060.

3. Declaratory Judgment ⇐2

Purpose of declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation and to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. West's Ann.Code Civ.Proc. § 1060.

4. Declaratory Judgment ⇐5, 394

Whether determination is proper in action for declaratory relief is matter within trial court's discretion, and exercise of such discretion will not be disturbed upon appeal in absence of clear showing of abuse thereof. West's Ann.Code Civ.Proc. § 1060.

5. Declaratory Judgment ⇐122

Statutes are inherently proper subjects of declaratory relief. West's Ann.Code Civ.Proc. § 1060.

6. Declaratory Judgment ⇐41

Fact that party has another remedy does not deprive court of power to grant declaratory relief. West's Ann.Code Civ. Proc. § 1060.

7. States ⇐191(1.20)

Declaratory relief is an available remedy against the state or its agencies. West's Ann.Code Civ.Proc. § 1060.

8. Declaratory Judgment ⇐204

Any interested person has right to obtain judicial declaration concerning validity of any rule, regulation, order, or standard of general application adopted by any state agency to implement, interpret, or make specific any law enforced or administered by agency or to govern agency's procedure. Government Code, §§ 11371, 11440; West's Ann.Code Civ.Proc. § 1060.

9. Labor Relations ⇐19

Labor Code provision that contract or receipt given by private employment agency to applicant for employment shall state amount of fee charged and collected from applicant, and paid in advance by prospective employer authorizes practice of collecting the fee in advance. Labor Code, § 1624.

10. Labor Relations ⇐18

Labor commissioner has duty to hear and determine all cases of controversy between employment agency and applicant for employment with administrative diligence and dispatch and cannot, arbitrarily, refuse to hear and determine the controversy on ground that ninety days must elapse from commencement of date of work before employment procured by agency can be deemed permanent. Labor Code, § 1647.

11. Mandamus ⇐72

Courts will not attempt to compel public official to exercise his discretion in any particular manner, but, if law imposes specific duties on official and he, either whimsically or arbitrarily, refuses to perform such duties, or if official's refusal is based upon erroneous conclusion of his legal duties, or if right of individual is so fixed that official's refusal amounts to clear abuse of discretion, such error will be corrected in proper judicial proceeding.

12. Administrative Law and Procedure ⇐754, 762

Labor Relations ⇐18

If, in determining controversy between employment agency and applicant for employment, labor commissioner exercises his discretion and makes a determination, judicial interference with such determination would be unauthorized, but, upon commissioner's refusal to act at law under misconception imposed upon him by law, courts will correct such error. Labor Code, § 1647.

Pauline Nightingale, Edward M. Belasco, Leon H. Berger, Los Angeles, for appellant.

Edmond Gattone, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by the Labor Commissioner of the State of California from a declaratory judgment of the trial court in favor of respondent. The latter is a private employment agency, licensed as such by the provisions of Chapter 1 of Part 6, Division 2 of the California Labor Code. Pursuant to Labor Code, Section 1589, respondent has posted with the labor commissioner a penal bond in the sum of $1,000, conditioned, among other obligations, to pay all sums due from respondent to applicants for employment when the former has received an application for employment from the latter. In the instant proceeding, it appears that respondent secured for an applicant permanent employment, the applicant refused to pay respondent the agreed fee for obtaining such employment for him, and the controversy was referred to the labor commissioner, Labor Code, Section 1647. It is the refusal of the latter to act and rule upon the controversy that instigated this proceeding.

The statutes governing private employment agencies is contained in sections 1550–1663 of the Labor Code.

There is no controversy surrounding the facts of this case. It is conceded that respondent entered into a contract with one O'Hanlon to obtain for him a permanent position. In the contract it was stated that the employment was to be permanent (defined by section 1624(h) of the Labor Code as "lasting beyond ninety days"). Respondent secured a permanent position for the applicant O'Hanlon and it is conceded that the fees provided for in the contract were earned by respondent but that O'Hanlon refused to pay the same. When such a situation arises between an employment agency and an applicant, section 1647 of the Labor Code provides as follows:

"In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to appeal within 10 days after determination, to the superior court where the same shall be heard de novo. To stay any award for money, the party aggrieved shall execute bond ap-

proved by the superior court in a sum not exceeding twice the amount of the judgment. In all other cases the bond shall be in a sum of not less than one thousand dollars ($1,000) and approved by the superior court."

In consonance with this provision of the statute the aforesaid controversy was duly referred by the respondent to the labor commissioner. The latter, however, refused to hear or determine the controversy because of a policy adopted by him, and which is set forth in a letter addressed to respondent, signed by the Acting State Labor Commissioner, and in which it is stated:

"Replying to your letter of October 11, 1951, I have again discussed with our Legal Staff the question of whether or not we can make a determination awarding an employment agency the full fee for a permanent position, where the employee is still on the job and 90 days have not elapsed. It is their unanimous opinion that we could not do this without prejudicing the applicant's right to a refund should his employment terminate in less than 90 days."

It is noteworthy that in the event an applicant refuses to pay the fee upon acceptance of the employment secured for him by the agency, the latter is restricted for its remedy by section 1647 of the Labor Code and the contract, to reference of the controversy to the labor commissioner for hearing and determination. In the meantime, the agency can file no action in court and as a consequence the provisional remedies of attachment and garnishment are unavailable to it. Nothing can be done but to await the decision of the labor commissioner and if either party is dissatisfied therewith he can appeal to the superior court within ten days after the determination, in which forum the matter is heard *de novo*.

The trial court found the existence of an actual controversy between the respondent and the labor commissioner and made a declaration, among other matters, that in the case of a controversy between the agency and an applicant involving a fee under the contract for permanent placement, the labor commissioner has no power to arbitrarily refuse to determine that controversy or to postpone an award for payment of the total fee on the ground that the employment being extant, the determination or award cannot be made until after such time as the employment shall have lasted beyond 90 days.

From the judgment accordingly entered, the labor commissioner prosecutes this appeal.

Appellant first contends that judicial review of the action of the labor commissioner in determining a controversy between an employment agency and an applicant cannot be invoked by declaratory relief procedure. That the Legislature has formulated a vehicle for review by providing for a complete trial *de novo* between the parties to such a controversy, Labor Code, Section 1647, supra.

[1–7] With this contention we cannot agree. An action for declaratory relief is an equitable proceeding. Ho Gate Wah v. Fong Wan, 118 Cal.App.2d 159, 165, 257 P.2d 674. As was said by our Supreme Court in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 729, 146 P.2d 673, 678, 151 A.L.R. 1062, "The purpose of a declaratory judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.' (Citing cases.)" Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. Jackson v. Lacy, 37 Cal.App.2d 551, 561, 100 P.2d 313. And, whether a determination is proper in an action for declaratory relief is a matter committed to the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless a clear abuse thereof is shown. Mefford v. City of Tulare, 102 Cal.App.2d 919, 922, 228 P.2d 847. That statutes are inherently proper subjects of declaratory relief was the holding in Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 751, 120 P.2d 730. Neither does the fact that a party has another remedy deprive the court of the power to grant relief under the law. Ermolieff v. R.K.O. Radio Pictures, 19 Cal.2d 543, 547, 122 P.2d 3. With reference to the propriety of declaratory relief

in the instant case, respondent observes, and we think correctly, that "The problem presented to the court was a recurring one involving the interpretation of a statute. True, the Respondent could have sought mandate by way of relief each time that the controversy with the Labor Commissioner arose and in the future the Respondent could apply for a writ of mandate on each occasion that the Labor Commissioner acting under a mistake of law refuses to determine the controversy or to award the total fee until after such time as the extant employment shall have lasted beyond 90 days. But this would involve a multiplicity of actions going to the same point and declaratory relief being an equitable proceeding the trial court can in its discretion grant that relief in order to liquidate uncertainties and controversies which might result in future litigation especially where the interpretation of a statute is the subject of the dispute. We submit that in the case at bar declaratory relief was an eminently proper remedy and one well within the discretion of the trial court." The claim that section 1060 of the Code of Civil Procedure does not authorize the bringing of an action for declaratory relief against the State or its governmental agencies, was set at rest in the case of Lord v. Garland, 27 Cal.2d 840, 852, 168 P.2d 5. See also California Physicians' Service v. Garrison, 28 Cal.2d 790, 800, 172 P.2d 4, 167 A.L.R. 306, and Nougues v. Douglass, 7 Cal. 65, 74.

[8] The right of any interested person to obtain a judicial declaration as to the validity of any rule, regulation, order or standard of general application adopted by any State agency to implement, interpret or make specific, any law enforced or administered by it or to govern its procedure is found in the provisions of the Administrative Procedure Act, Title 2, Division 3, Part 1, Chapters 4 and 5 of the Government Code, Sections 11371, 11440.

Finally, appellant contends that the refusal of the labor commissioner to award the agency a full fee for permanent employment before the employment had lasted more than 90 days was valid, reasonable and proper. Appellant concedes that the labor commissioner has adopted a rule or policy under which he will not hear or determine a controversy between an agency and applicant with regard to the payment of a fee for permanent employment until 90 days (the time provided by Labor Code, section 1624, as constituting permanent employment) has expired. This rule is predicated upon the ground that a possibility exists, at least, that the employment may not last for the 90 days and that a dispute could arise in the future as to whether the agency was entitled to a fee for obtaining permament employment. The basic contention of appellant labor commissioner is that he cannot determine the controversy or award the total fee prior to the expiration of 90 days "without prejudicing the applicant's right to a refund should his employment terminate in less than 90 days". The question thus presented on this appeal is whether appellant labor commissioner in arbitrarily refusing to determine the controversy or to make an award for the payment of the total fee until after the extant employment shall have lasted beyond 90 days, has abused the discretion vested in him by the statute.

[9] Here, we are confronted with an admitted legal and valid contract between the agency and the applicant under the terms of which the latter unconditionally agreed to pay to the former a total fee immediately at the time the applicant agrees to commence work. The contract was written in conformity with section 1624 of the Labor Code which provides that the contract or receipt given to the applicant shall in part state "The amount of fee charged and collected from the applicant, the amount of fee, paid or advanced by the prospective employer and the cost of transportation and by whom paid or advanced", and also whether the employment is "definite" or "indefinite", and "if temporary or permanent (to be deemed permanent only if lasting beyond ninety days)". That Labor Code section 1624 authorizes the practice of collecting the fee in advance seems evident because the amount of the fee so collected is required to be shown on the receipt or contract. The arbitrary postponement by appellant labor commis-

sioner of his determination or award in the event of a dispute between the agency and the applicant would seem to amount to a nullification of the terms of a binding contract, around which the controversy revolves. This would seem especially true when, as heretofore pointed out, the provisional remedies of suit, attachment and garnishment are unavailable to the agency until it is authorized to institute an action at law following the labor commissioner's award.

In the instant case the court found that although appellant labor commissioner refused to make a determination and award with respect to the controversy between the agency and the applicant until after 90 days from the time the latter commenced his employment, that after the applicant had remained in his employment for a period of 90 days the commissioner made an award in favor of the agency for the full fee for permanent employment.

As a conclusion of law the court decided, and we think correctly,

[10] "That the defendant Labor Commissioner is under a duty to hear and determine all said cases of controversy with administrative diligence and dispatch and does not have the right, arbitrarily, to refuse to hear and determine the controversy on the ground that ninety days must elapse from the commencement date of the work before employment procured by the agency can be deemed permanent."

[11] While it is true, as contended by appellant, that the courts will not attempt to compel a public official to exercise his discretion in any particular manner, nevertheless, where the law imposes upon him specific duties and he either whimsically or arbitrarily refuses to perform those duties, or where his refusal is based upon an erroneous conclusion of his legal duties, or where the right of the individual is so fixed that the refusal of the official to act amounts to a clear abuse of discretion, such error will be corrected in a proper judicial proceeding. Palmer v. Fox, 118 Cal.App. 2d 453, 457, 258 P.2d 30. Peters v. Sacramento City Employees' Retirement System, 27 Cal.App.2d 10, 16, 17, 80 P.2d 179; Hartsock v. Merritt, 94 Cal.App. 431, 432, 433, 271 P. 381; Thomas v. Armstrong, 7 Cal. 286.

[12] If the case before us were one in which there was any doubt, and the labor commissioner had exercised his discretion and determined upon an award one way or the other in the pending controversy, there would be no authority for judicial interference with such determination, but when he refused to act at all under a misconception of the duty imposed upon him by law, the courts will correct the error.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

131 Cal.App.2d 818

EVERFRESH, Incorporated, a California Corporation, Plaintiff and Respondent,

v.

William GOODMAN et al., Defendants and Appellants.

Civ. 20732.

District Court of Appeal, Second District, Division 1, California.

March 28, 1955.

Action by former lessee against former lessor for conversion of property former lessee left in leased premises when lessee vacated the premises. The Superior Court, Los Angeles County, Kenneth C. Newell, J., gave judgment for former lessee. Former lessor appealed. The District Court of Appeal, Doran, J., held that although Bureau of Internal Revenue had liens on property converted, the Bureau and holders of conditional sales contracts on property were not indispensable parties to action, and the plaintiff was the proper party to bring the action.

Judgment affirmed.

1. Trover and Conversion ⇐16

Ownership, either general or special, or the right to immediate possession, is all that is required to maintain an action for conversion, and it is not essential that plaintiff be an absolute owner. West's Ann. Code Civ.Proc. § 367.

2. Landlord and Tenant ⇐161(3)

Fact that Bureau of Internal Revenue might have lien covering property allegedly converted, or that conditional sale owners might have actual title, did not preclude lessee, who had left property in leased premises when he vacated, from bringing action for conversion against lessor. West's Ann.Code Civ.Proc. § 367.

3. Parties ⇐18, 29

"Indispensable parties" are those without which a complete determination of the controversy cannot be had. West's Ann. Code Civ.Proc. § 389.

See publication Words and Phrases, for other judicial constructions and definitions of "Indispensable Parties".

4. Parties ⇐18, 29

Proper parties are not always necessary or "indispensable parties". West's Ann.Code Civ.Proc. § 389.

5. Landlord and Tenant ⇐161(3)

In action by former lessee against former lessor for conversion of property former lessee left in leased premises when he vacated, Bureau of Internal Revenue, which allegedly had lien on property converted, and conditional sale owners of property, were not "indispensable parties". West's Ann.Code Civ.Proc. § 389.

6. Trover and Conversion ⇐22

Offer of convertor to return any of property converted need not be accepted.

7. Trover and Conversion ⇐46

Measure of damages for conversion is the value of the property at the time of the conversion. West's Ann.Civ.Code, § 3336.

Robert E. Austin and John N. Helmick, Los Angeles, for appellant.

Flam, Valensi & Rose, Stephen G. Valensi, Los Angeles, for respondents.

DORAN, Justice.

As reflected in the record, it appears that plaintiff leased certain premises from the defendant in February, 1952, and subsequently, in response to a notice, quit the premises, leaving behind certain property which is the subject of the present action for conversion. Plaintiff retained a key and had access to the premises, and had informed defendant that an attempt was being made to sell the stored property in order to satisfy creditors.

Plaintiff's president testified that the corporation "had no real interest in the equipment, financially, because it was all under lien to the Federal Government"; that permission was given to leave the equipment there until the premises should be leased. When plaintiff visited the store in February, "the equipment was no longer there", and "Mr. Goodman informed me that he had disposed of it". It was plaintiff's testimony that the equipment had been removed without notice to plaintiff, and that part of it was sold, all without plaintiff's consent.

After trial without a jury, judgment was rendered in favor of plaintiff in the sum of $1,698, as the value of the property converted, with an allowance of $220 for rent. From this judgment defendants appeal, alleging as error that "(1). The plaintiff is not the real party in interest. (2). That the Bureau of Internal Revenue and the holders of conditional title contracts and other liens and interests were essential parties. (3). That the judgment should have fixed values on each piece of property, and should have been for the return of the property or the value thereof".

[1, 2] The record fails to support appellants' contention that the action herein is not being prosecuted in the name of the real party in interest, as required by Section 367 of the Code of Civil Procedure. It has long been established that ownership, either general or special, or the right to immediate possession, is all that is required to maintain an action for conversion, and it is

not essential that plaintiff be the absolute owner. Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 156 P.2d 488. Plaintiff is clearly within this category, and the fact that the Federal Government might have a lien covering the property or that conditional sale owners might have actual title, does not alter the situation. Appellant has cited no authority to the contrary.

[3–5] While it is true that under Section 389 of the Code of Civil Procedure, "indispensable" parties must be before the court, such parties are those without which "a complete determination of the controversy can not be had". No such situation exists in the instant case. As said in respondent's brief, "Appellant confuses indispensable parties with proper parties. Proper parties are not always necessary or indispensable parties. Jones v. Feichtmeir, 95 Cal.App.2d 341, 212 P.2d 933." Neither the liens of the Bureau of Internal Revenue nor the claims of any conditional sale owners, were being adjudicated in the present action. Moreover, it appears that although appellant had knowledge of the liens in question, there was no objection to the matter by way of demurrer or answer.

[6, 7] The trial court found that there had been no abandonment of the property by the plaintiff, and determined the measure of damages from the testimony of expert witnesses. The record discloses no offer by the appellant to return any of the property, and as said in respondent's brief, had such an offer been made, plaintiff was not bound to accept it. The tort of conversion had already been committed, and the measure of damages under Section 3336 of the Civil Code, is the value of the property at the time of conversion.

The record discloses substantial evidence in support of the findings and judgment of the trial court, and no reversible error is apparent. Appellant's contentions are entirely without merit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., con-

132 Cal.App.2d 182

G. E. OAKS, Plaintiff and Respondent,

v.

Bruce BRAHS, also sometimes known as Bruce B. Brahs, Barbara Brahs, also sometimes known as Barbara L. Brahs, and Bruce B. Brahs, Frank C. Brahs, William W. Brahs, and Volney W. Wiggins, as copartners doing business under the firm name and style of Brahs Bros., Defendants and Appellants.

Civ. 8549.

District Court of Appeal, Third District, California.

April 8, 1955.

Rehearing Denied May 2, 1955.

Hearing Denied June 2, 1955.

Action by real estate broker to recover brokerage commission allegedly owed to him by defendants. The Superior Court, Siskiyou County, James M. Allen, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that even though final consummation of sale of realty resulted from negotiations directly between buyer and seller, where broker was procuring cause of sale, his commission had been earned and was payable.

Judgment affirmed.

1. Brokers ⇐86(4)

In action by real estate broker to recover brokerage commission allegedly owed to him by defendants, evidence was sufficient to support trial court's finding that broker was procuring cause of sale.

2. Brokers ⇐56(3)

Even though final consummation of sale of realty resulted from negotiations directly between buyer and seller, where broker was procuring cause of sale, his commission had been earned and was payable.

3. Brokers ⇐43(2)

Defendant, in action to recover brokerage commission allegedly owed to plaintiff, could not successfully attack plaintiff's agent's authority to accept listing of defendant's property for plaintiff on ground that such authority was not in writing.

4. Brokers ⇐49(1)

Valid contract existed between broker and realty owner who had listed property with such broker, where broker had performed his part of listing agreement by his action in procuring buyer to whom property was later sold.

Barr & Hammond, Yreka, for appellant.

Tebbe & Correia, Yreka, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and respondent brought this action to recover a broker's commission which he alleged was owing to him from defendants. By his complaint he joined as defendants others than defendants Bruce Brahs and his wife Barbara Brahs, but judgment was rendered against Bruce and Barbara only and they appeal therefrom.

The following facts appear: Respondent was a licensed real estate broker. On May 12, 1950 appellants executed a document whereunder they listed with respondent for sale a ranch consisting of approximately 2,000 acres. The quoted asking price was $145,000 and appellants agreed to pay respondent 5% of the selling price if he succeeded in making a sale of the property. The listing was taken by a Mr. Linville, a licensed real estate salesman working for respondent. Negotiations for the sale of the property were handled by Mr. Linville. Concerning his efforts to sell the property Mr. Linville testified as follows: Upon hearing that the Brahs ranch was for sale he contacted Bruce Brahs with whom he looked over the property which to some extent he already knew. He obtained the listing agreement at that time, having in mind a Mr. Taylor whom he thought would be interested in buying the property. On the next day he contacted Mr. Taylor who was a cattleman and was interested in acquiring a cattle ranch. He described the place thoroughly to Mr. Taylor, giving him detailed information concerning the improvements, the plantings, the capacity of the property to sustain a cattle raising business and the possibility that the owners might take other property in trade for a part of the purchase price. He asked Taylor to go with him to view the property, but Taylor, while expressing his interest, did not go, saying he was too busy at the time. Linville promptly telephoned and also wrote to Bruce Brahs, telling him of Taylor's interest and of his interview with him, saying he thought Taylor might soon go to visit the property, and asking Brahs, if he did so, to show the property to him. Brahs replied that he would fully cooperate if Taylor appeared. A considerable time passed before Taylor went to the property. During this time Linville saw Taylor on several occasions and made several efforts to sell the property to him, urging him at all times to either go visit the property with Linville or go to the property by himself and see it. He told Taylor he felt sure that if he went and looked at the property he would find it to be just what he wanted. Linville had caused the property to be advertised in the local papers and respondent had talked with a number of people whom he thought might be interested. Without going further into details, it appears that Taylor ultimately went to the ranch by himself and negotiated directly with Brahs, with the final result that he purchased the ranch.

The trial court found that the broker had been the procuring cause of the sale and accordingly gave judgment against Bruce and Barbara Brahs. Said the trial court in a memorandum opinion:

> "* * * In these brokerage commission cases, the cause is usually * * * a mental condition or interest created in another person's mind that becomes a motivating force that causes him to act, and the motivating force continues without cessation, until it brings about the consummation of the act, and the person who created such interest in the other person's mind that resulted in the act is said to be the procuring cause of the act."

After stating the evidence related above the trial court continued:

> "* * * There is no evidence that Taylor had any thought or notion of buying this ranch before the broker

contacted him. His interest was so much aroused that he promised to go 'to look at it.' * * * A force was at work in his mind. Who created that with regard to the Big Springs Ranch? Did this interest ever subside? True he talked with Frank Brahs about the ranch. Can it be said this was the sole cause of his going to look at the ranch and ultimately buy same? Did not the broker first create the interest in his mind, did this not continue, and perhaps Frank Brahs did augment and add to this interest the broker had created? There is no evidence that this original interest had subsided, and Frank Brahs created it anew. He said before he left Shasta County he was coming up to look at the ranch. Under this evidence the court will find the broker was the procuring cause of the sale."

[1, 2] We agree with the trial court that the evidence was amply sufficient to justify the conclusion that the broker was the procuring cause of the sale. Upon that sale being consummated, even though the final consummation resulted from negotiations directly between the buyer and the seller, the commission had been earned and must be paid.

[3] In support of the appeal appellants urge that the judgment must be reversed because Mr. Linville, respondent's salesman, was not authorized in writing to accept the list for his broker. There is no merit to the point. Cornelius v. Holland, 102 Cal.App. 136, 139–140, 282 P. 539.

[4] Appellants further urge that there was no valid contract between the broker and themselves; that the listing document constituted only an offer which could only ripen into an obligation by performance which they contend did not occur. We have hereinbefore held that the broker had accepted by performance. However, this view of a listing document executed by owners is not in accord with California law. Baumgartner v. Meek, 126 Cal.App.2d 505, 508–509, 272 P.2d 552. We think what has been said sufficiently disposes of the appeal and that it is unnecessary to specially comment upon a number of minor contentions made in the briefs.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

132 Cal.App.2d 70

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Glenn Ray WATSON and Russell Allen Neal, Defendants,

Glenn Ray Watson, Defendant and Appellant.

Cr. 5227.

District Court of Appeal, Second District, Division 3, California.

March 31, 1955.

Prosecution of defendants for murder. On defendants' plea of guilty the Superior Court of Los Angeles County, David Coleman, J., entered judgment of conviction for murder of the first degree, and one defendant appealed. The District Court of Appeal, Parker Wood, J., held that trial court did not err in finding that crime was murder of first degree.

Affirmed.

1. Homicide ⇐253(6)

Evidence was sufficient to support finding that murder was of the first degree in that it was committed in an attempt to perpetrate robbery. Pen.Code, § 189.

2. Criminal Law ⇐986

In prosecution of defendants for murder, trial court in determining the degree of the crime was not required to accept as true the statements of defendants in their applications for probation that without any indication of wrongdoing on defendants' part the victim had commanded one de-

fendant to get his hands in the air and then began shooting at both defendants

3. Homicide ⇐18(5)

A homicide committed in an attempt to perpetrate robbery is murder of the first degree. Pen.Code, § 189.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Watson and Neal were charged with murder in that on November 3, 1953, they did feloniously and with malice aforethought murder Sol DeBro, a human being. They pleaded guilty as charged. It was stipulated that the matter of determining the degree of the crime would be submitted upon the transcript of the preliminary examination, the report of the probation officer and such other evidence as might be presented. The judge found that the crime was murder of the first degree. Defendants were sentenced to life imprisonment. Watson appeals "from the judgment of the finding by the Court of first degree murder."

Appellant contends that the evidence was insufficient to support the finding of first degree murder. He argues that the finding should have been that the crime was second degree murder, because the evidence was not sufficient to support a finding that the murder was committed during an attempted robbery.

On November 2, 1953, about 11:30 p. m., while defendants were drinking in a saloon, they conspired to rob a liquor store because they were broke and needed money. Thereupon they went to their home and got two .45 caliber automatic pistols, which they had stolen from the U. S. Navy when they deserted it about two weeks previously. They loaded each automatic with seven cartridges. Neal put one pistol in his belt, and Watson put the other one in the waistband of his trousers. Then they went, in an automobile, and "spotted this liquor store." Defendants stood outside for a long time. The storekeeper, Mr. DeBro, was alone in the store. About 12:30 a. m. of November 3, Neal entered the store and walked toward Mr. DeBro who was standing near the cash register. Soon thereafter, Watson who remained outside in front of the store heard someone say, "Put your hands up you dirty bastard." Thereupon he entered the store and Mr. DeBro fired five shots with his .38 caliber revolver in the direction of defendants. One shot hit Watson in the chest. Then Neal fired one shot which killed Mr. DeBro immediately. Defendants went out the back door and went away from the vicinity of the crime. Police officers arrived at the store about 12:45 a. m. and found Mr. DeBro dead on the floor.

An officer testified that, in a conversation with defendants, both defendants said that they went into the store with the intention of robbing the storekeeper.

[1, 2] The judge was justified in concluding that defendants were attempting to commit robbery. Defendants pleaded guilty to the charge in the information that they murdered Mr. DeBro with malice aforethought. They admitted that they decided to rob a liquor store, that they armed themselves with loaded automatic pistols for that purpose, and that they entered the liquor store of Mr. DeBro with the pistols in their belts or waistbands with the intention of robbing him. The court was not required to accept, as true, the statement of Neal, in his application for probation, to the effect that without any indication of wrongdoing on the part of Neal the storekeeper, Mr. DeBro, pulled a gun on him and told him to get his hands in the air. Likewise, the court was not required to accept, as true, the statement of Watson, in his application for probation, to the effect that he saw Neal "with his hands in the air," and that without any indication of wrongdoing on the part of Watson or Neal the storekeeper began shooting at them. In People v. Parrish, 87 Cal.App.2d 853, 197 P.2d 804, the defendant told a person (who feigned to be an accomplice of defendant) that he intended to kill his (defendant's) wife with a .22 caliber rifle.

The defendant asked the alleged accomplice to gain entrance to the wife's house on a pretext, and then defendant would follow him therein. As planned, the defendant and the accomplice went in an automobile to a place about three blocks from the house, and then they walked to the house where the defendant explained the arrangement of the rooms. Then they returned to the automobile and drove it to the front of the house. The accomplice went into the house, and defendant remained in the automobile in which defendant had placed a loaded .22 rifle. Thereupon, police officers who were in the house went to the automobile and arrested defendant. Defendant therein was adjudged guilty of attempted murder, and on appeal he contended that the evidence was insufficient because the acts of defendant did not go beyond mere preparation for committing the crime. In affirming the judgment, the court said, 87 Cal.App.2d at page 856, 197 P.2d at page 806: "The essential elements required for the proof of the crime of attempted murder are (1) a specific intent to commit the crime, and (2) a direct ineffectual act done towards its commission. * * * (1) There is no question that the evidence is ample to sustain the trial judge's finding that defendant possessed the first element, that is, the intent to murder his wife, since the testimony disclosed that defendant had stated that he intended to kill his wife. (2) The second element of the crime of attempted murder is likewise present. It is settled that the overt act necessary to supply the second element need not be the last proximate act prior to the commission of the crime itself. * * * After preparation for the commission of the crime, if a defendant performs acts which amount to the commencement of the accomplishment of the intended offense, such acts constitute overt acts sufficient to meet the requirements of the second element above set forth for the commission of the crime of attempted murder. * * * In the present case, when defendant entered Mr. Thomas's [accomplice's] car on the evening of September 16, 1947, possessed of a loaded gun with plans to kill his wife, drove to her home, listened to see if there was any person present in her house, and sent Mr. Thomas into the house so that he, defendant, might gain entrance and kill his wife, such acts constituted overt acts toward the commission of the crime sufficient to sustain the trial court's findings to that effect."

In People v. Siu, 126 Cal.App.2d 41 at page 43, 271 P.2d 575 at page 576, it was said: "But if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete."

[3] A homicide committed in an attempt to perpetrate robbery is murder of the first degree. Pen.Code, § 189; People v. Anderson, 1 Cal.2d 687, 689, 37 P.2d 67.

The trial court did not err in finding that the crime was murder of the first degree

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Frank DRAGNA, Appellant,

v.

Lynn WHITE et al., Respondents.

Civ. 20490.

District Court of Appeal, Second District, Division 2, California.

March 29, 1955.

As Modified March 31, 1955.*

Action against peace officers for false arrest and imprisonment. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendants on pleadings for reason that complaint failed to state cause of action and plaintiff appealed. The District Court of Appeal, Moore, P. J., 280 P.2d 817, held that com-

* Opinion vacated 289 P.2d 428.

plaint was insufficient to state cause of action. On motion for rehearing the District Court of Appeal held that action of police officers in holding arrested suspect for period of five hours while investigating charges of murder against him was not unreasonable oppression of such person, who had reputation of being mobster and member of criminal gang.

Rehearing denied.

1. Arrest ⇐63(4), 70

Where police have reason to believe that person has committed murder, it is their duty to apprehend, hold and investigate.

2. Arrest ⇐70

When accused is arrested and handed to care and keeping of jailor, his detention by arresting officers ceases, and they do not have custody while he is in jail.

3. False Imprisonment ⇐8

Action of police officers in holding arrested suspect for period of five hours while investigating charges of murder against him was not unreasonable oppression of such person, who had reputation of being mobster and member of criminal gang.

William W. Shaw, Riverside, for appellant.

Roger Arenburgh, City Attorney, Los Angeles, for respondent.

PER CURIAM.

Appellant insists that the decisions in Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156, and Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 97 P.2d 472, are pertinent and authorize a reversal. In the Kaufman case, the allegation is that the policemen and the officers of the Waiters and Bartenders Union, without an order, warrant or process, forcibly arrested and imprisoned plaintiff and detained him for 24 hours in the city jail.

Appellant pleads himself out of the theory of those decisions by alleging the circumstances of his arrest, showing probable cause. The allegations are that the accused was arrested at 10 p. m. on the thirteenth day of February, and that he was delivered into the custody of the jailor at 3 a. m. on February 14; that he was suspected of murder, of being a member of a criminal gang, had been under surveillance for nine months.

[1–3] Where the police have reason to believe that a person has committed murder, it is their duty to apprehend, hold and investigate. When appellant was handed over to the care and keeping of the jailor, his detention by respondents ceased. Mackie v. Ambassador Hotel & Investment Corp., 123 Cal.App. 215, 222, 11 P.2d 3; Gisske v. Sanders, 9 Cal.App. 13, 15, 98 P. 43. Respondents did not have custody of appellant while he was incarcerated in the city jail. Ibidem. Holding plaintiff five hours while investigating such serious charges was not unreasonable oppression of a person who had the reputation of being a "mobster" and "member of a criminal gang."

Motion for rehearing denied.

132 Cal.App.2d 137

In re ESTATE of Norris L. COLEMAN, Deceased.

Margaret R. RICHARDSON, Petitioner and Appellant,

v.

Adele Coleman PARMENTER, Petitioner and Respondent.

Civ. 20719.

District Court of Appeal, Second District, Division 2, California.

April 6, 1955.

Hearing Denied June 2, 1955.

Proceeding on petitions for letters of administration. The Superior Court, Los Angeles County, John Gee Clark, J., granted letters to widow. Former wife of decedent, as guardian of minor children of her

and decedent, appealed. The District Court of Appeal, Fox, J., held that where decedent had induced widow to go to Nevada to obtain divorce from her former husband so she could marry him, and supplied her with money for that purpose, he would have been estopped from attacking validity of Nevada decree, or denying validity of their marriage, and therefore his heirs were estopped from attacking validity of decree.

Judgment affirmed.

1. Divorce ⇐172

The validity of a divorce decree cannot be contested by a party who has procured the decree, by a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry.

2. Divorce ⇐413

In proceeding on petitions for letters of administration, evidence that decedent had accompanied widow to Reno at time she was married to another, requested that she institute action for divorce, and sent her money with which to secure divorce, was sufficient to support finding that decedent took her to Reno for purpose of obtaining divorce so she could marry him.

3. Divorce ⇐386(2)

Where decedent had induced wife to go to Nevada to obtain divorce from her former husband so she could marry decedent, he would have been estopped from attacking validity of decree.

4. Divorce ⇐386(4)

Where decedent knew circumstances under which wife secured Nevada divorce from her former husband, knew decree had been granted, and in reliance on such decree married her, he would have been estopped to deny validity of his subsequent marriage to her.

5. Estoppel ⇐98(3)

As a general rule, an heir, being in privity with the ancestor, is bound by an estoppel which was binding upon the ancestor.

6. Divorce ⇐172

In proceeding on petition for letters of administration, where decedent would have been estopped to deny validity of wife's divorce from her former spouse and marriage to him, his heirs were estopped from attacking validity of marriage.

7. Marriage ⇐50(1)

In proceeding on petition for letters of administration, evidence that decedent and wife went through ceremony of marriage in Nevada and lived together as husband and wife, that in answer to her divorce suit against him in California decedent admitted marriage, and court, in granting interlocutory decree to her, found they were husband and wife, supported determination that widow was surviving spouse of decedent and entitled to administer his estate.

8. Executors and Administrators ⇐20(7)

In proceeding on petition for letters of administration, where wife testified that she had resided in California for more than twenty years, although wife had obtained Nevada divorce less than one year before she filed complaint to obtain California interlocutory decree from decedent, trial court could have believed wife's testimony that she resided here for more than twenty years, and that imposition, had been upon Nevada court.

Thomas A. Wood and Herbert C. Meade, Los Angeles, for appellant.

Maurice J. Hindin, Los Angeles, for respondent.

FOX, Justice.

The crucial question on this appeal is whether the trial court erred in finding that petitioner Parmenter was the surviving spouse of the decedent Norris L. Coleman. Procedurally, the question arose by the filing of petitions for letters of administration by both parties to these proceedings. The Richardson petition is based on the fact that petitioner (who is a former wife of decedent) is the guardian of the persons and estates of their two minor

sons. The Parmenter petition is on the theory that she is the widow; since, however, remarried to her former husband. The court granted the latter petition and denied the former. Mrs. Richardson appeals from the ensuing judgment.

During the holiday season of 1948, respondent, who was married and had resided in Los Angeles County for many years, went to Reno, Nevada, for the purpose of getting a divorce. She stayed at the home of her sister, who lived in Reno. She also had a daughter living in that city who was then enceinte. Respondent testified she intended to remain there indefinitely. She took her personal belongings with her, including her silverware and linens. She left no property in California and had no family ties remaining here.

Mr. Coleman, who was on temporary military leave, accompanied respondent to Reno. He asked her at that time to marry him. After remaining in Reno a few days, he returned to his military post. He frequently communicated with her in Reno, and again asked her to marry him. He requested her "to institute an action for divorce" and wired her $200 during the latter part of March, 1949, "with which to secure" the divorce. She was granted a divorce on April 1, 1949. Coleman was aware of that fact. She and Coleman were married in Reno ten days later. They lived together as husband and wife. Mrs. Coleman returned to Los Angeles in May. Mr. Coleman resumed his military duties.

On February 20, 1950, respondent filed suit in Los Angeles County for divorce from Mr. Coleman. He filed an answer in which he admitted the marriage. An interlocutory decree was granted to the plaintiff in July, 1950. That decree has not been reversed, vacated or set aside. At that hearing Mrs. Coleman testified she had resided in Los Angeles County continuously for about 23 years. In April, 1951, Mr. Coleman, while still on active duty as a member of the armed forces, died in Korea as a prisoner of war.

The trial court's decision is based primarily on the theory that the decedent would have been estopped to attack the validity of his marriage to respondent and that his minor children are thus also estopped. The facts justify and support the application of that doctrine.

[1, 2] The law is settled that "The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry." Rediker v. Rediker, 35 Cal.2d 796, 805, 221 P.2d 1, 6, 20 A.L.R.2d 1152, and cases there cited. The instant case falls within both the second and third segments of this rule. We shall first consider the application of the last portion of the rule to facts at hand. The evidence justifies the inference that decedent took respondent to Nevada for the purpose of securing a divorce so that she would be free to marry him and that he financed the expense thereof, at least to the extent of $200. These facts closely parallel those in Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490. There Harlan took a married woman to a Mexican attorney in Los Angeles and made arrangements with him to secure a Mexican divorce for her so that she might marry him. Harlan paid the attorney's fee. The parties then married. Later, Harlan brought an action for an annulment charging the Mexican decree was void. The court held he "was estopped from asserting its invalidity because he had aided and counselled the defendant in procuring it so that she might marry him." See Rediker v. Rediker, supra, 35 Cal.2d at page 806, 221 P.2d, at page 7 where the Harlan case is discussed with approval. The In re Estate of Davis, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545, also closely parallels the case at bar, factually. There the deceased urged the respondent to go to Nevada, establish a residence for the sole purpose of securing a divorce so that she could then marry him. He agreed to take care of her expenses and the costs of the divorce. He went to Reno, assisted in the preparation of the case, and married the lady on the day the divorce was granted. They then returned to California where they lived together until his death. The court said "the deceased * * * would

have been foreclosed from denying the validity of the divorce or the subsequent marriage under the doctrine of quasi-estoppel". 38 Cal.App.2d at page 585, 101 P.2d at page 763. In Margulies v. Margulies, 109 N.J.Eq. 391, 157 A. 676, it is said that "One who induces a defendant to obtain a foreign divorce and pays the expenses thereof, and afterwards marries her, is precluded from attacking the validity of the divorce." Other cases to the same effect where similar aid had been rendered are Goodloe v. Hawk, 72 App. D.C. 287, 113 F.2d 753; Saul v. Saul, 74 App.D.C. 287, 122 F.2d 64; and Van Slyke v. Van Slyke, 186 Mich. 324, 152 N.W. 921.

[3] From these authorities it is clear that the deceased would have been estopped to deny the validity of respondent's Nevada divorce or his subsequent marriage to her.

[4] The facts also bring the case within the second portion of the rule on estoppel quoted, supra, from the Rediker case. Coleman knew the circumstances under which respondent secured her divorce, knew the decree had been granted and in reliance on such decree married respondent. Thus the case comes squarely within the principle of estoppel as applied in Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269. It was there pointed out, 41 Cal.2d at page 505, 261 P.2d at page 273, as the foundation for the application of the doctrine, that Noah had "full knowledge of the circumstances" under which Carol had obtained a Nevada divorce from her husband, and "in reliance on such divorce" he "went through a marriage ceremony and lived with Carol as her husband for many years." This statement is precisely applicable to the case at bar except for the period of time the Colemans lived together as husband and wife after their marriage.

[5, 6] This brings us to the question whether such estoppel should be applied to Coleman's minor sons by his previous marriage. In the Davis case, supra, the court said 38 Cal.App.2d at page 585, 101 P.2d at page 764: "As a general rule, an heir, being in privity with the ancestor, is bound by an estoppel which was binding upon the ancestor." In that case the factual setting, as previously noted, is strikingly similar to the instant case. It was there held, in an heirship proceeding, that the children of the decedent by a former marriage were estopped to deny the validity of his marriage to a second wife, where he participated in assisting his second wife in getting a Nevada decree. See, also, Union Bank & Trust Co. v. Gordon, 116 Cal.App.2d 681, at page 690, 254 P.2d 644, at page 650, where, in discussing the In re Estate of Krone, 83 Cal.App.2d 766, 189 P.2d 741, the court observed, citing the Davis case, supra, that "The children in the Krone case were estopped because as heirs of their ancestor, the first wife, they were in privity with her, and were thus bound by an estoppel which bound the ancestor." Under the principle and authority of the Davis case it is clear that the minor children of Coleman are bound by the estoppel which was binding upon him. Of course appellant, as their guardian, is in no better position than the children.

[7] With the complication of the Nevada decree of respondent disposed of, it becomes apparent that the evidence is ample to support the trial court's determination that respondent was the surviving spouse of Coleman and as such was entitled to administer his estate. This evidence is that respondent and Coleman went through a ceremonial marriage in Reno; that they thereafter lived together as husband and wife; that he filed an answer in her divorce suit against him in California admitting the marriage; that in granting her an interlocutory decree on July 21, 1950, the court found as of that date that they were husband and wife; that such decree has not been reversed, vacated or set aside, and remains in full force and effect, and that Coleman died on or about April 30, 1951.

[8] Appellant attempts to challenge the validity of the California interlocutory decree of respondent from Coleman on the theory that respondent could not have been continuously a bona fide resident of this state for one year prior to February 20, 1950, the date on which she filed her complaint, since she had received a Nevada decree from her former husband which re-

quired residence there on April 1, 1949. The difficulty with this argument is that the trial court may well have believed respondent's testimony that she had resided here for more than 20 years, and that the imposition, if such there was, had been upon the Nevada court, the validity of whose decree Coleman would have been, and, therefore, his children were, estopped to question.

Appellant relies on Bernhard v. Bank of America Nat. Trust & Savings Ass'n., 19 Cal.2d 807, 122 P.2d 892; Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835, and McManus v. Bendlage, 82 Cal.App.2d 916, 187 P.2d 854. An examination of these cases reveals that none of them is pertinent to the issues in the instant matter. They deal with the application of res judicata rather than quasi estoppel.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

132 Cal.App.2d 10

A. A. BROCK, as Director of Agriculture of the State of California, Plaintiff and Respondent,

v.

WESTERN NATIONAL INDEMNITY COMPANY, a corporation, Defendant and Appellant.

Civ. 16266.

District Court of Appeal, First District, Division 2, California.

March 29, 1955.

Action by State Director of Agriculture on behalf of various suppliers of farm products to recover upon bond of processor to which suppliers delivered their products. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Kaufman, J., held that where failure of processor to pay suppliers within 30 days of receipt of products constituted the statutory failure to pay upon which suppliers' cause of action against producer accrued, action by Director of Agriculture on behalf of various supplies to recover upon processor's bond, which action was brought more than four years and thirty days from date of last delivery to processor was barred by statute of limitations.

Judgment reversed.

1. Licenses ⇐26

Statute requiring processor of farm products to post bond with State Director of Agriculture conditional upon payment to farmers for farm products delivered during period of processor's license does not contemplate that delivery of products and payment of price shall be concurrent conditions or that the statutory failure to pay should occur on date of delivery of each item, as respects time of processor's failure to pay upon which accrues cause of action on bond. West's Ann.Agric.Code, §§ 1299.-18 et seq., 1300.1, 1300.1a; West's Ann.Civ. Code, § 1762.

2. Licenses ⇐26

Processor of farm products who buys for cash is exempt from statute requiring all such processors to post bond with State Director of Agriculture conditional upon payment to farmers for farm products delivered during period of processor's license. West's Ann.Agric.Code, §§ 1261(h), 1300.-1a.

3. Licenses ⇐26

Statute requiring processor of farm products to post bond with State Director of Agriculture conditional upon payment to farmers for farm products delivered during period of processor's license does not limit processor's failure to pay to conditions of insolvency or bankruptcy, nor is failure to pay meant to be identical with inability to pay, as respects time of processor's failure to pay upon which accrues cause of action on bond. West's Ann.Agric.Code. § 1300.1a.

4. Licenses ⇐26

Where farmers supplied commodities to food processor, payment for each de-

livery was due 30 days from date made, in absence of agreement to contrary, and if not so made, "failure to pay" within statute requiring such processors to furnish bond with State Director of Agriculture to insure such payment had occurred, at which time cause of action on bond accrued. West's Ann.Agric.Code, §§ 1300.1a, 1300.4.

See publication Words and Phrases, for other judicial constructions and definitions of "Failure to Pay".

5. Licenses ⇐26

Statute governing duties of State Director of Agriculture when there has been failure to pay on part of food processor in behalf of food suppliers does not require director to proceed against surety of such processor, but only allows such a proceeding. West's Ann.Agric.Code, § 1300.1a.

6. Principal and Surety ⇐104(1)

Decision by creditors that it is to their best interest to give more time to principal to meet his obligations is extension of time which is considered material alteration which discharges principal's surety. West's Ann.Civ.Code, § 2819.

7. Principal and Surety ⇐67

Liability of surety accrues at same time as that of principal.

8. Limitation of Actions ⇐47(3)

Cause of action upon bond conditioned to do certain act accrues as soon as there is default in performance.

9. Limitation of Actions ⇐66(15)

Creditor whose cause of action has arisen may not indefinitely extend statute of limitations from running by failure to make demand.

10. Principal and Surety ⇐104(1)

Agreement between food suppliers who were creditors of food processor to grant extension of time to such processor in which to make payments to suppliers constituted material alteration of original agreement by surety to make restitution for failure to pay on part of processor, and such extension discharged surety on such bond. West's Ann.Civ.Code, § 2819; West's Ann. Agric.Code, § 1300.1a.

11. Limitation of Actions ⇐143(1)

Agreement extending time of debtor to pay does not affect running of statute of limitations where surety on bond insuring such payment is not party to extension agreement.

12. Limitation of Actions ⇐47(3)

Where failure of food processor to pay suppliers within 30 days of receipt of commodity constituted the statutory failure to pay upon which suppliers' cause of action against producer accrued, action by Director of Agriculture on behalf of various suppliers to recover upon bond furnished by surety of processor which action was brought more than 4 years and 30 days from date of last delivery to processor, was barred by statute of limitations. West's Ann.Code Civ.Proc. § 337; West's Ann. Agric.Code, § 1300.1a.

Worthington, Park & Worthington, Leonard A. Worthington, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., W. R. Augustine, Wayne D. Hudson, Deputy Attys. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal by defendant Western Indemnity Company from a judgment of the Superior Court in and for the County of San Francisco, in favor of plaintiff and respondent, A. A. Brock, Director of Agriculture of the State of California. The Director brought the action, under provisions of the Agricultural Code, on behalf of various producers of farm products, to recover upon the bond furnished by appellant to Clara-Val Packing Company, the debtor.

The surety bond was given pursuant to sec. 1300.1a of the Agricultural Code which requires all processors of farm products to post a $5,000 bond with the Director conditional upon the payment to farmers for farm products delivered during the period of its license. Clara-Val Packing Company obtained a processor's license under the state, and appellant executed its bond covering the period May 15, 1946 to May 14, 1947, and from May 15, 1947 to May 14,

1948. The first cause of action sought recovery of $2,637.12, the balance due creditors for products delivered to the debtor during the 1946–1947 season. The second cause of action prayed for $5,000, the full amount of the bond, for the period 1947–1948. Appellants raised the defenses of the Statute of Limitations, laches, estoppel, and alteration of the original obligation without the surety's consent. Judgment in favor of respondent was rendered in the sum of $7,637.12. Motion for new trial having been denied, this appeal was taken.

Section 1300.1a, under which the present suit was brought, reads as follows:

"Before any license is issued to any processor * * * the applicant shall execute and deliver to the director a surety bond * * *.

"Said bond shall be conditioned upon compliance with the provisions of the chapter and upon the faithful and honest handling of farm products in accordance with the terms of this chapter. Said bond shall be to the State in favor of every producer-creditor of farm products grown within the State of California. * * * *In case of failure by a processor to pay* producer-creditors for farm products received from said producer-creditors, *the director shall proceed forthwith* to ascertain the names and addresses of all producer-creditors of such processor, together with the amounts due and owing to them and each of them by such processor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. * * *

"Upon ascertaining all claims * * *, the director may then make demand upon the bond on behalf of those claimants whose statements have been filed * * *. Upon the refusal of the surety company to pay the demand, the director shall thereupon bring an action on the bond in behalf of said producer-creditors." (Emphasis added.)

It is clear from a reading of the above quoted statute, that an important question in this controversy is when did the statutory "failure to pay" occur? The trial court concluded that the causes of action arose sometime after March 24, 1949.

The parties filed a stipulation in open court on March 19, 1953, stating that the facts contained in the statement were true. Certain specific accounts of creditors were set out in detail, and it was stipulated that these were representative of all accounts listed in the complaint.

The first cause of action is based on the claims of creditors Abruzzini and Perino. Abruzzini delivered prunes to Clara-Val on 26 different occasions from August 24 through November 27, 1946. A payment of $26,438.89 appears in the debit column for October 10, and the specific deliveries paid for at that time are listed by the delivery tag numbers. All deliveries up to that time were then paid for except the first delivery on August 24. That delivery plus 2 more in October are then stated as a new credit balance of $4,934.27. No further payments were made in 1946, and after the November deliveries, on November 27, a new credit balance of $14,261.35 is stated. The account for 1947 shows no deliveries, but debits of payments on April 9, June 13, September 13, October 24, which are not listed as payments for specific deliveries. The balance of $3,166.66 is carried forward to 1948. One payment was made in 1948, and the final one on March 24, 1949, leaving a credit balance of $2,280. A similar type of account for Perino, with the final payment on March 4, 1949, shows a final balance due him of $357.12. The second cause of action involves similar accounts of numerous creditors for deliveries of prunes, apricots, peaches, apples and other commodities during the period May 15, 1947 to May 14, 1948.

Financial difficulties arose which were brought to the attention of the Director of Agriculture on March 3, 1948. Clara-Val advised the Department that it was calling a meeting of grower-creditors on March 22, 1948, for the purpose of explaining arrangements for payments on the balances due them. A Department representative attended this meeting at which the attorney for the debtor expressed the opinion that Clara-Val could eventually pay 100 cents on the dollar. He outlined a plan for payment of 50 cents on the dollar by April 10, and pro rata payments on the 10th of each month thereafter.

The growers agreed to work along with the company, and asked the Department to request the two growers who had complained to withhold their claims for the present.

On April 10 no payments were made, hence an investigational hearing was held on April 28, 1948, attended by grower-creditors. A financial statement showing assets of $331,937.90 and liabilities of $358,117.05 was exhibited by the president of the Clara-Val and refinancing plans were outlined by him. The Department requested that it be furnished with an inventory of assets. Payments were made thereafter on grower-creditor accounts on April 23, 1948, June 23, 1948, July 1948, and one payment to 3 growers prior to the July payment, September 4, 1948, December, 1948, and March 24, 1949, totaling $61,694.12.

The efforts of Clara-Val to refinance were unsuccessful. On November 13, 1950 the secretary sent out notices of a bankruptcy sale of the equipment and real estate to be held in December. The foreclosure sale brought $14,000 less than necessary to meet the Bank of America's claim and that of the second mortgage holders, leaving nothing for creditors.

Defendant and appellant gave notice of the cancellation of the processor's bond in December of 1948, to take effect January, 1949. Forms for submission of verified claims were mailed to producer-creditors by the Director on December 14, 1950. The final verified claim was received on June 7, 1951. Demand on the bond was made on June 15, 1951. After refusal by appellant to pay, this action was filed on July 8, 1952.

Appellant contends that the debtor's obligation to pay for the farm products arose when the products were received by it, citing section 1762 of the Civil Code which provides that *unless otherwise agreed* delivery of the goods and payment of the price are concurrent conditions. Accordingly, each load of produce delivered would constitute a separate contract, and there would be a failure to pay when payment was not made following each delivery, hence the statute of limitations would commence to run on the bond. At any time after the deliveries of produce the creditors could have filed suit against the debtor to recover judgment. The date of the last delivery herein is on November 13, 1947, more than four years and seven months before suit was brought.

Respondent contends that section 1762 of the Civil Code is not applicable here for the debtor and the producer-creditors dealt upon a book account basis. While there is no evidence offered in this record as to the nature of the transaction between processor and producer-creditor, other than the accounts for each creditor, it is respondent's contention, apparently, that these accounts are sufficient to show that the parties dealt upon a book account basis. In such case the Statute of Limitations could therefore never run against the principal or the surety as long as any payment in any amount was made within a four-year period. This would be true, of course, if the surety's undertaking was to indemnify creditors against loss by reason of the principal's failure to eventually pay his accounts. In such case the surety might not be exonerated of his liability for transactions carried out in 1946–1947 for many years to come.

Respondent has admitted that the controversy centers about the issue: When did the statutory failure to pay occur? for the agreement in the bond is to indemnify the producer-creditors against failure to pay. The condition stated therein is that the surety shall be discharged if the principal complies with the provisions of Chapter 9, Division 6, of the Agricultural Code, "and shall faithfully and honestly handle farm products and pay in full for them as such licensed Processor for said license period [May 15, 1946-May 14, 1947, and each year thereafter till cancelled]." Clearly, then, we must look to the Agricultural Code to determine whether it offers any solution to the meaning of the phrase "failure to pay".

[1, 2] That the statute here involved does not contemplate that delivery of the goods and payment of the price shall be concurrent conditions, as contended by appellant, seems to be obvious from the very language of Section 1300.1a which requires a bond before the issuance of a license to any processor "who buys or otherwise takes title to or possession of farm products from

the producer thereof, except by payment to the producer at the time of obtaining such possession or control of the full agreed price * * *". A cash buyer under the Produce Dealers Act is exempt from the bond provision. See § 1261(h), Agricultural Code; 7 A.G. 373. Respondent is therefore correct in its conclusion that "failure to pay" did not occur on the date of delivery of each item in the accounts.

[3] That "failure to pay" is not limited to conditions of insolvency or bankruptcy is also obvious, for the latter part of Section 1300.1a requires the filing of a new bond by the producer after a recovery is had on the bond sued upon, otherwise his license as a processor will be revoked. "Failure to pay" is not then, identical with "inability to pay."

Neither party has made any reference to Section 1300.4 of the Agricultural Code which defines the duty of the processor to pay for farm products. This definition is contained in the section dealing with revocation and suspension of licenses, payment for products, and procedure on insolvency. The duty to pay is there defined as follows: "Every processor *must pay* for farm products delivered to him or it at the time and in the manner specified in the contract with the producer, *but if no time is set by such contract, or at the time of said delivery, then within 30 days of the delivery or taking possession of such farm products.*" (Emphasis added.)

[4] In the present case no evidence was offered of any special contracts. Hence we have only the fact of delivery of the produce, the price, and the dates of delivery. No evidence of any custom as to dealing between processor and producers was introduced. Therefore, in the absence of any evidence of agreements made, it must be held as a matter of law that payment for each delivery was due thirty days from the date it was made, and if not so made, the statutory failure to pay had occurred. All deliveries were made herein during the 1946–1947 and the 1947–1948 harvest seasons. The last deliveries here involved were apparently made in November 1947. Certainly, then, by January 1948, there had been a "failure to pay" on the part of the principal as to even the very last of these accounts.

[5] The Director of Agriculture knew of the situation by March 3, 1948. Although after the "failure to pay" comes to his attention he has the duty to "proceed forthwith" under the statute to collect the names and addresses of all producer-creditors, and then request them to file their verified claims within 60 days of the request, he is not *required* by the statute to proceed against the surety, as contended by appellant, but he *may* proceed against the surety. Undoubtedly, great discretion is allowed to the Director in working out such a problem. On a bond such as that herein, if he proceeded immediately he could recover only $5,000 for claims for each period, and such a suit if the surety declined to pay, might affect the processor's business adversely, making recovery of the remainder of the accounts improbable. Here, by working along with the processor, there was a recovery for the creditors of $61,964.12.

[6] However, the fact that the Director may decide with the creditors that it is to their best interest to give more time to the principal to meet his obligations is in our opinion, the granting of an extension of time, which generally under the law of suretyship is considered a material alteration which discharges the surety. Braun v. Crew, 183 Cal. 728, 192 P. 531; Boteler v. Conway, 13 Cal.App.2d 79, 82, 56 P.2d 587; Driscoll v. Winters, 122 Cal. 65, 66, 54 P. 387; sec. 2819, Civil Code. While in the case of Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 122, 64 P.2d 138, 144, 108 A.L.R. 1080, the defense of extension of time is referred to as "one of the more technical suretyship defenses", we find no case which has abrogated the use of this defense in this state.

[7–9] The general rule is that the liability of a surety accrues at the same time as that of the principal. And a cause of action upon a bond conditioned to do a certain act accrues as soon as there is a default in performance. 23 Cal.Jur. 1049, § 42. The default in performance occurred here when there was a failure to pay 30 days after delivery. The creditor's cause of action arose then, for he could have then sued the proc-

essor at any time thereafter, and he could not indefinitely extend the statute of limitations from running by a failure to make a demand. 16 Cal.Jur. p. 492, § 95; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 P. 180, 61 P. 99.

[10, 11] The agreement between the creditors and the debtor to grant an extension of time to the debtor to pay was a material alteration of the original agreement to pay which discharged appellant surety. The Statute of Limitations, sec. 337, Code of Civil Procedure, however runs against the bond sued upon which means that suit would have to be commenced on the bond within four years from the original obligation to pay. Any agreement extending the time of the debtor to pay could not affect the running of the Statute of Limitations on the bond because the surety on the bond was not a party to the extension agreement.

[12] The last delivery was made on November 13, 1947, over four years elapsed after December 13, 1947, before suit was filed by the Director on the bond here involved. We hold therefore that this suit was barred under section 337, Code of Civil Procedure.

It cannot be doubted that from the facts herein stipulated to be true, that an extension of time was granted to the debtor. Creditors who had filed complaints were asked to withdraw them at the meeting of March 22, 1948, and a plan for payment on installments was outlined by the attorney for the company to which the growers agreed. The surety was not a party to this agreement, and there is nothing in the record from which it can be inferred that it assented thereto. The only testimony in the record as to the time when the financial difficulties of the principal first came to the surety's attention shows the date to have been sometime in December of 1948, several months after the creditors' meeting had been held.

Respondent contends that the strict rules of suretyship have no application to this type of bond, citing Los Angeles Stone Co. v. National Surety Co., 178 Cal. 247, 251–252, 173 P. 79. That case involved a labor and material bond requiring the surety to pay if the principal failed to pay. The extension of time involved therein was an extension of time for doing the work under the building contract. The opinion pointed out that there was no material alteration because the surety's obligation was not for the performance of the building contract which it was claimed had been altered, but was independent thereof and for a wholly different purpose, namely, for the benefit of persons furnishing labor and material. It was further noted that the claimants had filed their claims within the time required by law. If in the cited case, the laborers and materialmen had met after the date on which they could have sued the principal and without the surety's knowledge had agreed to an extension of time, then the case would be parallel to the case now before us.

In view of the fact that the appellant surety was discharged because of a material alteration of the obligation of the principal to pay without the consent of the surety and for the further reason that the Statute of Limitations has run barring suit on the bond in question, the judgment must be and is hereby reversed.

Judgment reversed.

NOURSE, P. J., and DOOLING, J., concur.

132 Cal.App.2d 126

Joseph B. MASHBURN, an individual doing business under the firm name and style of Madera Funeral Home, and under the firm name and style of Chowchilla Funeral Chapel, Plaintiff and Appellant,

v.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS OF the State of CALIFORNIA, C. C. DeYoung, John J. Cox, C. Lewis Edwards, Harvey L. Lewis, Jr., Harry T. Rowe, as members of said Board of Funeral Directors and Embalmers of the State of California; George L. Nielsen, as Executive Secretary of said Board of Funeral Directors and Embalmers of the State of California; Harland E. Jones, Field Representative of said Board of Funeral Directors and Embalmers of the State of California; et al., Defendants and Respondents.

Civ. 4933.

District Court of Appeal, Fourth District, California.

April 5, 1955.

Action for writ of mandate to set aside order of State Board of Funeral Directors and Embalmers suspending plaintiff's funeral director's license. The Superior Court, Fresno County, Arthur C. Shepard, J., denied writ, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that funeral director had violated statute prohibiting solicitation of funeral directing or embalming business.

Judgment affirmed.

1. Mandamus ⇐187(9)

On appeal from judgment denying writ of mandate to set aside order of State Board of Funeral Directors and Embalmers suspending funeral director's license, reviewing court would view evidence in light most favorable to Board and sustain findings if there was substantial evidence in record to support them.

2. Licenses ⇐38

In proceeding before State Board of Funeral Directors and Embalmers, evidence sustained finding that funeral director had violated statute prohibiting solicitation of funeral directing or embalming business. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Bus. & Prof.Code, §§ 7692, 7694.

3. Licenses ⇐40

Solicitation violative of statute prohibiting funeral directors from soliciting business need not consist of a direct request for funeral business, and it is sufficient that all facts and circumstances surrounding obtaining business indicate overzealous attempt to press services upon bereaved before first shock of disaster has been bridged. West's Ann.Bus. & Prof. Code, § 7694.

Claude L. Rowe, Chalmers E. Lones, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Willard A. Shank, Deputy Atty. Gen., for respondents.

GRIFFIN, Justice.

Plaintiff, a funeral director in Madera and Chowchilla, was accused in two counts of an accusation of violating section 7694 of the Business and Professions Code. The second count charged that on April 19, 1953, he solicited from a Mrs. Miller the human dead body of her husband, after his death, and did solicit from her the funeral directing and embalming business incident to and connected with the disposition of his dead body.

In a third count it is charged that on December 19, 1952, he solicited from a Mrs. O'Neal her husband's dead body, and likewise solicited from her the funeral directing and embalming business. The Board of Funeral Directors and Embalmers (hereinafter referred to as the Board) found these two counts to be true and suspended his funeral director's license for a period of ninety days, with certain conditions attached. On a review of that Board's judgment by the trial court it, in the light of the whole record, under sec. 1094.5 of the Code of Civil Procedure, sustained the Board's finding and denied the writ. The only issue here raised or involved is the claim that there was not

sufficient evidence before the Board or the trial court to support the findings.

Section 7694, supra, provides that "Solicitation, after a death or while a death is impending, of funeral directing or embalming business by the licensee, * * * constitutes a ground for disciplinary action. * * *" It is plaintiff's claim that this section only prohibits solicitation of funeral directing and embalming business; that therefore the charge of soliciting bodies should not be considered; and that plaintiff's conduct in neither case comes within the definition of "solicitation".

The Board held hearings in Madera and Long Beach. Some of the evidence is in sharp conflict, and a careful examination of the voluminous transcript, both at those hearings and in the trial court was necessary to properly view the overall picture.

Plaintiff and appellant Joseph B. Mashburn, doing business as Madera Funeral Home in Madera, and as The Chowchilla Funeral Chapel in Chowchilla, also had some working agreement with the county to operate a 24-hour ambulance service for accidents, etc., occurring in that county. His competitor, the county coroner, also maintained similarly located funeral parlors and apparently there was considerable feeling between them. It was the practice to take all accidental death cases to the coroner and he would embalm the bodies and if another funeral director secured the body from him he would make a charge for the embalming service. Although a signed order from the nearest of kin of a deceased, authorizing delivery of the body to Mashburn, was required by the coroner, this same rule was not altogether applied to other funeral directors. With this background, we will proceed to set forth a résumé of the evidence tending to support the respective charges.

The Miller Case

Tharold Miller was involved in an automobile accident at approximately 8 p. m. on December 19, 1952, on U. S. Highway 99, south of Madera. Appellant arrived in his ambulance shortly thereafter, assisted in extricating Miller from the wreckage, and drove him to the Dearborn Hospital in Madera, arriving approximately at 9 p. m. that evening. There is some evidence indicating that he may have been dead at the time he was first placed in the ambulance. The doctor, when he arrived at the hospital at approximately 9:15, pronounced him dead. Appellant placed a call to the wife of the deceased, Mrs. Miller, at 9:20 p. m., at the family residence in Fresno, and informed her, according to Mrs. Miller's story, that her husband had been involved in a serious accident, but he did not indicate to her that he was dead. When Mrs. Miller asked whether she should come to the hospital appellant suggested that she do so and offered to send a car to get her, which she declined. Mrs. Miller was driven to the hospital and arrived at approximately 10:20 p. m. She was informed by the doctor of her husband's death. Appellant, who was still at the hospital, then consoled Mrs. Miller and informed her that he needed certain information for the death certificate and suggested that she follow him to his office. She did so, and when they arrived at the Madera Funeral Home, a short distance from the hospital, Mrs. Miller was met by appellant and his wife. Appellant, according to Mrs. Miller's testimony, then asked her if she had any preference as to who should handle the funeral arrangements and services and she said: "Yes, the Lisle Funeral Home in Fresno". Appellant then stated he would contact Mr. Lisle and take the burden off of her shoulders. He then handed Mrs. Miller a document, which she signed, and informed her it was a routine procedure. The document proved to be an order for release of the body of Mr. Miller from the coroner of Madera County to the Madera Funeral Home, owned by appellant. Mrs. Miller testified that she signed the release without reading it as her eyes were full of tears. Appellant then told her that he would contact her in the morning and Mrs. Miller departed for Fresno. On the morning of December 20, about 9:30, appellant called at the Miller residence in Fresno. He assisted her in selecting the clothes for Mr. Miller to wear in the casket, assisted

her in selecting a casket in Fresno, and also accompanied her to the cemetery where a plot was selected. They then returned to the Miller residence. While at the cemetery appellant placed a telephone call to the Lisle Funeral Home and arranged for the use of the Lisle Chapel for the purpose of leaving the deceased there until the graveside service. Appellant left the Miller residence immediately after that. Mrs. Miller then inquired of her family whether Mr. Lisle had called to see them because he was a friend of the family and she believed that Mr. Lisle was handling the funeral arrangements. Due to this anxiety a friend of Mrs. Miller contacted Mr. Lisle, who came to the Miller home and informed her that appellant was a funeral director and that he had contacted Lisle for the first time from the cemetery just a few minutes before. Mrs. Miller testified this was the first time since her husband's death that she fully comprehended appellant was a funeral director and was in fact handling her husband's funeral. The Lisle Funeral Home was asked by Mrs. Miller to take charge of the funeral and obtain the body. This was accomplished with some bitterness between Mr. Lisle and the appellant. At about 5:30 that afternoon appellant dispatched a telegram to Mrs. Miller informing her of his charges for services in the sum of $935.

Appellant's testimony is that Miller was still alive when he reached the hospital; that he, according to custom, immediately telephoned Mrs. Miller while he was at the hospital; that he told her of the accident and of the fact that he was critically injured, and asked her to come to the hospital. He told her that if she had no transportation he would see that someone brought her there immediately; that he was Mr. Mashburn, owner of the Madera Funeral Home and the Madera Ambulance Service which brought him to the hospital; that he did not know at that time that Miller was dead; that he remained at the hospital, helping the nurses with three other people who were injured in the same accident; that when Mrs. Miller arrived the doctor informed her that he had pronounced Mr. Miller dead at 9:15 p. m. It appears that Mrs. Miller was quite indignant because she believed appellant misrepresented the facts to her and that Mr. Miller was dead when he called, and that this caused her to unnecessarily go to Madera where appellant could confront her with an order to turn the body over to him since it was required that the coroner take charge of the body after his death. He claims that he explained to her that he operated an undertaking establishment as well as an ambulance service, and took her to his funeral office, indicated by signs thereon, and that he fully explained to her the purpose of the release and that she voluntarily signed it; that she did thereafter remark about the Lisle Undertaking Establishment, but this was only in response to his inquiry as to what funeral parlor in Fresno she desired to have the "services held", and that he said he could arrange that; that he obtained the body from the coroner upon the signed order; that the next morning he made all the necessary arrangements in Fresno, as related by Mrs. Miller, charged the casket to his funeral parlor, and assumed the liability for the plot; and that Mrs. Miller well knew all of these facts. Appellant produced witnesses who testified that appellant made no statements in their presence indicating that he was using any coercion or was soliciting from Mrs. Miller the funeral services of her husband. Appellant refused to release the body to Lisle, upon a new order signed by Mrs. Miller, unless Lisle also took the casket selected, in which the body was then contained. The body was subsequently taken to Fresno. The casket selected was not used, but one that cost less money was substituted by Lisle and Mrs. Miller, and the funeral was conducted by the Lisle Funeral Home.

The O'Neal Case

William C. O'Neal, machinist's mate in the Navy, died in an automobile accident occurring about 7 a. m. December 19, 1952, on U. S. Highway 99, on the outskirts of Chowchilla. The deputy coroner was summoned to the scene, and after the body had been removed from the wreckage, about four hours later, the remains were taken to the coroner's funeral parlor in Chowchilla

by a deputy. He notified a Naval officer at the Naval station in Treasure Island of the death of O'Neal and attempted to contact Mrs. O'Neal in Long Beach. He reached her about 2 p. m. on that day at a neighbor's house since there was no telephone in her residence. He informed her of the death of her husband, and since she could not continue the conversation in the face of this news, her neighbor took over the telephone. The deputy coroner informed her that the body was in the coroner's funeral home and requested her to have Mrs. O'Neal call him with instructions as to what she desired concerning the disposition of the remains of her husband. It appears that about 11 a. m. of that day, appellant received information of the accident in which O'Neal was killed, and of his Naval status and the telephone number of his uncle in Gardena. About 2 p. m. appellant called the Naval station in San Francisco and talked to an officer on duty. He stated that he had possession of the body of O'Neal and wanted permission to take charge and complete the necessary funeral arrangements. He was informed that such authority must come from the medical department. About that time, possibly before the Navy call (the continuity of the time of the various calls is in conflict) appellant called the uncle and informed him of the accident and stated that he had possession of the O'Neal body and wanted authorization from the widow to proceed with its care. The uncle volunteered to call the widow and give her the information. He did so but she had already been informed of his death by the deputy coroner, who did have actual possession of the body and who requested her to come to Madera. Appellant then placed a call to the widow and informed her he had a funeral home in Madera; that the body was badly mutilated because he was there at the scene and helped, for four hours, to extricate it from the wreckage and that he was prepared to fix up the scars on the face and the body so the casket could be left open for their inspection. He had been in touch with the Navy, but he did not ask her for any written authority for the possession of the body at that time. Mrs. O'Neal testified she thought, at that time, she was talking to the same funeral home the deputy coroner represented.

Appellant again talked to the medical officer at the Naval station and in this conversation, which took place about 4 p. m. on the afternoon of the 19th, appellant informed the lieutenant that the body of O'Neal was in the possession of the deputy coroner of Madera county and that he, appellant, had permission of the widow to take care of the funeral arrangements. Appellant was informed that he should do nothing concerning the remains until Mrs. O'Neal had been notified. Appellant stated that Mrs. O'Neal had already been notified. Immediately thereafter appellant placed another call to Mrs. O'Neal. This call was taken by Dorothy O'Neal, a sister-in-law, upon the request of the widow. Dorothy then had a conversation with appellant during which appellant stated he had the body of the deceased; that he could fix up the face of the body so that it could be recognized; that he had gotten in touch with the Navy and they had given him full permission to handle the funeral; and that he needed a telegram from the widow to handle the funeral arrangements. Appellant then dictated to Dorothy the telegram he desired sent to him and Dorothy replied that she would inform the widow of the necessity for the telegram. This she did and she was instructed to send the telegram authorizing appellant to handle the body. It was received about 4:03 p. m. by appellant. Upon receipt of the telegram appellant telephoned the deputy coroner informing him that he had a telegram authorizing appellant to handle the body of Mr. O'Neal. The deputy coroner immediately telephoned the widow to find out why appellant had such a telegram and Mrs. O'Neal, when informed by the deputy coroner of this fact, expressed surprise and stated she thought she had sent the telegram to the deputy coroner. She then informed the deputy coroner to ignore the telegram to appellant and wait until someone came from the Navy to investigate the matter. About this time appellant placed

another call to the Navy and inquired as to when the investigator would arrive and was informed that they did not know. That evening appellant telephoned Mrs. O'Neal and inquired, through Dorothy, as to the choice of a casket. In that conversation appellant told her that the uncle, Mr. Tippin, in a previous telephone conversation with him, had authorized him to handle the body. This statement was questioned by Dorothy. Mr. Tippin's wife happened to be present and took the telephone and asked appellant why he said that, because she knew her husband had not so authorized him, and appellant then retracted his statement and said if the coroner kept the body he would seal the casket but that if appellant could have it he could fix it up so the casket could be opened and the body viewed. Mrs. Tippin hung up the telephone. The following day appellant received a telegram from the Navy authorizing appellant to take charge of the body, and ordered it sent to the Martel Chapel in Long Beach, as desired by the widow. Appellant presented an itemized bill to the widow for his claimed services, which exceeded $795.

Appellant's version of the affair is somewhat different. He claims his men received a call in reference to the accident and went to the scene; that Mr. O'Neal was pinned in the car; that the deputy coroner was there and took the body to his funeral parlor in Chowchilla; that an officer called appellant and told him of a card in the effects of the deceased listing Mr. Tippin as the one to call in case of an accident; that he called and told him of the accident and told him he owned the Chowchilla Funeral Home; that the body was at the coroner's chapel in Chowchilla and asked the widow to call him; that the widow called him and he told her the same thing; that she requested the body prepared and shipped to the Martel Chapel in Long Beach; that he told her to wire authority to take charge of the remains and she sent such a telegram; that she told him to notify the Navy department which he did so; and that Mrs. O'Neal sent a wire of authorization as dictated by him; that he presented it to the coroner who had just started the embalming; that appellant told him he would complete it in his establishment; that when appellant's agent arrived to obtain the body, the coroner refused to release it after the coroner had talked to Mrs. O'Neal because she ordered him not to do so until the Navy approved; that appellant called the Navy Department and they authorized appellant to receive the body and ship it to Long Beach; that it was released to appellant; that Mrs. O'Neal subsequently called appellant's office and agreed to accept a $795 casket and apply the Navy allowance of $300 on it; and that he shipped the remains according to the instructions.

Upon this conflicting evidence the Board found as true the allegations in the two counts indicated, and not true of the first count charging appellant with misrepresentation and fraud in the conduct of the business or the profession under section 7692 of the Business and Professions Code.

[1] It is contended that section 7694, supra, does not mention the act of soliciting the *human dead body* as constituting grounds for disciplinary action but only mentions the act of soliciting, after a death or while a death is impending, of *funeral directing or embalming business,* and accordingly the only question to consider is whether or not plaintiff violated the provisions of the section. We will limit our consideration of the evidence to the provisions of the section as charged, i. e., the act of soliciting funeral directing or embalming business. In viewing the evidence in this nature of a proceeding, we are bound by the general rules applicable to civil cases, i. e., that it is the province of the appellate court to view the evidence in the light most favorable to the respondent and to sustain the findings of the trial court if there is substantial evidence in the record of the proceedings before it (which included the proceedings before the Board of Funeral Directors and Embalmers) to support them. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20.

Appellant relies upon Aetna Building Maintenance Co., Inc., v. West, 39 Cal.2d 198, 246 P.2d 11, holding that the term "solicit" implies personal petition and importunity addressed to a particular individual to do some particular thing.

As applied to the Miller case assuming, as we must, the truth of the testimony supporting the findings, it appears that appellant did obtain funeral directing or business upon which he placed a value of $935. He contends that nowhere in his conduct is there any evidence that he solicited any of that business from the widow. He arrived at the scene of the accident in his ambulance, carried the body back to the hospital and at that time, knowing of Miller's death or impending death, called the widow and told her to come to the hospital. He remained there over one hour awaiting her arrival. While consulting her he suggested that they go to his office for the purpose of filling out the death certificate. There is no satisfactory reason shown why this could not have been done at the hospital or even without the necessity of the widow being present. The reasons for going to his office were more or less quite obvious. He was successful in obtaining her signature to a release of her husband's body to appellant's funeral home where he was to perform certain funeral services or directing business. In her grief, as claimed by her, she signed this release not knowing its characteristics or effect. It was said in Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, at pages 79–80, 87 P.2d 848, at page 851, that the "obvious purpose of the section is to prevent embalmers and undertakers from taking unfair advantage of their patrons at a time when such patrons are in no condition to withstand pressure." See also Daggett v. State Board of Funeral Directors and Embalmers, 44 Cal.App.2d 742, 112 P.2d 956. Appellant, then, in the face of the widow's specifically stated request that the Lisle Funeral Home of Fresno handle the funeral and burial arangements, took advantage of her confusion and bereavement to conduct the funeral and burial arrangements himself. The only concession appellant made to the widow's request was to obtain the Lisle Chapel on his own behalf for a place to keep the body preliminary to burial, and for possible burial services. One-half hour or less after the widow was informed of her husband's tragic death, appellant had obtained her signature to an order of release which she stated she could not read because her eyes were full of tears. Appellant contends that his conduct and his business status as a funeral director were so obvious that even a woman in the complete throes of grief could not mistake his identity or his intentions. That she did make this mistake, which she later attempted to rectify, would only indicate the depth of her confusion and the studied effort of appellant to obtain and retain the business. There is sufficient evidence to support this charge.

[2, 3] In the O'Neal case, likewise assuming the evidence against appellant to be true, as we must, appellant did not visit the scene of the accident although he represented to several people that he did. He did not have possession of the body although he stated on at least two occasions that he did. His contention is that in all cases where his ambulance is involved, whether or not it carries the injured or dead to the hospital or mortuary, he makes it a practice to notify the surviving kin of the death of their loved ones. In this case he did not use his ambulance in returning the body and did not have it in his possession. He called the uncle of the deceased and asked whether he could take care of the body of Mr. O'Neal but was referred to the widow. He then called the Naval station where the deceased was based and inquired concerning the care of the body. He made these calls from his funeral home in Madera while the body was in the funeral home of the Deputy Coroner in Chowchilla, a body which he had never seen. He represented to the widow that he could prepare the body so that the casket could be left open, whereas the deputy coroner who had possession of the body stated that it could not be done. Appellant contacted the widow a half hour after she had obtained knowledge of her husband's death, and as in the Miller case,

benefited from the confusion extant at the time. The widow did not distinguish between his separate identity as a funeral director and that of the deputy coroner who had possession of the body. The instant case goes far beyond the contentions of appellant that he, for many years, as a matter of accommodation, has been notifying families of the death or injuries to their members in accidents where his ambulance is involved. The record, considered as a whole, clearly indicates that there is sufficient evidence to justify the Board, as well as the trial court, in finding that defendant violated section 7694, supra. Solicitation violative of that section need not consist of a direct request for funeral business. It is sufficient that all of the facts and circumstances surrounding the obtaining of such business indicate an overzealous attempt by a funeral director to press his services upon the bereaved before the first shock of disaster has been bridged. The inability to make rational and reasonable decisions within a matter of minutes, or even hours after news of death requires the protection afforded by that section. Mrs. O'Neal's testimony reflects exactly the circumstances which that section seeks to eliminate. Ordinarily, emotional upsets react precisely as did Mrs. O'Neal when confronted with the reality of her husband's death. A summarization of the evidence by the learned trial judge is quite apropos. He said:

"Respecting the question of solicitation of funeral business, charged in the second and third counts, we interpret the legislative prohibition to mean that the licensee funeral director shall not, by active word or deed, entice, importune, allure, excite or ask for the funeral or embalming business respecting the body of a deceased person. The reason for this prohibition is clearly to protect those in the throes of deep grief at the loss of a loved one from being led unwittingly into commitments which they would not have entered into except for their grief and consequent inability to clearly follow an ordinary business transaction. * * Each time we have read and rechecked the evidence we have become more convinced that the sum total points to this conclusion, even though isolated portions of the evidence, when read alone, may give little hint of the total effect of all the evidence. We conclude, therefore, that the Board's action was fully supported by the evidence, and we are satisfied that its conclusion is correct."

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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Louis MERLINO; Patricia Stevens and John Stevens, minors, by and through their guardian ad litem, Louis Merlino; Daniel Ketelsen and Theodore Ketelsen, minors, by and through their guardian ad litem, Emil Ketelsen, Jr.; and Emil Ketelsen, Jr., Plaintiffs and Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corporation; Russell G. Robinson; and Ernest Hall, Defendants and Respondents.

Civ. 8382.

District Court of Appeal. Third District. California.

March 30, 1955.

Rehearing Denied April 27, 1955.

Hearing Denied May 25, 1955.

Action for wrongful death and for personal injuries suffered when train struck automobile at grade crossing. The Superior Court, Sacramento County, J. O. Moncur, J., granted railroad's motion for directed verdict. Driver and minor children of decedents appealed. The District Court of Appeal, Schottky, J., held that where evidence was conflicting as to whether locomotive whistle and bell were sounded, and whether crossing flasher lights were operating as train approached crossing, and train reached crossing shortly after another train

on another track cleared the crossing, question of railroad's negligence was for jury.

Judgment reversed.

1. Trial ⇐139(1)

A nonsuit or a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

2. Appeal and Error ⇐927(7), 989

On appeal from a judgment based on a directed verdict, it is the duty of the reviewing court to consider evidence and inferences which reasonably may be drawn therefrom, in light most favorable to plaintiff, and that other evidence may be found in record which would support equally reasonable inferences to contrary is of no consequence.

3. Railroads ⇐348(4)

Failure to comply with statutory regulations as to ringing bell and blowing whistle of a train upon approaching a street crossing is prima facie evidence of negligence of railroad. Public Utilities Code, § 7604.

4. Appeal and Error ⇐1002

Where evidence is conflicting as to whether train crew complied with statutory requirements as to ringing bell and blowing whistle of train upon approaching street crossing, implied finding of jury adverse to railroad is binding on appeal. Public Utilities Code, § 7604.

5. Evidence ⇐586(2)

If a witness is in a position to hear the bell or whistle of a locomotive, and he testified he heard neither, such testimony is sufficient to raise a conflict with positive testimony to the contrary that such warnings were given at grade crossing. Public Utilities Code, § 7604.

6. Railroads ⇐350(7)

In actions for wrongful death and for personal injuries resulting when train struck automobile at grade crossing, where evidence was conflicting as to whether locomotive whistle and bell were sounded as train approached crossing, question of railroad's negligence was for jury. Public Utilities Code, § 7604.

7. Railroads ⇐350(11)

In actions for wrongful death and for personal injuries resulting when train struck automobile at grade crossing, shortly after another train on another track had cleared the crossing, where evidence indicated train was traveling from 35 to 50 miles per hour, question of whether railroad was negligent in manner of operating train was for jury.

8. Railroads ⇐350(32)

In action for wrongful death and for personal injuries resulting when train struck automobile at grade crossing, where question of railroad's negligence as to manner of operating train and giving proper signals on approaching crossing was for jury, question of whether such negligence was proximate cause of collision was for jury. Public Utilities Code, § 7604.

9. Negligence ⇐136(25)

The question of proximate cause is generally one for the trier of fact, and it is only when reasonable minds cannot differ on the question that a court is justified in taking question from trier of facts.

10. Railroads ⇐350(13, 32)

In actions for wrongful death and for personal injuries resulting when train struck automobile at grade crossing, brought by driver of automobile and dependent minor children of decedents, if driver of automobile was guilty of contributory negligence as a matter of law, trial court properly directed verdict against him, and if his negligence was sole proximate cause of accident, then directed verdict was properly granted as to all plaintiffs.

11. Negligence ⇐122(1)

The burden of proving contributory negligence is upon the defendant.

12. Negligence ⇐135(1)

Contributory negligence may be found by the trier of facts from the plaintiff's own evidence.

13. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, and reasonable or sensible men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against will be followed.

14. Railroads ⇐350(28)

In action for wrongful death and for personal injuries resulting when train struck automobile at grade crossing, where driver of automobile stopped to allow one train to clear crossing, and as that train cleared crossing he observed that crossing blinker signals were not operating, and heard no warning signal from train, and then proceeded onto crossing, question of driver's contributory negligence was for jury. Public Utilities Code, § 7604.

Bradford, Cross, Dahl & Hefner, Sacramento, for appellants.

Devlin, Diepenbrock & Wulff, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiffs above named commenced an action against defendant Southern Pacific Company and its defendant employees for wrongful death and injuries resulting from a crossing collision on April 29, 1951, between an automobile and a railroad train, in which collision Frances Merlino and Susan Belle Ketelsen, passengers in the automobile, were killed, and plaintiff Emil Ketelsen, Jr., received personal injuries. Susan Belle Ketelsen was the wife of plaintiff Emil Ketelsen, Jr., and Frances Merlino was the wife of plaintiff Louis Merlino and the sister of Ketelsen. The Ketelsens had two minor children and Mrs. Merlino had two dependent minor children by a prior marriage.

At the close of plaintiffs' case defendants moved for a nonsuit, which motion was denied. Defendants introduced evidence, and after both sides had rested their case defendants' motion for a directed verdict was granted. Judgment was entered on the directed verdict and plaintiffs have appealed from said judgment.

[1] It is the established law of this state that the power of a trial court to direct a verdict is precisely the same as the power of the court to grant a nonsuit. As stated in Re Estate of Lances, 216 Cal. 397, at page 400, 14 P.2d 768:

> "* * * A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; In re Estate of Sharon, 179 Cal. 447, 177 P. 283; In re Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur., pp. 912–918.
>
> "Unless it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 228, 263 P. 799."

[2] Upon appeal from a judgment based on a directed verdict it is the duty of the reviewing court to consider the evidence and the inferences which reasonably may be drawn therefrom, in the light most favorable to the plaintiff. That other evidence may be found in the record which would support equally reasonable inferences to the contrary is of no consequence. Bearing in mind these familiar and well-settled principles we shall summarize briefly the evidence introduced in the trial court.

The accident occurred at Swanston crossing in Sacramento County. Swanston Road crosses a double track main line of the Southern Pacific Company and two switch tracks. From the west, the direction in which Ketelsen's automobile approached this crossing, the tracks were in this order: First, the southbound main, second, the northbound main, and then after the distance of several feet the two side tracks. This crossing was protected by two flasher light signals, one in the southwest corner of the crossing and another in the northeast corner, the latter being between the northbound main and the side tracks. These signals were installed pursuant to an order of the Railroad Commission of the State of California (now the Public Utilities Commission) dated March 15, 1937, which apparently was still in full force and effect on the date of the accident. The flasher type of signal has two lights each of which is enclosed by a cylinder with red glass on each end, so that the light can be seen from both directions. When one light goes on the other goes off, producing a flashing effect. A bell also clangs as the light flashes. To the west signal post is affixed a sign indicating four railroad tracks at this crossing.

On April 29, 1951, shortly before 1:00 o'clock p. m. (Standard Time), Ketelsen was driving his car in an easterly direction on Swanston Road just west of the railroad crossing. Riding in the car with him were his wife and sister. As Ketelsen approached the railroad crossing he observed a freight train about a block away coming from the north and traveling towards Sacramento on the westerly set of rails. He stopped his car so that the front bumper was located about even with the broad painted double white lines extending across his lane of travel, which lines were about seven feet from the most westerly rail. The westerly flasher signal was located about 14 feet west of the west rail of the crossing, so that Ketelsen's position was such that he could not see the flasher signal lights operating, he was sitting just about opposite the signal, and he stated that he did not know if they remained operating after he stopped his vehicle and the train crossed the road. The southbound freight crossed at an estimated speed of 15 to 25 miles per hour. Ketelsen testified that the noise of the passing train made it impossible for him to hear the intermittently sounded bell of the flasher signal and he did not know if it so sounded while he waited for the freight to pass.

As the caboose of the passing southbound freight approached and cleared the crossing a distance of 30 feet to the south edge of Swanston Road, Ketelsen placed his car in low gear and pulled slowly forward. At that time he listened for, but heard no signals or warning bells. He first looked to his right; saw no approaching northbound trains; but could see only approximately 30 feet to the rear end of the caboose on the southbound tracks and, because of the caboose, naturally could see only a little farther to the south on the easterly or northbound set of tracks. He then looked to his left to observe the approach of any possible southbound trains. Next he looked at the signal crossing light at the northeasterly side of the railroad crossing and observed that both of the red lenses of that signal light were somewhat illuminated by the reflection of the sun. They were not flashing, indicating to him that the signal was not in operation, and upon that indication he proceeded to go slowly forward.

As the front of his automobile about reached the easterly set of tracks Mrs. Ketelsen screamed. Ketelsen looked quickly to his right and saw a northbound railroad engine approaching him on the easterly set of rails traveling toward Roseville. There was neither time to stop nor accelerate. He had time only to look at the approaching engine, turn his gaze back to the highway and freeze at the steering wheel of his automobile. Two seconds after the scream the crash followed in which both Mrs. Ketelsen and Frances Merlino lost their lives and Ketelsen sustained severe injuries.

There was evidence from appellants' witnesses that the northbound train had sounded a series of whistle blasts while coming around the Elvas curve, which curve ended about one-half mile south of the crossing.

Mr. J. Franklin, driver of the third car stopped on the west side of the crossing and the second one behind Ketelsen, testified

that he heard the northbound train sound its whistle when it was rounding the curve about one-half mile to the south, that he heard no sounding of any whistle from that time on until the accident occurred, that he estimated the speed of the northbound train to be 35 to 40 miles per hour, and that the caboose of the southbound train was still on the crossing when Ketelsen's car started to creep forward.

Mrs. Vivian Franklin, wife of Mr. Franklin, who was riding in the same car, testified that she heard the northbound train sound its whistle when it was at the curve, that she did not hear any subsequent whistle from that time until the accident occurred, and that she estimated the speed of the train to be 45 to 50 miles per hour.

Mrs. Rena Whitton, who was the driver of the first vehicle stopped on the east side of the crossing, testified that she first saw the northbound train when it was about a block (about 400 feet) away from the crossing; that she estimated its speed at 50 miles per hour because it seemed to be going twice as fast as the southbound freight, which she estimated to be traveling at 25 miles per hour; that the northbound engine blew its whistle when about one-half block (about 200 feet) from the crossing; and that Ketelsen's car crept upon the track right after the caboose of the southbound train had cleared. She admitted that she was a poor judge of speed.

Mr. John Perkins, father of Mrs. Whitton, who was riding with her, stated that he heard the northbound engine sounding its whistle when it was about 50 to 60 yards from the crossing, that it was a steady blast until it hit the car, and that he judged the caboose had cleared about 20 feet when Ketelsen started to cross the tracks.

There was considerable testimony adduced by respondents which contradicted the testimony of appellants' witnesses. The members of the train crew testified that both the whistle and the bell were rung simultaneously and continuously from the whistle post, located one-quarter of a mile from the crossing, up to and including the very moment of impact. They testified also that they were aware of the presence of the southbound freight as their northbound engine neared the crossing, but that no special attention was directed to that train. Neither the engineer nor fireman made any estimate as to whether their engine would approach and pass the crossing just at the moment the southbound train cleared it, nor did they feel any duty to consider that factor as the respondent company had no rules regarding such a circumstance because the northbound line was operated independently of the southbound line.

Three other witnesses, Glen W. Negle, Margaret Negle and Kenneth Negle, who were parked immediately behind the Ketelsen car on the west side of the railroad tracks, testified that they heard the whistle and bell ringing as the northbound engine approached.

Appellants contend that in granting respondents' motion for a directed verdict the trial court failed to give due weight to the well-settled rule that a directed verdict is not proper unless, after taking all the evidence in the light most favorable to the plaintiff, and all inferences reasonably drawn therefrom, there is nothing upon which a finding in favor of the plaintiff could be supported. Appellants contend that the evidence of respondents' negligence is abundant, in that they violated section 486 of the Civil Code (now section 7604 of the Public Utilities Code), in that respondents negligently maintained and operated the flasher warning signals, in that respondents were negligent in allowing two trains to approach the crossing from opposite directions without regard to the clearing distance of one train before the other train got to the crossing, in that the northbound engine was being negligently operated at a high rate of speed, and that there was proximate causation. Appellants also contend that Ketelsen was not contributorily negligent as a matter of law, and even if he were it does not affect the rights of all the other parties to this action.

[3–5] Section 486 of the Civil Code (now section 7604 of the Public Utilities Code) requires the sounding of a whistle at intervals or the continuous ringing of a bell for a distance of 80 rods before reaching

the crossing and until the street, road or highway has been crossed. Proof of failure to comply with this section has been held to be prima facie negligence on the part of the railroad company, as stated by the court in Eastman v. Atchison, Topeka & Santa Fe Railway Company, 51 Cal.App.2d 653, at pages 660–661, 125 P.2d 564, at page 568:

"It is doubtless the law that failure to comply with the regulations prescribed by section 486 of the Civil Code as to ringing the bell and blowing the whistle of a railroad train upon approaching a street crossing is prima facie evidence of negligence on the part of the railroad company (Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 P. 661); and that where the evidence is conflicting as to whether the train crew complied with such statutory requirement, the implied finding of the jury adverse to the railroad company is binding on appeal. [Citing cases.] Furthermore, the courts have held that if a witness is in a position to hear the bell or the whistle of the locomotive and he testified he heard neither, such testimony is sufficient to raise a conflict with positive testimony to the contrary that such warnings were given. [Citing cases.]" See also Jones v. Southern Pac. Co., 74 Cal.App. 10, 26, 239 P. 429; Quiroga v. Southern Pac. Co., 130 Cal.App.2d 93, 278 P.2d 80.

[6] Bearing these well-settled principles in mind we are satisfied that there is sufficient evidence in the record to support a finding that such warning signals were not given by respondents as required by the statute. The jury was not required to accept at its face value the testimony of respondents' witnesses that the proper warning signals were given, but could, instead, believe the testimony of appellants' witnesses to the effect that no whistle or bell was heard by any of them from the time that the northbound train came around the curve, one-half mile to the south of the crossing, until such train was within one-half block, or about 200 feet, of the crossing. Ketelsen at no time heard any whistle or bell from the northbound train, Mr. Franklin and Mrs. Franklin never heard any subsequent whistle signals after they had heard the first ones as the train was rounding and coming out of the Elvas curve, Mrs. Whitton heard such train's whistle for the first time when it was about one-half block, or 200 feet, from the crossing, and Mr. Perkins heard a whistle sound from such train only when it was about 50 to 60 yards from the crossing and that it was a steady blast until the train hit the automobile. If, as we have concluded, there was sufficient evidence to support a finding that the warning signals were not given as required by said section 486 of the Civil Code, then such failure was prima facie evidence of negligence on the part of respondent Southern Pacific Railroad Company.

Appellants argue also that in addition to the violation of said section 486, respondents were negligent in the speed and manner of operation of the northbound train in approaching the crossing occupied by the southbound freight train proceeding in the opposite direction. Appellants' testimony is to the effect that the northbound train was proceeding at the rate of 35 to 50 miles per hour, that the southbound freight was passing the crossing at quite a slower rate of speed, 15 to 25 miles per hour, and that the crew of the northbound train knew of the presence of the southbound train but did nothing in regard to regulating the speed of their train so that it would not reach the crossing as the southbound freight cleared it. Appellants argue that under these circumstances the jury could well find that respondents were negligent in operating the northbound train at such a rate of speed when approaching this crossing, or that in the exercise of due care they should have controlled the speed so that they would not have reached the crossing in such a short space of time after the southbound train had cleared, and that this is so, regardless of the conduct of the railroad company in operating one track independently of the other.

Appellants concede that it is true that no given rate of speed is, in and of itself, negligence in the absence of statute or ordi-

nance, but cite the case of Young v. Pacific Electric Railway Co., 208 Cal. 568, at page 572, 283 P. 61, at page 612, where the court said:

"With reference to the alleged excessive speed of the car, respondents contend that, in the absence of a regulatory statute or ordinance, a railway company may ordinarily run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on that rate of speed unless there are attendant circumstances which make such speed negligence. They also cite authorities as to the right of a railroad company to operate its trains at a high rate of speed in country districts. While it is true that no rate of speed is negligence *per se* in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. The character of a crossing, it has been well reasoned, affects the duty of the railroad company towards travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger."

Respondents in reply state:

"In other words, the Young case merely recognizes that there may be circumstances which, considered with speed, may constitute negligence. No such circumstances were present in the case at bar. This was an unobstructed country crossing, protected by automatic signal devices. Secondly, speed became immaterial when the plaintiffs adduced evidence that these flasher light signals were operating and the whistle signals from the train were given."

It is apparent that respondents are assuming that the evidence shows without conflict that the proper warning signals were given and also that the flasher light signals were operating, and while it is true that there was strong evidence that the warning signals were given and that the flasher light signals were operating we cannot hold, in view of the record, that there was no conflict in the evidence upon these points, as we are convinced that these were matters for the determination of the jury.

[7–9] We believe that there was sufficient evidence to support a finding that respondents were negligent in the operation of said train at said time and place, and will now proceed to consider whether the record would support a finding that such negligence was a proximate cause of the damages sustained by appellants. If, as we have hereinbefore pointed out, there was sufficient evidence to support findings that respondents did not give the warning signals required by section 486 of the Civil Code, and also that the train was operated at an excessive rate of speed under the circumstances, then we are satisfied that the question of proximate cause was one to be determined by the jury. The question of proximate cause is generally one for the trier of the fact and it is only when reasonable minds cannot differ on the question that a court is justified in taking that question from the trier of the fact. Bearing this familiar rule in mind we believe that the trial court erred in concluding that, as a matter of law, respondents were guilty of no negligence that constituted a proximate cause of the accident.

[10–13] There remains to be considered the question of whether appellant Ketelsen was guilty of contributory negligence as a matter of law. The trial court in ruling on respondents' motion for a directed verdict stated that he was, and respondents contend that the negligence of appellant Ketelsen was the sole proximate cause of the accident. If appellant Ketelsen was guilty of contributory negligence as a matter of law, the directed verdict was properly granted as to him, and if his negligence was the sole proximate cause of the accident then the motion for a directed verdict was properly granted as to the other appellants.

As stated in Anthony v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, at page 829:

"The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697–699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citing cases.] Finally, the plaintiff is not bound by the testimony elicited from defendant under section 2055 of the Code of Civil Procedure. On appeal he may rely upon the portion of such evidence that is favorable to him and disregard the unfavorable portion in support of a judgment in his favor or in his attack on a directed verdict."

In the instant case appellant Ketelsen's testimony was that as the caboose of the passing southbound freight approached and cleared the crossing a distance of 30 feet to the south edge of Swanston Road, Ketelsen placed his car in low gear and pulled slowly forward. At that time he listened for, but heard no signals or warning bells. He first looked to his right, saw no approaching northbound trains, but could see only approximately 30 feet to the rear end of the caboose on the southbound tracks and, because of the caboose, naturally could see only a little farther to the south on the easterly or northbound set of tracks. He then looked to his left to observe the approach of any possible southbound trains. Next he looked at the signal crossing light at the northeasterly side of the railroad crossing and observed that both of the red lenses of that signal light were somewhat illuminated by the reflection of the sun. They were not flashing, indicating to him that the signal was not in operation, and upon that indication he proceeded to go slowly forward. As the front of his automobile about reached the easterly set of tracks Mrs. Ketelsen screamed. Ketelsen looked quickly to his right and saw a northbound railroad engine approaching him on the easterly set of rails traveling toward Roseville. There was neither time to stop nor accelerate. He had time only to look at the approaching engine, turn his gaze back to the highway and freeze at the steering wheel of his automobile. Two seconds after the scream the crash followed. The witness John Perkins testified that he judged that the caboose had cleared the crossing about 20 feet before appellant Ketelsen started across the crossing.

Respondents contend that Ketelsen exercised no care whatsoever, that he blindly drove upon the crossing without looking just as the caboose cleared, and that he was therefore guilty of contributory negligence as a matter of law. Respondents contend that not only should the testimony of Ketelsen and Mr. Perkins be considered on this point, but also that of Mrs. Whitton and Mr. Franklin, who, in effect, stated that Ketelsen's car began creeping toward the crossing as the caboose was upon it and that as soon as the caboose passed, Ketelsen immediately drove upon the tracks and was struck by the northbound train.

[14] However, under the well settled rules governing appellate tribunals it was for the trier of facts, in this instance the jury, to weigh the testimony of the witnesses and to decide the question of whether or not, under all of the circumstances shown by the evidence, appellant Ketelsen was guilty of contributory negligence. We do not believe that it can be held as a matter of law that appellant Ketelsen did not exercise some care, and it was a question for the jury to decide whether or not his conduct amounted to contributory negligence. The rule is well stated in the recent case of Lloyd v. Southern Pacific Co., 111 Cal.App. 2d 626, 634, 245 P.2d 583, 588, hearing denied:

"The Spendlove case [Spendlove v. Pacific Electric Ry. Co., 30 Cal.2d 632, 184 P.2d 873] had first been before the District Court of Appeal, 177 P.2d 27, where the judgments of nonsuit were affirmed and where four cases were cited by the court in support of its holding that the driver was guilty of contributory negligence as a matter of law under the look and listen rule. All of them are now relied on by these appellants. Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788; Heroux v. Atchison, T. & S. F. Ry. Co., 28 Cal. App.2d 401, 82 P.2d 620; Guyer v. Pacific Elec. Ry. Co., 24 Cal.App.2d 499, 75 P.2d 550 and Jones v. Southern Pac. Co., 34 Cal.App. 629, 168 P. 586. The Supreme Court, however, in reversing the judgments of nonsuit, distinguished those cases. It thus appears that that court has now adopted or restated the rule of the Koch case, and we of course are bound to follow it if there is any evidence in this record that Lloyd exercised *some* care—whatever the quantum thereof. He testified that when he saw the 'RRX' sign on the surface of the highway he took his foot off the accelerator and looked in both directions. Under the rule of the Spendlove case this seems to be sufficient to make the question one for the jury. The same rule was followed in the Startup case, supra [Startup v. Pacific Electric Ry. Co.], 29 Cal.2d 866, 180 P.2d 896, and by this court in Correa v. Davis, 69 Cal.App. 180, 182, 230 P. 934. In Andre v. Allynn, 84 Cal.App. 2d 347, 354, 190 P.2d 949, 953, the court in speaking of the Spendlove case says: 'This last decision illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which such cases "are rare." See Anthony v. Hobbie, supra, 25 Cal.2d 814, 818, 155 P.2d 826.'" See also Jansen v. Southern Pacific Co., 112 Cal.App.2d 833, 841, 247 P.2d 581.

In view of the foregoing we are of the opinion that the trial court erred in directing a verdict in favor of respondents. The questions of negligence, proximate cause and contributory negligence should have been submitted to the jury.

No other points raised in the briefs require discussion.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 151

Seth OBERG and Oscar Oberg, Copartners, doing business as Oberg Bros. Construction Co., Plaintiffs and Appellants,

v.

The CITY OF LOS ANGELES, a municipal corporation, Defendant and Respondent.

Civ. 20622.

District Court of Appeal, Second District, Division 3, California.

April 7, 1955.

Rehearing Denied May 4, 1955.

Action by contractors to recover value of labor and materials alleged to be extra under construction contract. From judgment of the Superior Court, Los Angeles County, J. J. Ford, J., for an amount less than that claimed, the contractors appealed. The District Court of Appeal Vallée, J., held that where specifications 138, which was part of contract consisting also of plans, special specifications and executed contract, provided that membrane waterproofing should be placed over specific concrete joints, including concrete joints which would be in contact with fill, but expansion joints, under special specifications, were to be sealed with rubber waterstop and specifications 138 was made part of contract when not in conflict with other provisions, specifications 138 did not conflict with special

specifications with respect to concrete joints which would be in contact with fill, and contractors were not entitled to value of labor and materials for membrane waterproofing of concrete joints.

Affirmed.

1. Contracts ⇐143

A contract entered into by a governmental body and an individual is to be construed by same rules which apply to construction of contracts between private persons.

2. Contracts ⇐147(1)

In construing a contract, primary object is to ascertain and give effect to intention of parties as it existed at time of contracting. West's Ann.Civ.Code, § 1636.

3. Contracts ⇐166

Effect must be given to writings incorporated into contract by reference.

4. Contracts ⇐199(1)

A plan of work is subsidiary to the contract, and latter is controlling in case of a discrepancy, and where language of contract will permit, specifications will be construed so as to uphold validity of contract.

5. Contracts ⇐199(1)

Where specifications 138 which was part of contract consisting also of plans, special specifications, and executed contract, provided that membrane waterproofing should be placed over specific concrete joints, including concrete joints which would be in contact with fill, but expansion joints, under special specifications, were to be sealed with rubber waterstop, and specifications 138 was made a part of contract when not in conflict with other provisions, specifications 138 did not conflict with special specifications with respect to concrete joints in contact with fill, and contractors were not entitled to value of labor and materials for membrane waterproofing of concrete joints. West's Ann. Civ.Code, §§ 1635 et seq., 1636, 1638, 1641, 1654.

Danielson & St. Clair and H. Spencer St. Clair, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Alfred E. Rogers, Deputy City Atty., Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment in an action for the value of labor and material alleged to be extras furnished under a construction contract.

On September 29, 1950 plaintiffs entered into a contract with the city of Los Angeles for the construction of a subway and appurtenant work on Sepulveda Boulevard. During the course of construction a dispute arose as to whether plaintiffs were required by the contract to install membrane waterproofing over all concrete joints in contact with fill other than expansion joints. The city asserted plaintiffs were required to do so by virtue of section 158 of specifications 138, being general specifications adopted by the city council in 1941. Plaintiffs claimed they were not required to install any membrane waterproofing because the contract designated and required the installation of rubber waterstop and because membrane waterproofing was not designated in the contract nor shown on the plans or set forth in the specifications adopted by the Board of Public Works in 1950 providing for the construction. Pursuant to a change order issued by the city, plaintiffs installed membrane waterproofing as directed, the parties agreeing that all rights of plaintiffs to compensation for the installation of membrane waterproofing were reserved.

Membrane waterproofing is a seal composed of asphalt and fabric which is sometimes placed over the edges of concrete joints to prevent seepage. Rubber waterstop is a piece of rubber that is placed in the first section of concrete being poured and when the next section is poured the concrete seals it, leaving the rubber waterstop as a barrier to water seepage at the joint. Membrane waterproofing and rubber waterstop serve the same purpose. Good construction practice does not require membrane waterproofing and rubber waterstop at the same joint.

After completion of the contract plaintiffs duly filed a claim with the city for

$15,412.76, based on the cost to them of installing the membrane waterproofing and reduction in the contract price charged against them by reason of elimination of some membrane waterproofing. The claim was denied and this action filed.

The court concluded that plaintiffs were not required by the contract to install membrane waterproofing over expansion joints, at which rubber waterstops were required and installed; plaintiffs were required by the contract to install 51,142 square feet of membrane waterproofing; plaintiffs were entitled to a credit on the total contract of $3,102.45, being the agreed price for 12,578.5 square feet of membrane waterproofing which, at the direction of the city, was not installed "as required by the original contract." Judgment was for plaintiffs for $1,355.31. Plaintiffs appeal.

Plaintiffs contend that the contract did not require them to install any membrane waterproofing and that the installation thereof at the demand of the city was an extra for which they are entitled to extra compensation.

The question is whether plaintiffs were required by the contract to install membrane waterproofing over all concrete joints of the structure in contact with fill other than expansion joints. The parties agree that the interpretation of the contract presents a question of law. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. The contract consisted of the plans, the special specifications, specifications 138, and the executed contract.

On August 16, 1950 the Board of Public Works of the city adopted plans and specifications for the construction of a subway and appurtenant work on Sepulveda Boulevard. The plans did not show membrane waterproofing; they did show rubber waterstop. This statement appeared on the plans:

> "Materials and workmanship shall conform to City of Los Angeles Specification No. 138, and the specifications accompanying this set of plans."

The specifications accompanying the plans, called the "special specifications," contained these provisions:

> "Whenever the word 'specifications' is used herein and in the Instructions to Bidders, Bonds, Affidavit, Published Notice Inviting Bids, and in the Contract it means these specifications together with all provisions not in conflict herewith, contained in Specifications No. 138 as amended to date of 'Notice Inviting Bids' on file in the office of the City Clerk, which Specifications No. 138 are hereby made a part hereof as though fully set forth herein.
>
> "The intent of the plans and specifications is to prescribe a complete work or improvement which the Contractor undertakes to do in full compliance with the plans, the specifications, the special provisions, proposal, and contract. The Contractor shall do all work including such additional, extra, and incidental work as may be considered necessary to complete the project in a satisfactory and acceptable manner, as provided in the plans, proposal, and contract. He shall furnish, unless otherwise provided in the specifications, special provisions or contract, all materials, equipment, tools, labor, and incidentals necessary to prosecute the completion of the work.
>
> "These specifications, the plans, special provisions, and all supplementary plans and documents are essential parts of the contract, and a requirement occurring in one is just as binding as though occurring in all. They are intended to be cooperative to describe and provide for a complete work. In case of discrepancy, figured dimensions, unless obviously incorrect, shall govern over scale dimensions. Plans shall govern over specifications and special provisions shall govern over both plans and specifications."

Under the title "Special Provisions" the following appeared:

> "All work done and materials furnished shall be in conformity with these specifications, Specifications No. 138 as amended to date of 'Notice Inviting Bids', the above mentioned plans and all plans mentioned thereon."

Under the heading "Expansion Joints," the "special specifications" provided that:

"Where shown on the plans, expansion joints shall be formed as per Specifications No. 138. All such joints shall be filled with expansion joint filler material as specified in Specifications No. 138. Each such joint shall be sealed, using a continuous rubber waterstop throughout the lengths called for on the plans."

The section then went into detail as to the construction and installation of rubber waterstops. There was no specific mention of membrane waterproofing in the special specifications.

Section 18 of specifications 138 provided:

"In the event of there being certain provisions in the special specifications, the plans, or the standard plans for the work which may modify or be contrary to these Specifications, the particular provisions of the special specifications and plans shall supersede and control these specifications in the following order of precedence:

"First, plans.

"Second, special specifications.

"Third, standard plans, except where definitely provided otherwise herein, and except that these Specifications shall supersede and control any specifications referred to on the standard plans."

Section 77 of specifications 138 specified the materials of which membrane waterproofing should consist.[1]

Section 158 of specifications 138 was in Part XII titled "Waterproofing of Structures." In pertinent part it read:

"(a) *General Requirements.* Materials for membrane waterproofing shall conform to the requirements of Sec. 77, hereof.

"Forms for areas and angles to be waterproofed shall conform to Sec. 121, hereof.

"Concrete surfaces which are to be waterproofed shall be smooth and free from projections and cavities which might injure the membrane. The surface of the concrete shall be dry and shall be thoroughly cleaned of dust and loose materials. No waterproofing shall be done in wet weather.

"(b) *Surfaces to be Waterproofed.* A strip of membrane waterproofing 18 inches wide shall be placed over the edges of all construction, contraction, and expansion joints (except those of sewers and storm drains) which will be in contact with fill, including the joints between the footings and the members resting upon the footings, but not including the vertical joints in the footings themselves, unless so indicated on the plans.

"A strip of membrane waterproofing 24 inches wide shall be placed over the side or sides of joints of abutment and footing hinges and keys of arches and rigid frames which will be in contact with fill, or as indicated on the plans.

"Membrane waterproofing shall be applied to all other surfaces indicated on the plans or specified herein or in the special specifications."

Section 158 then specified the quality and manner of application of membrane waterproofing. There was no mention of rubber waterstop in specifications 138.

1. Section 77 reads: "Membrane Waterproofing

"(a) *Coatings and Fabric.* The prime coat shall be of bituminous type of sealing compound. [Sec. 36, hereof]

"The asphalt coatings shall be Type B asphalt complying with Std. Spec. D 449–37T, A.S.T.M.

"The fabric shall be woven cotton fabric complying with Std. Spec. D 173–40T, A.S.T.M., except that the rolls of treated cotton fabric may be wound on cardboard cores not less than one inch in diameter, and except that the moisture content of the fabric based on the net weight shall not exceed 2 percent.

"Samples of the asphalt and fabric for testing shall be taken by the Engineer not less than 3 days before the material is first applied and at intervals thereafter, as the Engineer may require.

"(b) *Asphalt Plastic Cement* shall comply with Federal Specifications SS–C–153, except that it may have either asphalt or coal tar base."

The city invited bids for the proposed construction. The notice inviting bids stated that the work was to be performed in "strict conformity with specifications therefor, which said specifications were duly adopted by the said Board of Public Works at its meeting of *Aug. 16,* 1950, * * * Reference is hereby made to the said specifications for full particulars and description of the said work." Under the General Information heading of "Instructions to Bidders," the following provision is found:

> "The said work must be done in strict conformity with specifications and/or plans therefor, which specifications and/or plans were adopted by the Board of Public Works of said City on *Aug. 16 1950.*"

In the schedule of quantities in the "Notice Inviting Bids" the city specified 49 different items of materials to be furnished and work to be performed. No item for the installation of membrane waterproofing was listed. Item number 8 provided "6,040 linear feet rubber waterstop, in place." The introduction to section 13, Schedule of Quantities, in part read:

> "The scope of the work included in each item is more fully described in the special specifications included herein."

On the printed proposals for contractors to submit, following the schedule of work and prices and preceding the page on which the contractor signed, there appeared the following statement:

> "All work done and materials furnished shall be in conformity with Specifications No. 138 as amended to date of 'Notice Inviting Bids', the accompanying Specifications, and in further accordance with [certain plans]. * * *"

Plaintiffs' bid was accepted and on September 29, 1950 a contract was executed by plaintiffs and the city. The executed contract was an "item" contract whereby plaintiffs agreed to furnish materials and do certain units of work at specified unit prices. Article 1, Statement of Work and Compensation, provided that "The Contractor shall furnish all labor, material and equipment necessary for the construction of a subway and appurtenant work * * * as covered by Section 13 of the 'Instructions to Bidders', at and for the following prices: * * *." A schedule of 49 items of materials, work, and prices followed. Membrane waterproofing was not listed nor was any unit price specified for the cost of furnishing or installing it. A unit price was specified for furnishing and installing rubber waterstop. The executed contract then provided: "Said work to be performed strictly in accordance with the specifications, schedules and drawings, all of which are made a part hereof. * * *" Article 29 provided:

> *"Documents Which Constitute a Part of This Contract.*
>
> "It is expressly agreed that the Instructions to Bidders, the Notice Inviting Bids, the Contractor's Proposal and the Specifications, all of which are on file in the office of the Board of Public Works, shall constitute a part of this contract and each of the parties hereto does hereby expressly covenant and agree to carry out and fully perform each and all of the provisions of said documents, upon its part to be performed, provided, however, that in the event of any conflict between any of the provisions of said documents and this instrument, the provisions of this instrument shall prevail."

Specifications 138 were not expressly mentioned in the contract, but they in turn were referred to in the other documents.

About a month after the execution of the contract representatives of the city presented a drawing to plaintiffs and asserted that plaintiffs were required by section 158 (b) of specifications 138 to install a total of 52,190 square feet of membrane waterproofing over concrete joints. The drawing omitted any requirement of installation of membrane waterproofing over 27,110 square feet of concrete joints. The drawing also omitted 13,180 square feet of membrane waterproofing over certain joints and replaced the same with a different application of membrane waterproofing totaling 23,190 square feet. On February 20, 1951

the city issued Change Order No. 11, which was in accord with the drawing. It required plaintiffs to install membrane waterproofing at certain joints and directed that it not be installed at certain other joints. The joints at which plaintiffs were directed to install membrane waterproofing were not expansion joints.

A controversy ensued between the parties. In accord with the direction of the city, plaintiffs, reserving their rights as to compensation, installed 38,563.5 square feet of membrane waterproofing for which they received no compensation as an extra. The contract was fully performed by plaintiffs and the work accepted by the city. The city deducted from the total amount paid plaintiffs the sum of $4,457.76 by reason of the omission of membrane waterproofing over certain concrete joints which the city had asserted was required by the contract.

[1, 2] A contract entered into by a governmental body and an individual is to be construed by the same rules which apply to the construction of contracts between private persons. Hensler v. City of Los Angeles, 124 Cal.App.2d 71, 78, 268 P.2d 12; M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 704, 235 P.2d 7; Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 19 L.R.A.,N.S., 178; Corporation of America v. Durham Mut. Water Co., 50 Cal.App.2d 337, 340, 123 P.2d 81; 18 Cal.Jur. 1000, § 272; 63 C.J.S., Municipal Corporations, § 1169, p. 853. In construing a contract, the primary object is to ascertain and give effect to the intention of the parties as it existed at the time of contracting. Civ.Code, § 1636; Hay v. Allen, 112 Cal.App.2d 676, 681, 247 P.2d 94. In accord with section 1638 of the Civil Code, the language of the contract, if clear and explicit and not conducive to an absurd result, must govern its interpretation. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641.

In cases of uncertainty not removed by the rules stated in sections 1635 to 1653 of the Civil Code, the language of the contract is to be interpreted most strongly against the party who caused the uncertainty to exist. As between a public officer or body and a private party it is presumed that the uncertainty was caused by the private party. Section 1654 states:

> In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

The restricted application of this section only comes into operation when, after application of the rules formulated in the sections preceding it, the uncertainty has not been removed. Eaton v. Thieme, 15 Cal. App.2d 458, 464, 59 P.2d 638; Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706; Cullen v. Sprigg, 83 Cal. 56, 62–63, 23 P. 222.

[3, 4] Effect must be given to writings incorporated into the contract by reference; hence the contract will be construed with respect to plans and specifications incorporated by reference. However, a plan of work is subsidiary to the contract, and the latter is controlling in the case of a discrepancy, and where the language thereof will permit, the specifications will be construed so as to uphold the validity of the contract. Fidelity & Deposit Co. of Maryland v. Maryland Board of Councilmen, 253 Ky. 802, 70 S.W.2d 685; Utility Const. Co. v. Borough of South River, 136 N.J.L. 633, 57 A.2d 389; Dean v. City of New York, 167 N.Y. 13, 60 N.E. 236; 63 C.J.S., Municipal Corporations, § 1169, p. 854.

[5] We think it clear that plaintiffs were required under the contract to install membrane waterproofing. Membrane waterproofing was specified in section 158 (b) of specifications 138. Section 158(b) said that a strip of membrane waterproofing 18 inches wide should be placed over the edges of all construction, contraction, and expansion joints which would be in contact with fill. Expansion joints were

not to be waterproofed with membrane waterproofing since, as provided in the special specifications, they were to be sealed with rubber waterstop and the special specifications controlled over specifications 138. Section 158(b) also said that a strip of membrane waterproofing 24 inches wide should be placed over the side or sides of certain other joints which would be in contact with fill. Membrane waterproofing was not specified in either the plans or the special specifications, hence section 158(b) of specifications 138 controlled. The statement repeated throughout the documents that materials and workmanship "shall conform" or "shall be in conformity with" specifications 138 does not merely mean that materials should be of the quality shown in those specifications, as plaintiffs appear to argue; it means that materials shall comply with specifications 138, i. e., that the contractor shall install the materials specified in those specifications when they are not specified in the plans or special specifications. Specifications 138 did more than merely specify standards of quality of materials and of work procedures where such materials and work procedures were required by the plans and special specifications. They distinctly and definitely said that membrane waterproofing should be placed over specified concrete joints which, in this case, included all concrete joints which would be in contact with fill except expansion joints.

There was no conflict between the special specifications and specifications 138, as plaintiffs appear to contend. Rubber waterstop was not referred to in specifications 138 hence it was necessary, since it was to be used on expansion joints, to say so in the special specifications. Membrane waterproofing was specified in specifications 138, hence it was not necessary to say anything about it in the plans or special specifications.

The fact that the executed contract was an item or unit price contract does not militate against our conclusion. As we have observed, plaintiffs agreed to furnish all materials specified in specifications 138 necessary to complete the structure. Item 6 of the executed contract read:

> "Per cubic yard for Class 'F' Concrete for structures, including forms, in place."

Item 6 of the "Schedule of Quantities" in the Instructions to Bidders said:

> "31,486 cubic yards Class 'F' concrete for structures in place, including forms."

The introduction to the "Schedule of Quantities" stated that the 49 items of quantities were approximate only, to be used by the city for the purpose of comparing bids, and continued:

> "The scope of the work included in each item is more fully described in the special specifications included herein."

The special specifications, in turn, made specifications 138 a part thereof when not in conflict. Section 27 of the special specifications covered in detail the composition of Class "F" concrete and concrete construction. It said:

> "The price paid for cubic yard of concrete in place shall include full compensation for furnishing all labor, materials, tools and equipment and doing all work involved in furnishing material and constructing of forms and falsework, of expansion joints, excepting rubber waterstops, of weepers and pouring and finishing concrete as shown on the plans and specified in this section."

Section 29 provided that expansion joints were to be sealed with rubber waterstop and:

> "The cost of all material, labor and equipment required to conform to the provisions of this section, except furnishing and installing rubber waterstops, shall be considered to be included in the price paid per cubic foot of concrete and no additional allowance will be made therefor."

The cost of furnishing and installing rubber waterstops was provided for and was a separate item in the Schedule of Quantities. Section 158 of specifications 138 provided for membrane waterproofing of all "concrete" surfaces that were to be waterproofed.

Under section 158 of specifications 138 all joints in contact with fill, including expansion joints, would have to have been waterproofed with membrane waterproofing but since expansion joints were specifically excepted and were to be sealed with waterstop, the cost of waterproofing all other joints was included in the cost paid per cubic foot of concrete. Construing the documents as one, it appears to be manifest that membrane waterproofing was included in the executed contract.

Plaintiffs undertook to provide all materials necessary to complete the structure in full compliance with the plans and specifications, which included specifications 138, and obligated themselves to install membrane waterproofing. Membrane waterproofing was not an extra and plaintiffs were not entitled to extra compensation for installing it.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 73

The AMERICAN DISTILLING COMPANY, Plaintiff and Appellant,

v.

Charles G. JOHNSON, as Treasurer of the State of California, George R. Reilly, William G. Bonelli, Jerold L. Seawell, James H. Quinn and Thomas H. Kuchel, as members of and constituting the State Board of Equalization, Defendants and Respondents.

Civ. 16237.

District Court of Appeal, First District, Division 2, California.
April 1, 1955.

Hearing Denied May 25, 1955.

Action for refund of excise taxes imposed under Alcoholic Beverage Control Act. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that failure to file export sale report at time of sale was fatal to plaintiff's claim.

Affirmed.

1. Evidence ⇐47

Courts take judicial notice of rules of State Board of Equalization. West's Ann. Code Civ.Proc. § 1875, subd. 3.

2. Pleading ⇐6

On demurrer all matters of which court takes judicial notice must be read into pleading, even when pleading makes express allegation to contrary.

3. Pleading ⇐214(5)

Demurrer does not admit truth of conclusions of law pleaded.

4. Intoxicating Liquors ⇐90(1)

The authority given to Board by Alcoholic Beverage Control Act subsection requiring any claim for exemption from excise taxes to be made to Board in such manner as Board shall prescribe is not restricted to prescribing one form for filing of such claim but extends to whole procedure applicable to claiming of such exemption including manner in which, form on which and time on which proof must be furnished, and notwithstanding preceding section creating "presumption" that all distilled spirits acquired by any taxpayer have been sold in state unless it is proven to satisfaction of Board in reports on forms prescribed by Board, that such distilled spirits have been exported, taxpayer failing to file export sale report at time of such sale would not be entitled to exemption even though it filed claim for exemption in accordance with Board's requirements and, more than a year after export sale, filed export sale report. Gen.Laws, Act 3796, §§ 24.2, 24.25.

5. Constitutional Law ⇐42

To be entitled to raise constitutional question, party complaining must show that his rights are injuriously affected, and that he is aggrieved by matter complained of.

6. Statutes ⇐227

Directory provisions of statute must be complied with as nearly as practicable, and they may be enforced in absence of excusatory facts.

Norman A. Eisner, Haskel Titchell, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman and Sho Sato, Deputy Attys. Gen., for respondents.

NOURSE, Presiding Justice.

This is an action for refund of excise taxes imposed under Section 24 of the Alcoholic Beverage Control Act, Deering's General Laws, Act 3796, hereinafter called the Act. Defendants, Treasurer of the State of California and members of the State Board of Equalization, had judgment, after their demurrer to the amended complaint on the ground that it did not state a cause of action was sustained without leave to amend, and plaintiff appeals.

The allegations of the amended complaint relevant to the appeal are to the following effect:

On January 31, 1952 a determination of additional alcoholic beverage excise taxes and interest was served on plaintiff with respect to sales made by plaintiff in 1950. All the beverages upon which the claim was based were sold for export and actually exported from this State within 30 days from the date of the sale, partly through common carrier, partly in vehicles owned by the purchasers. With respect to each of said sales plaintiff had filed its claim for excise tax exemption on SBE Form 244B in compliance with the instructions of the State Board of Equalization (herein further called the Board) but plaintiff was at the time said sales were made, unaware of the requirement of the Board with respect to the filing of SBE Form 260 for proof of sales exported in vehicles owned by the purchaser. On February 11, 1952 plaintiff filed with the Board a petition for redetermination of the above additional tax. Prior to the hearing of said petition plaintiff became aware of the requirement as to SBE Form 260 and furnished to the Board proof of exportation upon said form. The Board granted plaintiff's petition with respect to those beverages which had been exported by common carrier, but denied it with respect to those exported in vehicles owned by the purchasers, notwithstanding the fact that the sale for export and the actual export within 30 days from the sale were proved to the satisfaction of the Board, but solely because plaintiff had not filed Form 260 at the time provided for. Plaintiff paid, under protest the additional tax upheld and filed with the Board a claim for refund, which refund was denied.

It is further alleged that the additional tax was illegally collected, because the exported beverages on which it was based were tax exempt under Sections 24.2 and 24.25 of the Act, the claim of exemption had duly been filed on Form SBE 244B, the full report on SBE Form 260 as to said sales had been filed prior to the hearing for redetermination of tax, the failure to furnish proof on said Form 260 promptly or at all is by Section 24.2 of the Act made presumptive only of taxable sale within the State not conclusive and does not cause forfeiture of the claim of exemption, and the action of the Board which made the presumption conclusive is contrary to law and beyond the jurisdiction of the Board.

[1–3] The question decisive of the correctness of the sustaining of the demurrer without leave to amend is whether the facts alleged in connection with the matters of which the court takes judicial notice show that by not filing Form 260 at the time provided for appellant as a matter of law forfeited its claim of exemption. The courts take judicial notice of the rules of the Board. § 1875, subd. 3, Code of Civil Procedure; Anders v. State Board of Equalization, 82 Cal.App.2d 88, 98, 185 P.2d 883. On demurrer all matter of which the courts take judicial notice must be read into the pleading even when the pleading contains an express allegation to the contrary. Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666. The demurrer does not admit the truth of conclusions of law pleaded. Connecticut Gen-

eral Life Ins. Co. v. Johnson, 8 Cal.2d 624, 629, 67 P.2d 675.

The regulation as to Form 260 was and is contained in Rule 54a of the Board (California Administrative Code, Title 4, Chapter I) which reads:

"Licensees of other States desiring to make purchases of alcoholic beverages in California for export in private vehicles owned or operated by the out-of-State licensee, shall apply to the board for an identification permit on application forms prescribed by the board.

"The identification permit issued by the board must be presented to the California taxpayer at the time of making purchases of alcoholic beverages in California, at which time the California taxpayer must complete SBE Form 260, Report of Sale of Alcoholic Beverages for Export.

"Pages 1 and 2 of this report shall be delivered to the purchaser. Page 3 shall be forwarded to the board at the time sale is completed, together with copy of invoice or invoices listed on the report. Page 4 shall be retained by the California taxpayer. The out-of-State purchaser must report the importation to the liquor control authority of his own state and obtain the approval of such authority on page 1 of the report. The approved page 1 must then be returned to the California taxpayer. Page 1, properly approved, must be kept on file at the premises of the California taxpayer as proof of export and for verification by employees of the board.

"Claims for tax exemption, where delivery is made to the purchaser in this State, will be allowed only upon completion of the foregoing procedure."

It has been held in San Francisco Brewing Corp. v. Johnson, 110 Cal.App.2d 479, 243 P.2d 53, 55, that a provision of the Act that certain claims for exemption from excise tax must be made to the board "'in such manner as the Board shall prescribe'", authorized the Board to prescribe the procedure for such claims; that Rule 54 was within the authority so granted and in the absence of a showing to the contrary must be construed to be a reasonable and valid exercise thereof. Where no attempt was made to comply with Rule 54, the exemption was held to have been forfeited and the sustaining of a demurrer to the complaint without leave to amend was upheld. The case related to excise tax on beer and therefore involved other sections of the Act, but as these sections are to the same effect as those here involved this does not influence its authority for this case. However, it does not appear that the arguments urged in this case for the illegality of the effect given to Rule 54a were considered in the San Francisco Brewing Corp. case and the fact that here the Forms 260 were furnished to the Board, although later than provided for in Rule 54a, whereas no attempt of compliance was made in the cited case, might be a distinguishing feature.

The sections of the Act here involved read, Section 24.2: "It shall be presumed that all distilled spirits acquired by any taxpayer have been sold in this State by him unless proven to the satisfaction of the board, in verified reports on forms prescribed by the board, that such distilled spirits are (1) still in the possession of such licensee, or (2) that such distilled spirits have been sold or delivered to another licensed distilled spirits manufacturer, rectifier, importer or wholesaler, or (3) that such distilled spirits have been exported without this State or sold for export by the licensee making the report and actually exported from this State within 30 days from the date of such sale, or (4) that prior to the termination of possession such distilled spirits have been lost through unintentional destruction, or (5) that prior to the termination of possession there has been an unaccounted for loss, but such unaccounted for loss shall not exceed a tolerance to be fixed by the board, or (6) that such distilled spirits are otherwise exempt from taxation under this act."

Section 24.25: "The excise tax imposed by Section 24 of this act shall not be, and is not imposed upon any distilled spirits specifically mentioned in Section 24.2, subdivision (1) to (7) thereof.

"Any claim for exemption from excise taxes under Section 24.2 must be made to

the board in such manner as the board shall prescribe."

[4] Appellant mainly urges a distinction between the "claim", as to which the Board may give binding rules under Section 24.25 last paragraph and the "proof", as to which noncompliance with the rules of the Board gives under Section 24.2 rise to a rebuttable adverse presumption only. It is alleged that Form 244B is "the claim" and that appellant duly filed it, whereas Form 260 is a matter of proof and that the presumption caused by appellant's failure to comply with it at the time of the sale has been rebutted. The reasoning is without merit.

The authority given to the Board in Section 24.25 last paragraph supra to make binding rules as to the manner of claiming an excise tax exemption is not restricted to prescribing one form for the filing of such claim. It extends to the whole procedure applicable to the claiming of such exemption including the manner in which, the form on which and the time at which proof must be furnished. Section 24.2 does not contain anything inconsistent with such power. It provides in substance that it is enough (for the purpose of exemption that the Board is satisfied by reports filed on forms prescribed by the Board, that certain enumerated facts which exclude tax liability have taken place. If the Board is not so satisfied, then there is a presumption of sale in this State and the burden of proof of the exemption is on the taxpayer. There is no provision in this section as to the manner in which the taxpayer must furnish this proof in rebuttal. The Board is given power to prescribe the manner of this proof in the general enabling provision of Section 24.25 last paragraph and this power is not limited by the above provision of Section 24.2 but is in addition to it. As part of this manner the Board can also prescribe the time at which data on which the taxpayer relies must be furnished to it, as it did in Rule 54a supra. Said rule is therefore within the Board's power regardless of whether Form 260 is considered as relating to the claim, its proof or both.

The imperative character of the prescribed use of Form 260 is clearly shown by the last paragraph of Section 24.25 and of Rule 54a. That even a constitutional substantive right can be lost by failure to adhere to the prescribed procedure was held in Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106, on which the San Francisco Brewing Corp. case, supra, relies.

[5] Appellant further contends that even if the Board had power to make binding rules of the kind of Rule 54a, the specific rule is an unreasonable exercise of its power because the required authentication of the form by the liquor control authority of the foreign state and the return of the form so authenticated to the taxpayer are beyond said taxpayer's control. The matter criticized is not actually involved in this case. It does not appear that appellant experienced any difficulty in obtaining the cooperation of the foreign liquor control authority. To be entitled to raise a constitutional question, like the one of due process here involved, the party complaining must show that his rights are injuriously affected, that he is aggrieved, by the matter complained of. 11 Cal. Jur.2d Constitutional Law, § 68; In re Durand, 6 Cal.App.2d 69, 44 P.2d 367.

[6] We conclude that the provision of Rule 54a with which appellant did not comply at the time prescribed was binding on it. In its closing brief appellant contends, however, that even if noncompliance would justify the forfeiture of the exemption, the belated compliance in this case did not justify it. It is true that requirements relating to the time within which acts are to be done are frequently held to be directory only, 23 Cal.Jur. 615; Francis v. Superior Court, 3 Cal.2d 19, 27, 43 P.2d 300, and that the provision requiring the furnishing of Form 260 *at the time of the sale* can be so considered. However, also directory provisions must be complied with as nearly as practicable, and they may be enforced, certainly in the absence of excusatory facts. 82 C.J.S., Statutes, § 374, p. 869; 50 Am.Jur. 43. Where in this case the complaint showed on its face that appellant was more than a year late in filing the forms, and that the

only excuse offered was that he was not aware of the existence of the published rule, the court could decide as a matter of law that the decision of the Board was not an abuse of discretion and that appellant was not entitled to relief. Even under the express relief provision of Section 473, Code of Civil Procedures not here applicable, the relief is in the discretion of the trial court and ignorance of law is as a rule not a sufficient excuse, Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385.

Judgment affirmed.

DOOLING, J., and BRAY, J., assigned, concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

132 Cal.App.2d 162

Donald Duane JONES and Marsha L. Jones, minors, by Bernice M. Jones, their Guardian ad litem, and Bernice M. Jones, Plaintiffs and Appellants,

v.

JOHNSTON TESTERS, Inc., a corporation, M. O. Johnston Oil Field Service Corporation, a corporation, Johnston Formation Tester Service, a corporation, Defendants.

Johnston Testers, Inc., a corporation, Respondent.

Civ. 20390.

District Court of Appeal, Second District, Division 3, California.

April 8, 1955.

Rehearing Denied May 5, 1955.

Hearing Denied June 2, 1955.

Wrongful death action against supplier of testing equipment to oil well driller for whom decedent was working when plug being used in test fell and hit decedent on the head. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered a judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that it was error to refuse to permit qualified expert to testify that hook from which plug was suspended had been worn to such extent as to create hazard of its being opened without exertion of pressure on both latch and trigger at same time, and crucial question in case being whether hook was worn to that extent, exclusion of such testimony would require reversal.

Reversed.

1. Death ⇐58(1)

Absence of decedent's testimony due to his death created, in wrongful death action, presumption of exercise of reasonable care on his part.

2. Appeal and Error ⇐1056(1)
Evidence ⇐513(11)

In wrongful death action against supplier of testing equipment to oil well driller for whom decedent was working when plug being used in test fell and hit decedent on the head, it was error to refuse to permit qualified expert to testify that hook from which plug was suspended had been worn to such extent as to create hazard of its being opened without exertion of pressure on both latch and trigger at same time; and crucial question in case being whether hook was worn to that extent, exclusion of such testimony would require reversal.

3. Evidence ⇐527

Expert testimony is not only proper but also virtually indispensable in cases where relation between facts and results may be understood only by those with special skill or training.

4. Trial ⇐45(1)

Where question to which objection is sustained indicates that answer to it will be favorable to party seeking to introduce testimony and question is a material one, it is not necessary to make an offer of proof.

Joseph Passin, Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Sherman Welpton, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiffs appeal from a judgment of nonsuit granted in a jury trial of an action for wrongful death.

The rules which govern a reviewing court in the determination of an appeal from a judgment of nonsuit are well known and need not be repeated.

Plaintiffs are the heirs of Clayton Jones, who died as a result of injuries received on May 23, 1952, while working as a rotary helper upon an oil well which was being drilled by his employer, K. L. Kellogg and Sons. On the day of the accident drilling had progressed to the stage where a water shutoff test was to be made. The tools for the test were furnished on a rental basis by defendant, Johnston Testers, Inc.,[1] at the request of K. L. Kellogg and Sons. The test was supervised by defendant's employee, Earl Hittson, but the work was done by Kellogg's crew. At the time of the accident the shutoff test had been completed. There is no claim that the men in that Kellogg crew were general or special employees of defendant.

The Kellogg crew consisted of five men: three were known as rotary helpers, and Jones was one of them; another, Senske, was the drilling foreman; and the fifth man, Narron, was derrick man. All of them worked at or about the level of the derrick floor except Narron who was on a small platform known as a "monkey board" at the side of the derrick and about 85 feet above the floor. The testing equipment, when delivered to the job by Hittson, was assembled by the Kellogg crew under his directions. That equipment included a chain, a hook, and two "wet" plugs which came into use only after the test was made and while pipe was being pulled from the well. This was standard equipment in the oil fields.

The operation was this, so far as pertinent to the case at bar: the tester having been hoisted out of the hole, pipe was pulled, being handled in stands of three sections of about 30 feet each, or 90 feet a stand. When the top of the stand reached a convenient height a wet plug would be screwed by hand into the top, thus closing it; the object being to prevent any fluid—gas, oil, water—from spurting out the top of the pipe. The plug was put in place by one of the rotary helpers; it was then attached to the hook which was on the end of the chain, and the chain fastened to the hoisting or elevator equipment. This being done the stand of pipe would be raised until the top was some 4 or 5 feet above the derrick man, Narron, and about 3 feet in front of him. The lower end of the stand of pipe was then unscrewed by a rotary table, a "wet box" attached to the bottom, and the fluid drained out through it. After that was done the pipe would be lowered somewhat, the derrick man would unscrew the wet plug from the top of the stand, and the plug would then hang free at the end of the hook and chain; the pipe would then be lowered into a rack; and the handling of the next stand would begin.

John L. Lucas, one of the rotary helpers, said he screwed in the particular plug; others say Jones did that; all agree that Jones put the ring of the plug into the hook, and, according to Lucas, "I watched him rattle it back and forth as we always did to see that it was latched." The two stood there, awaiting their next movement while the pipe was being drained and lowered; the wet plug fell and hit Jones on the head inflicting the fatal injuries.

The plug is made of aluminum, about 4½ inches in its greatest diameter and weighs some 7½ pounds. In its top is a metal ring with an inside diameter of 2-½ inches. When in use the plug is attached to a "safety hook" which is on the end of a chain about 6 or 7 feet in length. The chain is fastened at the top to the hoisting apparatus, part of which is known as the elevator. The elevator raises and lowers the pipe. The hook is the part of the equipment which was responsible for the accident. It is generally oval in shape, some 6 inches long and 3 inches wide, and made of bronze. On the front is a moveable "safety latch" which when closed forms a continuous piece of metal with the rest of the hook and will not permit the ring of the plug to escape from the hook; when opened there is a space of about 2 inches in the front of

1. The record does not disclose what happened with respect to other defendants, but the only respondent is Johnston Testers, Inc.

the hook through which the ring of the plug can be inserted or removed. To open this latch (when the hook is operating properly) it is necessary to apply an inward pressure to the latch from the outside and at the same time press a spring trigger in the back of the hook. It is a squeezing movement. When this is done the latch opens and stays open until the trigger is pressed again; when that occurs the latch automatically closes. In a normal operation the plug, when unscrewed by the derrick man from the pipe, hangs on the closed hook which is on the chain.

On the day of the accident a stand of pipe was pulled to the height where the plug was to be installed. Lucas or Jones, the decedent, installed the plug. Jones then placed the hook in the ring on top of the plug. It was his duty to close the hook. The pipe was then raised and at the appropriate time Narron, the derrick man, seized and held the chain, which was slack, in his left hand while he unscrewed the plug with his right hand, and let it swing by the chain behind the elevator. He then racked the pipe. Normally the plug would hang free at the lower end of the chain and in the hook. While Narron was racking the pipe, the plug fell and hit Jones on the head. The hook and chain continued to hang from the top of the elevator apparatus, and the hook was found to be open when it was lowered and examined after the accident.

The defendant in this action is a third person who supplied equipment to Jones' employer. The duty resting upon the hirer is summarized in this language, at page 673 of Prosser on Torts:

> "It is now generally agreed that a seller, or other supplier of chattels for a consideration, may be liable for harm to the person or property of a third person who may be expected to be in the vicinity of the chattel's probable use, if he has failed to exercise reasonable care to make the chattel safe for the use for which it is supplied."

The Restatement says:

> "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be in the vicinity of its probable use, for bodily harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

(Rest., Torts, 1095, § 408.) Comment a. upon said section says:

> "*When lessor must inspect.* The fact that a chattel is leased for immediate use makes it unreasonable for the lessor to expect that the lessee will do more than give it the most cursory of inspections. The lessor must, therefore, realize that the safe use of the chattel can be secured only by precautions taken by him before turning it over to the lessee."

And comment b.:

> "The rule stated in this Section is peculiarly applicable to persons who make a business of leasing chattels. In such a case, in the absence of an understanding to the contrary it may be assumed that both lessor and lessee understand that the article is leased as fit for immediate use."

See also Larramendy v. Myres, 126 Cal. App.2d 636, 640, 272 P.2d 824; Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 55 P. 706; Jaehne v. Pacific Tel. & Tel. Co., 105 Cal.App.2d 683, 688, 234 P.2d 165.

[1] Jones was seen to connect the hook and plug in the usual manner, and the absence of his testimony due to his death creates a presumption of the exercise of reasonable care on his part. Scott v. Burke, 39 Cal.2d 388, 394, 247 P.2d 313. Thus the particular movement of the elevator starts with the ring of the plug properly inserted in the hook and the hook properly closed. The fact that they stayed in place on the upward trip is also some evidence to this effect.

Narron, the derrick man who unscrewed the plug some 85 feet in the air, testified that in unscrewing the plug "You hold the chain up with your left hand and unscrew the plug and set the plug back in the elevators, unlatch your door, take the pipe out of the elevators and rack it behind. * * *

"The Court: So, when you say you set it back, you put it behind the elevator and let it hang free?

"The Witness: Put it behind the elevators.

"Q. By Mr. Passin [attorney for plaintiffs]: In relation to the monkey board, how far below the monkey board is the plug at the time that it is hanging suspended by the chain? A. It is not below the monkey board. It is above the monkey board about 5 feet.

"Q. It is above the monkey board at that time? A. At that time, yes.

"The Court: When you unscrew this plug, is it about your shoulder height? The Witness: Just about shoulder height. * *

"Q. While you are racking the pipe, after you open the door of the elevator, where is the plug at that time? A. It is behind the elevators.

"Q. Hanging from this chain; is that right? A. Yes.

"Q. And except for the chain and the hook, is there anything else that holds the plug up? A. Just the chain and hook.

"Q. In this operation, can you explain more in detail how you would take the plug out? How would you remove the plug? A. You have to unscrew it.

"Q. And you unscrew it with which hand? A. Your right hand.

"Q. Would you only use the one hand? A. Well, it depends on which link you would have the chain on. If you have it—

"Q. I am talking about this— A. This particular time?

"Q. Yes. A. It was on the left link, and that would make the chain slant down to the plug. Naturally, you use your left hand to hold the chain and unscrew it with your right.

"Q. So, on this day, when you were performing these duties, you held the chain in your left hand? A. That's right.

"Q. And unscrewed the plug with your right hand? A. Unscrewed it with your right hand. * * *

"Q. Did you have to handle the hook at all in this operation? A. No.

"Q. You didn't have to touch it at all; it that right? A. No.

"Q. Just preceding the accident, what did you do in relation to the plug and the chain? A. Well, I took it out of the pipe when I pulled it up there.

"Q. On this occasion; I am talking about the time just before the accident; how did you do it? A. I pulled the chain up with my left hand, unscrewed the plug and set it back in the elevators. * * *

"Q. Then it hung free; is that right? Then the plug hung suspended by the chain? A. Yes.

"Q. Did you touch the hook at all? A. Not that I ever remember of.

"Q. Would there be any occasion for you to touch the hook? A. No, there would be no reason for me to touch the hook.

"Q. Just before the accident, on this last time when the stand of pipe was up to your level, did you look at the safety hook which is attached to the plug? A. Well, I looked at the plug and chain, hook and all. You have to, to get ahold of it. If I couldn't see, I couldn't get ahold of the chain.

"Q. Did you observe whether or not the hook was in an open or closed position? A. Well, I couldn't say if it was or if it wasn't at that particular time. * * *

"Q. Did you have any occasion to examine the safety hook at all at any time after the accident? A. No.

"Q. Do you remember whether or not this particular safety hook and plug was used at all again after the accident? A. It was not.

"Q. At the time that you unscrewed the plug, just preceding the accident, what position were you in? A. Well, you are leaning out against your bellybuster and safety belt about four and a half feet out from the edge of your monkey board.

"Q. You are standing up, though, are you not? A. Well, no; you are on your

feet, but your put your feet on the edge of your monkey board and you lean over to get to the pipe.

"Q. And you are supported, you say, by this bellybuster? A. And safety belt.

"Q. How far away at that time is the pipe with the plug from the monkey board? A. It is approximately four and a half feet.

"Q. I believe you stated that the plug at that time was about shoulder level; is that right? A. That is right.

"Q. You say your left hand was on the chain. How far from the plug was your left hand on this occasion? A. I would think around ten inches; eight inches or ten inches, you know, above, just enough to get above the swivel and the chain.

"Q. At that time is there a slack in the chain or is the chain tight? A. Yes, there is slack in the chain.

"Q. Do you recall whether or not the swivel on the chain was operating on that occasion? A. I think it was, yes.

"Q. By Mr. Passin: Mr. Narron, when you set the plug behind the elevators on these occasions that morning when you were pulling the pipe out, do you remember if at any time the plug swung on the chain? A. Well, yes, the elevators swing. You pull the pipe over before you unlatch them, and the elevator or plug, links and all, swing back.

"Q. I am talking merely about the plug that is suspended from the chain. Does that swing? A. Yes, they all swing. * * *

"Q. [By Mr. Welpton, attorney for defendant]: And this whole thing is moving, kind of swinging and swaying up there, isn't it? A. Yes.

"Q. * * * When you are trying to take this plug out and take this pipe and rack the pipe, after you get the plug out; isn't that right? A. Well, when you take the plug out, it is not swinging; but when you get it out and set it behind your elevators, then pull your pipe over to unlatch the elevators, then when the elevators comes off the whole thing swings, blocks and all.

"Q. So now you just took this plug on out and then you just pushed it out through the elevators, or out beyond the elevators there? A. Set it behind.

"Q. And just let it down, didn't you? A. Yes. * * *

"Q. By Mr. Passin: There is one thing I am confused about, Mr. Narron, and that is the swinging of the elevator. You mentioned that the elevator swings, is that right, at some point in this operation? A. When you pull your pipe to you, you have a rope on the derrick that you put around the pipe, and you pull it over and unlatch your elevators. Well, when the door comes open, the elevators swing back.

"Q. You pull over the pipe; that operation you just described. Is that done before or after the plug is unscrewed? A. That is after the plug is unscrewed.

"Q. And you say the elevators go back; is that right? A. Yes.

"Q. They swing back? A. When you unscrew the plug and set it back of the elevators, then you take ahold of your haul-back rope and pull it to you and unlatch it.

"Q. How far back would the elevators swing, do you know? A. They would swing two feet, I guess.

"Q. And when they swung two feet, what would happen to the plug and chain that was suspended from the links? A. Well, it would swing with them, I guess.

"Q. They would swing with the elevators. On this occasion immediately preceding this accident, did the elevators swing? A. Yes. * * *

"The Court: Not how far will it swing; how far back did it swing?

"Q. By Mr. Passin: On this occasion, this time. A. Well, I never measured it. I couldn't say exactly.

"Q. What is your best— A. Approximately 18 inches to two feet.

"Q. When the elevator swung back, did you see on this occasion what happened to the plug? A. No. When I unlatch the elevators and take the pipe, then I rack it behind and tie it back; my attention is all on that pipe when I unlatch the hook, or the elevator door, and it opens; then I am all through with the elevators and I have to take care of my pipe."

Mr. Royce D. Leer, a mechanical and industrial engineer, who was employed as safety engineer for Kellogg's insurance carrier, testified that he was given possession of the chain, hook, and plug within three days after the accident. He took the hook with him and in his own office examined it as "completely as we could without taking it apart." He testified that the points of contact between the safety latch and the trigger, where it was intended to hold the hook in a closed position, were quite badly worn, even for bronze; instead of meeting squarely, they were worn around seven, maybe ten, degrees on each side; by "degrees on each side" he meant "an inclined plane of about seven or ten degrees on each of the two members"; the wear was at the point of contact between the latch and the trigger; the points of contact were worn down to an angle between seven and ten degrees on each side; the excluded angle would be about 14 or 15 degrees. Exhibit 1, produced by defendant, is a plug, hook and chain similar to the one involved in the accident, but not the same one. The hook involved in the accident was not produced. Using exhibit 1 for illustration the witness pointed out a worn spot "where the trigger falls back, and pulling the latch way forward, the worn space that denotes the wear on both can be readily observed." He also said there is not as much wear on exhibit 1 as there was on the hook which was in the accident.

Mr. Leer further testified:

"Q. [By Mr. Passin]: What effect, if any, would this wearing have on the particular hook that you examined? A. First, it would remove the squareness of the angle and offset the latching capabilities of the safety latch; and, secondly, the angle of the inclined plane would allow for a decrease in the amount of pressure necessary to snap it open without using the trigger.

"Q. I show you Plaintiffs' Exhibit 1 and ask you whether or not you can demonstrate that on this hook that we have introduced here in evidence. * * *

"The Witness: There is already some play in here, and by increasing the angle, it offsets the force of the spring. Instead of hitting square, if it is hitting like this, it will allow that to ride up and push it out of the rod.

"Mr. Welpton: For the record, may that be described? He is showing an exertion of pressure on the outside of the latch.

"The Witness: On the outside of the latch only.

"The Court: I understand from your testimony, in your opinion, the wearing of the part indicated would permit pressure on the outside without touching the latch to—

"The Witness: Yes, sir; because an inclined plane—well, it is a wedge; a wedge, depending upon its angle, will always increase the amount of work to be done by a given effort. As your Honor can see, the latch does not entirely encompass the end of the trigger now. The wearing actually has to be over only about one-half of the end of the latch to allow for a pressure opening on the latch."

[2-4] Mr. Leer was then asked this question by counsel for plaintiff: "Was the wearing on the hook that you examined to such an extent as to create the hazard of it being opened without exerting pressure on both the latch and the trigger at the same time?" Defendant objected to the question on the grounds it was "incompetent, immaterial, not within the issues of the case, and no proper and sufficient foundation laid." The objection was sustained. The ruling was error and highly prejudicial. The crucial question in the case was whether the hook was worn to the extent that it would open without pressure being exerted on both the latch and the trigger at the same time. That Mr. Leer was a highly qualified expert is not subject to debate. His qualifications had not been questioned. The effect of the wear he saw and described was strictly a matter for expert testimony.

> "It has long been recognized that expert testimony is not only proper but also virtually indispensable in cases where the relation between the facts and results may be understood only by those with special skill or training."

Natural Soda Products Co. v. City of Los Angeles, 109 Cal.App.2d 440, 443, 240 P.2d 993, 995. That is the situation here. See also Manney v. Housing Authority, 79 Cal.

App.2d 453, 460, 180 P.2d 69; Jutras v. Satters, Inc., 96 N.H. 300, 75 A.2d 712, 713; 20 Am.Jur. 647, § 775; 32 C.J.S., Evidence, § 569, p. 394.

The witness had disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. The purpose of the question was apparent. It is evident from the question itself and from the previous testimony of the witness that his answer would have been favorable to plaintiffs. No offer of proof was necessary. Where a question to which an objection is sustained indicates that the answer to it will be favorable to the party seeking to introduce the testimony and the question is a material one, it is not necessary to make an offer of proof. Cripe v. Cripe, 170 Cal. 91, 94, 148 P. 520; Chambers v. Silver, 103 Cal.App.2d 633, 642, 230 P.2d 146.

In erroneously excluding the testimony of Mr. Leer as indicated, the court effectively denied plaintiffs a fair opportunity to prove their case. The ruling was an abuse of discretion compelling a reversal.

Reversed.

PARKER WOOD, Acting P. J., concurs.

ASHBURN, J., pro tem., dissents.

132 Cal.App.2d 81

In re ESTATE of Harry G. BUCHMAN, also known as H. G. Buchman, Deceased.

Hamlin K. BUCHMAN, Petitioner and Appellant,

v.

Claire MORSE and Citizens National Bank of Los Angeles, Respondents.

Civ. 20331.

District Court of Appeal, Second District, Division 2, California.

April 1, 1955.

Hearing Denied May 25, 1955.

Proceeding involving application for partial distribution of estate and settlement of accounts of an executor. The Superior Court, Los Angeles County, Newcomb Condee, J., decreed partial distribution and entered an order settling the accounts and from each order the executor appealed. The District Court of Appeal, Fox, J., held that under a proper construction of a property settlement agreement into which the decedent and his wife had entered, she was not precluded from taking under the will.

Order decreeing partial distribution affirmed.

Order settling accounts modified and, as so modified, affirmed.

See also 123 Cal.App.2d 546, 267 P.2d 73.

1. Wills ⇐719

Unless property settlement agreement expressly renounces right to take by will, or intention to accomplish such result appears by necessary implication, the agreement will not preclude surviving spouse from taking what decedent might choose to bequeath or devise.

2. Wills ⇐719

Even if condition precedent did not prevent husband-and-wife property settlement agreement from being in force, agreement which provided, inter alia, that each relinquished right to act as personal representative of other's estate, to have set aside any of other's property as community property or to declare homestead thereon or to demand family allowance or to succeed to estate of the other and by which agreement wife purported to surrender any right or claim as beneficiary of certain life insurance policies did not extinguish wife's right to take under will of her husband, notwithstanding added phrase in the agreement, following the express waivers, "or any other right, benefit or emolument from estate of the other".

3. Wills ⇐719

General expressions or clauses in husband-and-wife property settlement agreement are not to be construed as a relinquishment or divestment of an expectancy to take by will unless that is the clear and unmistakable import of the language employed.

4. Wills ⇐719

Expectancies under a will are regarded as waived by contract only when it appears that intention of parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract.

5. Husband and Wife ⇐279(1)

Where property settlement agreement between husband and wife set forth waivers of rights and releases of expectancies with specificity of detail, maxim expressio unius est exclusio alterius was applicable in construing the agreement.

6. Appeal and Error ⇐1056(1), 1071(6)

Where, under correct construction of agreement between husband and wife, wife was not precluded from taking under his will, question whether she was estopped to deny that agreement became effective was immaterial, and trial court's failure or refusal to find on question of estoppel was immaterial and exclusion of evidence touching on question of estoppel was nonprejudicial.

7. Executors and Administrators ⇐314(8)

In proceeding upon widow's petition for partial distribution under will, wherein principal issue was whether property settlement agreement as properly construed constituted waiver of right to take under will, trial court properly excluded, as incompetent, evidence relating to purpose of wife's trip to Nevada after execution of agreement and of her remarriage after husband's death.

8. Executors and Administrators ⇐295

Petition for partial distribution of estate implements policy of law favoring earliest possible delivery of inherited property to legatees or devisees consistent with proper administration of estate.

9. Executors and Administrators ⇐314(11)

Before court can make an order for partial distribution, it is necessary to know whether petitioner is entitled to any part of the estate.

10. Jury ⇐19(7)

In proceeding for partial distribution of estate, either party has right to demand trial by jury of any issues of fact raised therein. Probate Code, § 1081.

11. Jury ⇐28(15)

Record on appeal from order decreeing partial distribution of estate sustained implied finding that party who opposed distribution had waived right to jury trial. Probate Code, § 1081; West's Ann.Code Civ.Proc. § 631, subd. 4.

12. Descent and Distribution ⇐71(1) Jury ⇐28(17)

Where all issues which would have been raised by proceeding by brother and executor of decedent to determine heirship had long been before court in widow's proceeding for partial distribution under will, and brother had waived jury trial in latter proceeding, trial court did not err in vacating setting of petition to determine heirship and in refusing to relieve brother of waiver of jury trial. Probate Code, §§ 1080, 1081; West's Ann.Code Civ.Proc. § 631, subd. 4.

13. Executors and Administrators ⇐314(12)

Even if decedent's brother who opposed widow's proceeding for partial distribution of estate had not waived jury trial, or had been entitled to relief from waiver, trial court's refusal to relieve from waiver was not prejudicial where question involved was question of interpretation of unambiguous written property settlement agreement and was question of law. Probate Code, § 1081; West's Ann.Code Civ.Proc. § 631, subd. 4.

14. Judges ⇐49(1)

Holding on appeal that trial court's denial of due process by removal of executor without sufficient notice and opportunity to be heard, where denial was result of judge's erroneous conception of duty, was not evidence that judge was disqualified because of bias and prejudice. West's Ann.Code Civ.Proc. § 170.

15. Judges ⇐49(1)

Erroneous opinion on law relating to proceedings is not any evidence of bias or prejudice on part of judge. West's Ann. Code Civ.Proc. § 170.

16. Judges ⇐49(2)

Expressions of opinion uttered by a judge, in what he conceives to be a dis-

charge of his official duties, are not evidence of bias or prejudice. West's Ann. Code Civ.Proc. § 170.

17. Judges ⇐51(1)

To disqualify judge, burden was upon party who sought disqualification to establish as fact that judge was biased or prejudiced against him. West's Ann.Code Civ. Proc. § 170.

18. Appeal and Error ⇐1011(1)

Where presiding judge of Superior Court passed upon issue of disqualification of trial judge and found on conflicting evidence that charges of bias and prejudice were not true, finding and order based on such evidence was binding on appeal. West's Ann.Code Civ.Proc. § 170.

19. Judges ⇐56

Even if appellate holding, that trial court's removal of executor without sufficient notice and opportunity to be heard constituted denial of due process, meant that trial court was biased and prejudiced and disqualified, disqualification would not carry over to proceedings before same judge relating respectively to partial distribution and to settlement of accounts, where no order of consolidation had been entered and the several matters had been tried together merely for convenience.

20. Executors and Administrators ⇐22(1)

Obvious purpose of statute authorizing appointment of special administrator with general powers is to provide for general administration of estate during delay and uncertainty attendant upon will contest or litigation over appointment, suspension or removal of executor or administrator. Probate Code, § 465.

21. Executors and Administrators ⇐288

Where superior court appointed special administrator with general powers, letters of administration were in effect general and court could properly direct such special administrator to make partial distribution of estate. Probate Code, § 465.

22. Executors and Administrators ⇐35(19)

Where several matters before Superior Court had not been consolidated except that they were tried together for convenience, notice of appeal in proceeding where-by executor was removed did not cause loss of superior court's jurisdiction over proceeding for partial distribution. West's Ann.Code Civ.Proc. § 946.

23. Executors and Administrators ⇐314(12)

Record on appeal from order for partial distribution of estate sustained trial court's order for partial distribution. Probate Code, § 1001.

24. Executors and Administrators ⇐314(12)

Whether estate is but little indebted and whether partial distribution can be made without loss to creditors or injury to estate or any person interested therein, are questions of fact to be determined by trial court upon comparison of value of estate with amount of debts, character of property, expense of its maintenance and operation where it is part of business venture, extent of net income therefrom and all other relevant factors. Probate Code, § 1001.

25. Executors and Administrators ⇐299

Question of bond on partial distribution, under facts shown in record on appeal from order for such distribution, was one of discretion and record showed no abuse thereof. Probate Code, § 1001.

26. Executors and Administrators ⇐475

Where it was conceded that executor owed $6,000 to decedent, order settling account properly treated this indebtedness as cash in hands of executor for which he was chargeable in accounting. Probate Code, § 602.

27. Executors and Administrators ⇐507(2)

In proceeding for settlement of executor's account, wherein one item appeared twice as credit to executor, court properly adjusted matter to avoid duplication.

28. Executors and Administrators ⇐479

In proceeding involving settlement of executor's account, executor was properly allowed credit of $2,515 which he had advanced from personal funds to pay mortician as cost of decedent's funeral, where there was no question as to reasonableness of amount.

Morris Lavine, Los Angeles, for appellant.

Jerry Giesler, Beverly Hills, George I. Devor, Los Angeles, for respondent Claire Morse.

FOX, Justice.

Hamlin K. Buchman, executor of the estate of his late brother, Harry G. Buchman, has filed two appeals. One is taken from an order decreeing partial distribution in favor of Claire Morse, decedent's former wife, hereinafter termed respondent; the other is from an order settling certain accounts filed by appellant. Various assignments of error arising in connection with the disposition of the several proceedings herein are also presented for review and will be adverted to subsequently.

Respondent became the wife of the decedent on November 7, 1949. No children were born of this marriage. By the spring of 1951, marital differences and difficulties had developed between the spouses to a point which impelled decedent to discuss with his then counsel, Isaac Pacht, the matter of negotiating a property settlement agreement with his wife. Thereafter, on about May 28, 1951, the decedent discussed with his attorney his desire to make a will, and submitted instructions as to the contents of the proposed document. On June 7, 1951, a form of will embodying these instructions was mailed to decedent in Chicago by his counsel. According to Pacht's testimony, this proposed will contained the following provision: "I declare that except as otherwise provided in this will I have intentionally and with full knowledge and not by accident or mistake omitted to provide herein for any of my heirs living at the time of my death. This includes specifically, but is not limited to, my wife, Claire Buchman (respondent)." There is no record that the proposed will was ever signed by decedent.

On June 29, 1951, decedent executed the will which was admitted to probate. It was a one-page document naming Hamlin K. Buchman as executor and contained two dispositive clauses, as follows:

"Second: I give, device (sic) and bequeath unto my beloved wife, Claire Buchman, one-fourth (¼) of my entire residuary estate.

"Third: I hereby give, devise and bequeath unto my beloved brother, Hamlin K. Buchman, three-fourths (¾) of my entire residuary estate, and in the event of the death of my wife Claire before my death, then I devise and bequeath to my said brother, Hamlin K. Buchman, my entire residuary estate."

On July 2, 1951, respondent and decedent separated and thereafter maintained separate living arrangements. On August 2, 1951, a property settlement agreement was entered into by the spouses. Both parties had the benefit of independent legal assistance; decedent was, during the negotiations, represented by the firm of Pacht, Tannenbaum & Ross, while respondent employed Jerry Giesler as counsel. The agreement arrived at is fairly lengthy. In its preamble appear the following recitals: "In addition to the other differences which have arisen between the parties, certain differences and disputes exist with reference to the property interests of the parties. The parties are the owners of certain property. Husband contends that all property, title to which is vested in him or for his account, is his separate property, and wife contends that certain of said property is community property of the parties. The parties are mutually desirous of making a full, complete, permanent and final settlement of all of their respective rights in and to said property and any property which may hereafter be acquired by either of them, and, as a part of said settlement, each of the parties desires to relinquish any and all claims, past, present and future, against the property or estate heretofore or hereafter acquired by the other party, his or her executors, administrators, heirs, successors or assigns, and to finally settle, determine and dispose of all rights and matters of maintenance, support, inheritance, homestead, and each and every claim either party had, now has, or may have against the other party."

The agreement contains 19 numbered paragraphs and two exhibits. The provisions most pertinent to the questions with which we will be here concerned read as follows:

"2. Concurrently with the execution of this agreement Husband shall pay to Wife the sum of Two Thousand Five Hundred Dollars ($2,500.00) in cash, the receipt of which is hereby acknowledged.

"3. Upon the effective date of this agreement Husband shall pay to Wife the sum of Twenty-Two Thousand Five Hundred Dollars ($22,500.00) in cash.

"4. Husband does hereby transfer, convey, set over, assign and quitclaim to Wife, as her sole and separate property, any and all right, title and interest that Husband has in and to the following: (The items are set out in the margin.) [1]

"5. Wife does hereby transfer, convey, set over, assign and quitclaim to Husband, as his sole and separate property, any and all right, title and interest that Wife has in and to" certain described property which it is not necessary to set out. Section (e) is pertinent and reads:

"(e) Any and all insurance policies owned by, payable to, or insuring the life or property of, Husband, a description of said life insurance policies being contained in the list of life insurance policies attached hereto, marked Exhibit B,[2] and which list is by this reference hereby incorporated herein. In connection with the said life and property insurance policies, Wife agrees to execute and deliver to Husband, at his request, any and all assignments, quitclaims, changes of beneficiary and other instruments and forms which Husband may request to vest in Husband the complete ownership of said insurance policies, both legal and equitable, including the right to change the beneficiaries thereof free and clear of any claim, right, title or interest of Wife."

"7. Each party hereto waives and relinquishes, except as in this agreement otherwise provided, any and all rights which he or she may now or hereafter have to succeed to the estate of the other; and each hereby expressly waives and relinquishes any and all rights to act as personal representative or to nominate a personal representative of the estate of the other, or to have set aside to him or to her any of the property of the other as community property, or to have set aside to him or to her by any Court having jurisdiction of any portion of the estate of the other any homestead or other property which might be set aside to a surviving husband or widow as exempt property, or to demand any family allowance, or any other right, benefit or emolument from the estate of the other, and both parties hereto agree that each will never exercise any right to select a homestead from the property of the other during his or her lifetime.

"8. It is expressly agreed between the parties hereto that this instrument is a full, complete and final memorandum of the agreement of the parties hereto covering all matters in connection with the division of the community property of the parties and all rights and claims of each and both of the parties therein or thereto, and in or to the separate property of either party, and of each and every claim of every character whatsoever one against the other, and that no agreement exists between the parties other than as herein specifically set forth; and it is hereby covenanted and agreed by each of the parties with the other that he or she will not assert or claim against the other any right or claim in or to any property of the other, except under the terms of this agreement, and except as provided by the terms and provisions of this agreement, and will not assert against the other except as herein otherwise specifically provided, any claim for alimony, maintenance or support, costs, attorneys' fees or any other claim whatsoever by reason of their marital relationship or otherwise, or in any action for divorce or separate maintenance, or in any other action or proceeding involving

1. The property referred to consists of all clothing, money, jewelry and personal effects in respondent's possession and all money and securities standing in her name; a 1949 Cadillac convertible; virtually all the furniture and furnishings in the apartment occupied by the parties; all the personal property and furnishings in storage; and all of respondent's personal effects in a certain house trailer.

2. Exhibit B lists three life insurance policies, each in the amount of $10,000.00.

the marriage state or any obligations thereof wheresoever brought. * * *

"10(b) Husband agrees to pay and hold Wife harmless from obligations incurred by the Wife to the following creditors only and in amounts not exceeding the amounts set forth opposite the names of said respective creditors, to wit:

Bullocks	$116.75
Bullock's Wilshire	201.48
The French Bootire	20.49
Saks Fifth Avenue	307.51
Total	$646.23 [3]

"13. All of the covenants, provisions and agreements in this instrument contained shall apply to, be binding and obligatory upon, not only the parties hereto but also their respective heirs, executors, administrators, successors and assigns. * * *

"16. Anything contained in this agreement to the contrary notwithstanding, it is expressly understood and agreed that this agreement shall be of no force or effect unless or until it shall be approved by the Court in divorce proceedings between the parties instituted in a court of competent jurisdiction and incorporated in and made a part of the decree or judgment of the Court in such proceedings, the parties hereby agreeing that this agreement shall be submitted to the Court in which any such proceedings are pending with the request that it be approved by said Court as being fair and equitable, and be incorporated in and made a part of the judgment or decree of said Court in such proceeding.

"17(b) Should this agreement be submitted for approval in a divorce action between the parties, and the Court fail to approve the same, then this agreement shall be of no force or effect, and said action shall thereafter proceed as an adversary action after reasonable notice thereafter given to each of the parties.

"18. The 'effective date of this agreement' hereinbefore referred to in this agreement shall be the day upon which a decree of divorce in favor of either party hereto shall be entered in an action brought as hereinbefore provided in paragraph 16.

"19. Concurrently with the execution of this agreement Husband shall deposit in trust with Pacht, Tannenbaum & Ross and with Jerry Giesler jointly, the respective attorneys for said parties, as trustees, $25,000 to be used by said trustees to discharge on his behalf the obligations referred to in paragraphs 3 and 17(a)[4] hereof, and said trustees are here irrevocably authorized and instructed to pay said funds to the respective parties to whom payments are to be made pursuant to said paragraphs, upon the furnishing to each of said firms of attorneys of a certified copy of the decree of divorce referred to in paragraph 18 hereof."

Upon execution of the agreement, respondent received and has retained the consideration of $2,500 noted in paragraph 2. The sum of $25,000 referred to in paragraph 19 was deposited in trust with counsel for the respective parties to discharge the obligations contemplated by the terms of paragraphs 3 and 17(a), where it has since remained. Ownership of the items of property designated in paragraphs 4 and 5 was assumed by the decedent and respondent as set out therein.

In the middle of August, respondent departed for Nevada. She had sojourned there for about three weeks when her husband died in Chicago on September 4, 1951. On the 19th of September, appellant became special administrator of the decedent's estate. The will executed under date of June 29, 1951, in which appellant and respondent were named as residuary legatees and devisees of the estate in the proportion of ¾ and ¼ thereof, respectively, was admitted to probate on October 16,

3. In a letter written on the day the property settlement agreement was executed, decedent agreed to pay three additional bills that respondent owed, aggregating almost $500, "but none other."

4. This section commits decedent to pay $2,500 to Mr. Giesler as attorney's fees for services rendered to respondent upon the effective date of the agreement.

1951, and letters testamentary were issued to appellant as executor.

The course of the ensuing proceedings, extracting only those here germane, is best delineated in their chronological sequence:

April 3, 1952: Respondent filed a contingent creditor's claim against decedent's estate.[5]

May 12, 1952: Appellant filed an inventory and appraisement of the estate. Three supplementary inventories and appraisements were filed thereafter, the last on March 11, 1953. As of March 13, 1953, the total net assets of the estate were close to $500,000.

Jan. 16, 1953: Appellant filed his First and Final Account and Report of Special Administrator and a First Account Current and Report of Executor. Respondent filed objections to these accounts on January 27th and February 9, 1953.

Jan. 26, 1953: Respondent filed a petition for citation for the removal of appellant as executor. The citation was issued commanding appellant to show cause why the letters testamentary should not be revoked and he should not be removed as executor. Concurrently, she filed a petition for partial distribution in the sum of $24,000. A citation was issued requiring the executor to show cause why the court should not make an order distributing the sum prayed for.

Feb. 13, 1953: Appellant filed answers to the petitions filed by respondent on January 26. In answering the petition for partial distribution, appellant alleged the existence of substantial encumbrances against certain real property belonging to the estate; as an affirmative defense, appellant asserted that respondent was estopped by her acceptance of the benefits of the property settlement agreement from taking under the will, and that by virtue of the terms of said agreement she had waived and relinquished her right to take under the will.

March 11, 1953: The several petitions filed by respondent, various petitions for attorney fees and extraordinary fees, and settlement of and objections to appellant's accounts as executor and administrator came on for hearing before Judge Condee. It was stipulated that the matters might be heard together and "that evidence competent in any of the matters may be received and at the end the court will sort it out and make a separate ruling in each matter." There was no stipulation that these matters might be consolidated, nor was any order made that they be consolidated. Thereafter, Judge Condee stated that his initial concern was with regard to appellant's competency to continue as executor. The hearing was continued to March 13th.

March 13, 1953: Upon resumption of the hearing, Mr. Lavine, present counsel for appellant, appeared and requested that he be substituted as counsel of record. Judge Condee consented only that he appear specially, on a phase of the removal proceedings. At the conclusion of this proceeding, Judge Condee made an order removing appellant as executor.[6] This order was reversed upon appeal in Re Estate of Buchman, 123 Cal.App.2d 546, 267 P.2d 73, the court holding that the removal was accomplished in violation of appellant's constitutional right of due process, in that he had not been given specific notice of the charges against him or an opportunity to be fairly heard thereon.

April 2, 1953: Appellant filed a substitution of attorneys. Concomitantly therewith, he filed a petition to determine heirship,[7] with a prayer that the issues be tried

5. Said claim reads in part: "In the event that it should be ultimately adjudged that the Claimant is not entitled to take under the Last Will and Testament of the decedent, as aforesaid, then Claimant demands the following sums of money:

"The sum of $22,500.00 as and for the payment required to be made to her under the provisions of paragraph '3' of said agreement so dated August 2, 1951.

"The sum of $2,500.00 in exoneration of her liability under the terms and provisions of paragraph '17(a)' of said agreement."

6. The Citizens National Trust & Savings Bank was thereupon appointed Special Administrator with general powers.

7. As an outgrowth of this petition, a series of motions was filed by both sides. On

by jury. Hearing thereon was set for April 23d. A formal demand for a jury trial in connection with this petition was filed on April 7th.

April 6, 1953: Appellant filed objections to the hearing of the petition for partial distribution by Judge Condee, alleging Judge Condee to be biased and prejudiced against him, and objecting to the hearing of any matters relating to the estate of decedent by said judge. In accordance with section 170 of the Code of Civil Procedure, appellant submitted his affidavit of bias and prejudice. Thereupon, Judge Condee continued all the various matters before him to May 18, 1953.

April 8, 1953: Judge Condee filed an affidavit in response to the motion to disqualify him. The judge controverted the statements in appellant's affidavit, denied "that by reason of any bias or prejudice Mr. Buchman cannot have a fair and impartial trial" before him and averred that in removing appellant as executor he was motivated only by the desire to preserve the estate.

April 23, 1953: Presiding Judge Philip H. Richards, having been duly charged with the determination of the issue of Judge Condee's asserted disqualification, filed his order and finding that the said Judge was not disqualified to hear the pending matters.

May 14, 1953: Judge Victor R. Hansen made the following orders with respect to certain of the various motions relating to appellant's petition to determine heirship (see footnote 7, supra): (a) overruled appellant's objections to the motion of respondent to vacate the setting of said petition; (b) denied appellant's motion to consolidate the petition for partial distribution with the petition to determine heirship;[8] (c) granted respondent's motion to vacate the setting of appellant's petition to determine heirship and ordered said petition "off calendar."

On this date, appellant filed a motion to be relieved from waiver of jury trial in the partial distribution proceeding.

May 18, 1953: The proceedings which had been initiated on March 11th, and which had been continued on April 6th, were resumed before Judge Condee. Appellant's motion to be relieved from waiver of jury trial was denied. The matters then were tried before the court.

June 8, 1953: Appellant filed a "Supplemental to First and Final Account and Report of Executor." Respondent filed her objections thereto on June 11th.

Sept. 29, 1953: The court entered its order settling the several accounts previously filed.

Nov. 23, 1953: The court filed its decree granting respondent's petition for partial distribution in the sum of $24,000.

Appellant has filed briefs totaling almost 250 pages, raising many issues and prolix in his citation of authorities. Succinctly stated, the paramount question is whether the property settlement agreement effectively precludes respondent from taking the testamentary dispositions in her favor under decedent's will. Appellant asserts that by virtue of the agreement, respondent relinquished her right to claim any part of the estate which decedent might leave to her by will. By its express terms, the agreement categorically declares that it shall be of no force and effect until approved by a court in divorce proceedings. (See paragraphs 16, 17(b) and 18, supra.) Despite the nonoccurrence of this condition precedent, appellant argues, in miscellaneous variations on the theme, that respondent is nonetheless bound by this agreement. In support of this thesis, he contends respond-

April 10, 1953, respondent filed a motion to vacate the setting of this petition. On April 20, appellant filed a motion to strike respondent's motion to vacate the setting, and his objections thereto. On May 1, 1953, respondent filed a motion to abate and dismiss appellant's petition to determine heirship. Thereupon, appellant filed a motion to consolidate his petition to determine heirship with the petition for partial distribution previously filed by respondent. The rulings on these motions are given under date of May 14, 1953, infra.

8. The court also denied appellant's motion to strike respondent's notice of motion to vacate the setting of the petition to determine heirship.

ent is bound because she never rescinded the agreement, because she never restored or offered to restore the money and property she received under it, that she is thereby estopped from denying the agreement became effective upon its execution, and finally, that paragraphs 16 and 18 were dispensed with by death, and, in any event, should be disregarded. Respondent's brief has cogently met and effectively demolished the premises on which these arguments are predicated. However, it is here unnecessary that we engage in any extended inquiry into these issues, for even if we concede, arguendo, that the contract became binding upon the parties, appellant still cannot prevail on this phase of his case. For a textual examination of that document discloses that, under the controlling authorities, respondent is not foreclosed thereby from taking by bequest or devise under decedent's will.

[1] The rule has become firmly crystallized in this state, by an unbroken concatenation of decisions, that unless a property settlement agreement expressly renounces the right to take by will, or the intention to accomplish such result appears by necessary implication, the agreement will not preclude the surviving spouse from taking what the decedent might choose to bequeath or devise. In re Estate of Crane, 6 Cal.2d 218, 220–221, 57 P.2d 476, 104 A.L.R. 1101; In re Estate of Bartolo, 124 Cal.App.2d 727, 728, 730, 269 P.2d 30; In re Estate of Hadsell, 120 Cal.App.2d 270, 272, 260 P.2d 1021; In re Estate of Johnson, 31 Cal.App.2d 251, 258, 87 P.2d 900; Nichols v. Board of Retirement, 121 Cal.App.2d 176, 180, 262 P.2d 862. See Grimm v. Grimm, 26 Cal.2d 173, 176, 177, 157 P.2d 841; Bennett v. Forrest, 24 Cal.2d 485, 493, 150 P.2d 416; Shaw v. Board of Administration, etc., 109 Cal.App.2d 770, 776, 241 P.2d 635. The definitive expression of this principle appears in the leading case of In re Estate of Crane, supra [6 Cal.2d 218, 57 P.2d 477], which has been followed in many other jurisdictions.[9] In that case, the property settlement agreement contained the following language:

"* * * 'It is further expressly covenanted and agreed that neither of the parties hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, his or her heirs or assigns, in the exercise of the rights of property herein agreed to; that neither of them will at any time hereafter assert any right, interest or title as heirs at law of the other *or as against the estate of the other, and all claim or right as surviving husband or wife, and all right to contest or oppose the last will of the other is hereby expressly waived*, together with all right to administer, or to apply for letters of administration, or *letters of administration with the will annexed*, upon the estate of the other. * * * *It is the true intent and purpose of this agreement that the parties hereto have settled and forever adjusted, and that they do hereby settle and forever adjust, by and between themselves, all present and future property rights of every kind and nature, whether community or separate, wheresoever the same is or may be located, and all other rights and claims which either may have or claim to have against the other*, so far as their property rights are concerned, and in addition thereto that the said parties hereto have settled and adjusted, and do *hereby settle and adjust, and forever determine, all of their respective rights, to, of and in any inheritance the one from the other, respectively, or in or to the estate of either.*'" (Emphasis added.)

In deciding that the surviving widow was entitled to a bequest under her deceased husband's will, our Supreme Court stated, 6 Cal.2d at pages 220–221, 57 P.2d at page 477: "* * * In this case the parties by the terms of their agreement did make reference and contract with relation to the will or wills of both or either of them, whether then existing or thereafter to be made. But the agreement in relation to such wills was not unlimited. The agreement of each party was, first, not to oppose the probate of the

9. Berg v. Berg, 201 Minn. 179, 275 N.W. 836; Bartle v. Bartle, 121 Colo. 388, 216 P.2d 649; Swann v. Swann, 131 W. Va. 555, 48 S.E.2d 425; First Nat. Bank of Princeton v. Miley, 3 N.J.Super. 348, 65 A.2d 553; In re Darrow's Estate, 164 Pa.Super. 25, 63 A.2d 458.

other's will; second, not to contest or oppose such will; and third, not to apply for letters of administration or letters of administration with the will annexed upon the estate of the other. Both parties agreed that by said contract they had settled, adjusted and forever determined 'all of their respective rights to, of, and in any inheritance of the one from the other, respectively, or in or to the estate of either.' Reading the terms of the contract as thus limited, it took away from appellant all right or claim to any interest in the property of her husband either by virtue of her status as wife or widow or as heir of her husband. *But, as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift inter vivos, by devise, or by bequest.* As applied to such gift, we find in the agreement no basis for an estoppel against appellant with respect to the legacy claimed in the will. * * *" (Emphasis added.)

In Grimm v. Grimm, supra, the court had occasion to give more elaborate expression to the rule of the Crane case. The question there presented was whether the property settlement agreement negated the wife's right to take the proceeds from her husband's life insurance policy, in which she had been designated the beneficiary. In holding that the wife could take as a beneficiary, the court stated, 26 Cal.2d at pages 176–177, 157 P.2d at page 843: "It is settled, however, that a contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides. [Citation.] In interpreting property settlement agreements courts weigh carefully the language of the agreements before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements. [Citations.] This court and other courts have therefore applied to property settlement agreements the rule that *general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies* and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other. [Citations.] In Re Estate of Crane, supra, this court set forth the considerations that commend the rule that *expectancies under a will or an insurance policy are regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract.* Since the husband has the power to revoke his will or to change the beneficiary named in an insurance policy his failure to do so ordinarily indicates that he did not wish to effect a change so that in effect his failure to act amounts to a confirmation of the will or the designation of the wife in the insurance policy. Both instruments are to be read as expressing the decedent's intentions at the time of his death." (Emphasis added.)

In Re Estate of Hadsell, 120 Cal.App.2d 270, 260 P.2d 1021, 1022, the decedent willed all her property to her husband. After the execution of the will, decedent entered into a property settlement agreement with her husband which read in part: "'It is agreed that neither party will at any time hereafter assert any right, title or interest as heir-at-law, or otherwise of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate, and all claims as such heir, or as surviving husband and wife respectively, and the right to contest or oppose the will of the other is hereby expressly waived, together with the right to administer, or to apply for Letters of Administration, or Letters Testamentary, upon the estate of the other. The parties also waive all rights of probate, homestead and family allowance.'" The parties were living apart when the wife died. Both the husband and decedent's brother applied for letters testamentary. The brother was appointed administrator with the will annexed and the husband appealed. In reversing, the court stated, 120 Cal.App.2d at page 272, 260 P. 2d at page 1022: "Unless a property settle-

ment agreement specifically renounces the right, such agreement does not estop a surviving husband or wife to take under the will of the other. And the will speaks from and as of the date of the testator's death. [Citation.] A property settlement agreement by a wife, relinquishing all right to any interest in her husband's estate, was not inconsistent with the husband's will, executed before the agreement, leaving his property to her. 'The relinquishment amounts to nothing more than leaving the decedent free to dispose of his property as he pleases. * * *' [Citation.]"

It is to be borne in mind that decedent executed the will under which respondent is claiming on June 29, 1951, while negotiations for a property settlement were in progress. He had then available an alternate form of will under which respondent would take nothing. This form he never executed. After the property settlement agreement was signed, he did not revoke the testamentary disposition in respondent's favor.

[2–5] Applying the above criteria to the instant case leads inevitably to the conclusion that the trial court correctly interpreted the instrument as not extinguishing respondent's right to take anything the testator might voluntarily leave her by will. The agreement is comprehensive as to the existing property rights of the parties, and plainly preserves to each complete freedom with respect to the disposition of the segregated property. The crucial paragraphs are 5(e), 6, 7, and 8, set out supra. Their ultimate effect is to eliminate the future obligations of the testator growing out of the conjugal relationship; but in no way do they inhibit his privilege of making respondent an object of his testamentary bounty or abridge her eligibility to receive such gift. The contract does disclose, on the part of each, a relinquishment of the right (1) to act as personal representative of the other's estate; (2) to have set aside any of the other's property as community property or to declare a homestead thereon; (3) to demand a family allowance, and (4) to *succeed* to the estate of the other. It specifically relates to a particular expectancy in paragraph 5(e), where respondent purports to surrender any right or claim as a beneficiary of decedent's insurance policies, which are individually listed in an appendix. But one searches in vain for any provision in which respondent agreed to forego any part of the estate that might come to her *by will*. In Re Estate of McNutt, 36 Cal.App.2d 542, 549, 98 P.2d 253, 256, decided by this court, it was said: "If it had been the intention of the parties that plaintiff should waive her right to inherit from decedent, under such circumstances as those presented, it would have been 'the easiest and most natural thing in the world. * * * for them to have simply, plainly, and in apt language said so.'"

Appellant urges that particular language in paragraph 7, when construed with the other paragraphs alluded to, must necessarily exclude the respondent from inheriting by will. He focuses his emphasis on the clause appearing near the close of the paragraph, following the recitation of various express waivers, which reads "or any other right, benefit or emolument from the estate of the other" as the fulcrum for this argument. However, the tenor of the authorities we have previously cited, militates fatally against appellant's construction. For it is firmly established that general expressions or clauses are not to be construed as a relinquishment or divestment of an expectancy to take by will unless that is the clear and unmistakable import of the language employed. Grimm v. Grimm, 26 Cal.2d 173, and cases cited at pages 176 and 177, 157 P.2d 841, 843. As the Grimm case states in exposition of this rule, "expectancies under a will * * * are regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract." But there is nothing in the record to remotely suggest that respondent ever knew that decedent had included her in the testamentary scheme of his will, or that her attention was directed to such possibility. The agreement contains no express reference to such expectancy, and it does not show with any quantum of reasonable certitude that respondent was, by necessary

implication, waiving her right to take by will. The general language relied on by appellant does not express such intent with the certainty the law requires for the renunciation of an expectancy. Furthermore, it may be observed that they are set in immediate juxtaposition with and colored by the waiver of family allowance in the preceding clause and the waiver of the right to select a homestead in the succeeding one, and are contained in the same paragraph where the right of succession to, as well as the right to act as personal representative of, the estate is waived. The agreement was prepared by able and experienced counsel presumably conversant with the law, and if it had been intended that respondent waive the right to inherit by will the insertion of a few simple words could have easily effected such result.[10] In re Estate of McNutt, 36 Cal.App.2d 542, 549, 98 P.2d 253. However, such words are here entirely absent, and we may not undertake, by indulging in precarious and dubious inferences, to supply them and thus remake the contract of the parties. The observation of the court in Re Estate of Crane, supra, 6 Cal.2d at page 220, 57 P.2d at page 478, is here apposite that "as if by intention, there is a total failure to set forth in the contract any renunciation of the right to accept and receive future gifts to the one from the other whether by way of gift *inter vivos*, by devise, or by bequest." We are all the more restrained from interpolating such words because a scrutiny of the text of paragraph 8 reveals with what specificity of detail the desired releases of various rights is set forth. This paragraph, read in conjunction with paragraph 5(e), containing the waiver of rights under the insurance policies, points up how cognizant the draftsmen of the contract were of the necessity to embody therein the release of expectancies. It is noteworthy that the parties waived the right "to succeed to the estate of the other," i.e., to take by descent —by operation of law, In re Estate of Schwartz, 79 Cal.App.2d 301, 307, 179 P.2d 863, yet significantly omitted any reference to an expectancy under a will. Taking into account the meticulously defined waiver of rights and releases of expectancies enumerated in the document, the situation presented renders peculiarly applicable the invocation of the maxim *expressio unius est exclusio alterius*. In Re Estate of Minier, 15 Cal. 31, at page 35, 8 P.2d 123, at page 125, 81 A.L.R. 689, the court stated in discussing a kindred problem: "It will be further observed that following the general release clause in the separation agreement between Mr. and Mrs. Minier is a provision that in case of divorce neither party will make any claim or demand from the other for any cost, counsel fees, or alimony, or any other property claim, or demand of any kind whatsoever. That the parties should so carefully and minutely provide against either party claiming any rights from the other in case of divorce proceedings being instituted, and should omit any reference to any claim either should make against the property of the other in the case of the death of either, under the rule of *expressio unius est exclusio alterius*, leads strongly to the inference that they did not intend by their agreement to relinquish or in any way affect their inheritable rights."

In the light of these circumstances, to hold that a contract by necessary implication was intended to nullify an antecedent will in the possession of, and subject to the absolute control of its maker, where the proper construction of its language does not so require, would be to incorporate therein a specific term which the parties have not included. To do so would constitute an unwarranted departure from the principles governing cases of this character. Grimm v. Grimm, supra; In re Estate of McNutt, supra; In re Estate of Minier, supra; Jones v. Lamont, 118 Cal. 499, 502, 50 P. 766.

The principal cases relied on by appellant are clearly distinguishable, and reinforce

10. In Sullivan v. Union Oil Co. of California, 16 Cal.2d 229, 105 P.2d 922, the agreement provided that the parties " 'release and waive all right to inherit under any will of the other.' " 16 Cal.2d at page 233, 105 P.2d at page 925. This exact phrase is used in the agreement considered in Meherin v. Meherin, 99 Cal. App.2d 596, 598, 222 P.2d 305.

the views here expressed. In Sullivan v. Union Oil Co. of California, 16 Cal.2d 229, 105 P.2d 922, 923, the husband had an interest in an "'Employees' Provident Fund'" maintained by his employer, to which he contributed by monthly deductions from his salary, and which provided for a benefit payable at death to the wife. This "Provident Fund" was *expressly mentioned* in a property settlement between husband and wife dividing all their property. As pointed out in Grimm v. Grimm, supra, 26 Cal.2d at page 180, 157 P.2d at page 845, in distinguishing the case: "Under the facts of that case all interests of the wife in the fund were regarded as part of her interest in the community property and as such released [by the agreement] in favor of the husband." In Meherin v. Meherin, 99 Cal.App.2d 596, 222 P.2d 305, a husband and wife made a property settlement agreement in which the wife released to her husband her interest in a certain policy which was *specifically designated* in the instrument. It was therefore held her rights terminated even though the husband had not executed a formal change of beneficiary before his death. In Thorp v. Randazzo, 41 Cal.2d 770, 264 P.2d 38, the court was again confronted with a property settlement agreement in which a divorced wife (plaintiff) waived her claims in two named and numbered insurance policies on her husband's life. The deceased failed to remove plaintiff's name as beneficiary of one of the policies, although he did on the other. In rejecting plaintiff's claim to the proceeds of the policy, the Supreme Court reaffirmed the rules we have hitherto stated, see 41 Cal.2d at pages 773–774, 264 P.2d at pages 39–41. The court then said, 41 Cal.2d at page 776, 264 P.2d at page 41: "Expectancies under a will or an insurance policy may be regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights which might develop from such expectancies is made clear in their property settlement agreement. [Citations.] But in the present case *specific reference was made in the agreement to the insurance policy, and plaintiff expressly waived all claim to 'any benefits that she may have at present, or which may hereafter be derived from' such policy.* This language clearly indicates that the parties' attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future." (Emphasis added.)

This is vitally different from the agreement here under consideration and lends support to our conclusion that plaintiff is not barred from taking under the will.

[6] In view of this conclusion, it becomes readily apparent that there is no substance in the affirmative defense of waiver by agreement interposed to the petition for partial distribution. The further argument that respondent is estopped to deny the binding force of the agreement is of no moment since such agreement offers no obstacle to her right to take under decedent's will.[11]

[7] There is likewise no merit in the claim of error in several rulings on the admission of evidence. To begin with, the court did receive evidence, contrary to appellant's claim, of the length of the marriage, the fact that difficulties had arisen, and that respondent was advised by counsel in negotiating the property settlement agreement. The exclusion of other evidence relating to the purpose of respondent's trip to Nevada after the agreement was executed and her remarriage after her husband's death was not prejudicial. It could not affect the terms of the previously negotiated property settlement agreement and was not calculated to establish that her attention was directed to any possible expectancy and that she waived it. On this latter point, the court excluded no competent evidence.

Appellant also seeks review of the order vacating the setting of his petition to de-

11. The claimed error committed by the trial court in allegedly failing to find on the question of estoppel is rendered immaterial. Logan v. Forster, 114 Cal.App. 2d 587, 250 P.2d 730. Therefore the exclusion of certain evidence touching on the question of estoppel is, of course, nonprejudicial.

termine heirship, contending he was thereby denied a trial by jury to which he was entitled by section 1081 of the Probate Code. He also assigns as error the court's ruling in denying his motion to be relieved from waiver of a jury trial in the hearing of respondent's petition for partial distribution. In brief recapitulation of the events leading up to these rulings, respondent filed her petition for partial distribution on January 26, 1953. Appellant filed his answer thereto on February 13, 1953. By way of affirmative defense, appellant set up the property settlement agreement, alleging that thereby respondent was not entitled to take under the will and was estopped to disclaim the validity of the agreement by virtue of having allegedly accepted its benefits. This petition was first set for hearing on February 13, 1953, but was continued from time to time until March 10, 1953, when it was transferred with the other pending matters, for determination by Judge Condee. The various matters were continued until the following day, when the parties entered into the stipulation concerning the mode of conducting the hearing and the application of the evidence to all of the pending matters. When the court thereafter concerned itself with the question of appellant's competency to act as executor, the other proceedings were continued until April 6th. On April 2, 1953, appellant filed his petition to determine heirship and prayed for jury trial. This was 65 days after service of citation on him of respondent's petition for partial distribution, 48 days after the matter was first set for trial, and about three weeks after the hearing had commenced and stipulations made as to the conduct of the proceedings.

[8, 9] We may pause here to point out that the petition for partial distribution and the answer thereto embraced all the issues involved in the heirship proceeding. A petition for partial distribution implements the policy of the law favoring the earliest possible delivery of inherited property to legatees or devisees consistent with a proper administration of the estate. In re Estate of Glenn, 153 Cal. 77, 80, 94 P. 230; In re Estate of Morelli, 102 Cal.App. 2d 39, 42, 226 P.2d 716. Diverse questions are often raised in such a proceeding in addition to the propriety of distribution, including that of disputed heirship. In re Estate of Painter, 115 Cal. 635, 639–640, 47 P. 700; In re Estate of Hill, 94 Cal.App. 113, 117, 270 P. 708, 709. As stated in Re Estate of Hill: "before the court can make an order for partial distribution, it is necessary to know whether the petitioner is entitled to any part of the estate. In re Estate of Ross, 187 Cal. 454, 466, 202 P. 641." To the same effect is In re Estate of Stephenson, 65 Cal.App.2d 120, 124, 150 P.2d 222.

[10–12] In proceedings for partial distribution, either party has a right to demand a trial by jury of any issues of fact raised therein. In re Estate of Baird, 173 Cal. 617, 623, 160 P. 1078; In re Estate of Perkins, 21 Cal.2d 561, 567, 134 P.2d 231. From the record, it is clear that appellant's former counsel waived any right to a trial by jury by failing to demand a jury "at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation * * *." Code Civ.Proc. sec. 631(4); In re Estate of Henshaw, 68 Cal.App.2d 627, 638, 157 P.2d 390; Glogau v. Hagan, 107 Cal.App.2d 313, 316–319, 237 P.2d 329. As late as March 11th, the record is clear that appellant was prepared to proceed without a jury and that this waiver of jury had been consciously and deliberately effected. The belated interjection of appellant's petition to determine heirship coupled with a demand for a jury trial, Prob.Code, secs. 1080–1081, did not compel a suspension of the proceedings and a trial of the matter by jury thereafter. In re Estate of Stephenson, 65 Cal. App.2d 120, 124, 150 P.2d 222, 224. When the motion to vacate the setting of this petition was before Judge Hansen on May 14, 1953, the following situation prevailed: The partial distribution proceeding was set for further hearing four days later; the petition to determine heirship, filed some two months after service of respondent's petition for partial distribution, constituted a duplication of the issues already before

the court in the distribution proceeding and a jury had been deliberately waived in the latter proceeding by appellant. We perceive no abuse of discretion on the part of Judge Hansen, in the light of these facts, in vacating the setting and ordering the petition "off calendar."

The denial of appellant's request for relief from the waiver of the jury trial was likewise proper. In re Estate of Stephenson, supra. The request for such relief was filed on May 14th and the order of denial was made upon the resumption of the hearing of the partial distribution and other proceedings on May 18th. In re Estate of Stephenson, supra, bears a striking parallel to the instant situation. In that case, the court refused to suspend its hearing of a petition for partial distribution despite the filing of a petition to determine heirship accompanied by a demand for a jury trial on the day set for hearing on the first petition. The court remarked in language here pertinent: "As above noted, at the commencement of the hearing on respondent's petition no proceedings to determine heirship were pending. The filing of the heirship proceedings during the progress of the hearing did not compel the court to terminate the hearing and decide the issues then before the court at a later hearing on appellant's heirship petition. All of the interested parties were then before the court and the issues were clearly set forth. Appellant had had notice of the pendency of the respondent's petition and was not prejudiced by the action of the court in proceeding therewith. Appellant's claim that she was prejudiced by being deprived of a jury trial is without merit. She made no demand for a jury trial in the matter heard by the court. Her only demand for a jury trial was made at the time she filed her own petition to determine heirship and, as we have seen, the court was justified in proceeding with the hearing of the issues on respondent's petition for partial distribution."

[13] Furthermore, appellant was not prejudiced in this instant situation by proceeding without a jury. The question here involved is one of law, viz., the interpretation of an unambiguous written property settlement agreement. As has been pointed out previously where, as here, there is no evidence to indicate that the attention of the respondent was directed to an expectancy under a will and no clear language appears in the settlement contract suggestive of an intention to disclaim such an expectancy, the agreement will not be construed as a renunciation of the right to take under the will. In re Crane's Estate, supra; Grimm v. Grimm, supra; Thorp v. Randazzo, supra. In such case, it is the duty of the court to carry out the solemn directions contained in the will without detracting from the provisions therein made.

[14–19] Appellant charges that he was denied due process on the theory that the trial judge's conduct was arbitrary and capricious. He therefore asserts that the entire proceedings herein were "null and void." He bases this contention on the fact that on March 11, 1953, when the petition of Mrs. Morse for partial distribution, petitions for attorney fees, and extraordinary fees, and the settlement of and objection to the accounts of the administrator and executor came on for hearing, the court, on its own motion, raised the question of the competency of appellant to act as executor, and two days later removed him from this office. This order was reversed because of the lack of prior notice of the specific charges against him and the failure to provide him an opportunity to present evidence in his defense. In re Estate of Buchman, 123 Cal.App.2d 546, 267 P.2d 73. In holding appellant was denied due process of law, 123 Cal.App. 2d at page 561, 267 P.2d at page 84, in this removal proceeding the court pointed out that the judge's conception of his duty was erroneous, 123 Cal.App.2d at page 560, 267 P.2d at page 84. On April 6, 1953, the date to which the matters here under review were continued, appellant, through new counsel, filed objections to Judge Condee's hearing the petition for partial distribution or any other matter in the Buchman Estate on the ground that Judge Condee "is biased and prejudiced" against him. Appellant supported his objections by his own affidavit in accordance with section 170, Code of Civil

Procedure. Judge Condee thereupon continued the various matters, including the petition for partial distribution, to May 18, 1953. In the meantime Judge Condee filed his controverting affidavit and answer in response to the motion to disqualify. The matter was referred to the Honorable Philip H. Richards, Presiding Judge of the Superior Court of Los Angeles County, to pass upon. On April 23d he found that Judge Condee was not disqualified. Notwithstanding Judge Richards' decision, appellant asserts that the reversal of the order removing him as executor of the estate necessarily meant that Judge Condee was in fact biased and prejudiced and that on review of "the judgment of the balance of the proceedings of this consolidated trial, it must necessarily follow that the entire proceedings were fatally infected with the denial of due process" which nullified all subsequent orders. In making this argument appellant misconceives his legal position in three particulars. The first relates to the decision of the District Court of Appeal in the removal proceeding, In re Estate of Buchman, supra. The basis of the reversal of the order removing Buchman as executor was the failure to give him prior notice of the asserted grounds therefor and an opportunity to present evidence in relation thereto. This, of course, was a denial of due process but it was not a determination that Judge Condee was guilty of bias and prejudice. As the court pointed out, 123 Cal.App.2d at page 560, 267 P.2d at page 84, the judge's conception of his duty was simply erroneous. However, an erroneous opinion on the law relating to proceedings is not "any evidence of bias or prejudice." Ryan v. Welte, 87 Cal.App.2d 888, 893, 198 P.2d 351, 355. Likewise, "the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice." Kreling v. Superior Court, 25 Cal.2d 305, 310–311, 153 P.2d 734, 737. Appellant's second misconception relates to the effect of Judge Richards' decision on appellant's charge of bias and prejudice against him. The burden in such proceedings was on appellant to establish as a fact that Judge Condee was biased or prejudiced against him. Golish v. Feinstein, 123 Cal.App. 547, 549, 11 P.2d 893; Ryan v. Welte, supra. On conflicting evidence Judge Richards found that appellant's charges were not true. A finding and order based on such evidence is, of course, binding on appeal. Barry v. Contractors State License Board, 85 Cal.App.2d 600, 608, 193 P.2d 979; Ryan v. Welte, supra, 87 Cal.App.2d at page 891, 198 P.2d at pages 353, 354. This provides a complete answer to appellant's further point that "the trial court erred in failing to grant a change of venue in this case to some other judge." Since the matters were regularly before a judge who was not disqualified there was no legal reason for a transfer to another court. Appellant's third misconception relates to the state of the record. It is his position that all matters before the probate court in the Buchman Estate were consolidated. From this he argues that the lack of due process inherent in the removal proceeding permeated the entire matter, vitiated all orders thereafter made, and rendered them null and void. The fact is, the several matters before the probate court were not consolidated except for convenience of trial of related issues. On March 11, 1953, counsel for the parties stipulated, with the court's approval, "that these [matters] may all be tried together, and that evidence competent in any of these matters may be received, and at the end the court will sort it out and make a separate ruling in each matter." No order of consolidation was made. As indicated by the stipulation, a single order or judgment was not contemplated as is true where there is actual consolidation. See McClure, on Behalf of Caruthers v. Donovan, 33 Cal.2d 717, 721–722, 205 P.2d 17.

It is thus clear that while all of the matters were related, since they all pertained to some phase of the Buchman Estate, they were each to be decided individually and separately based upon the evidence relevant to the particular item. Hence the failure to observe procedural due process in the removal proceedings of March 11 and 13 could not possibly serve to render invalid orders thereafter made relative to partial

distribution, settlement of accounts or allowance of fees.

[20, 21] In this connection appellant makes the further contention that "having appointed a special administrator, the court was without power to make a partial distribution." In making this contention appellant fails to appreciate that the special administrator was appointed "with general powers" pursuant to section 465, Probate Code.[12] As said in Levy v. Cytron, 84 Cal.App.2d 827, 829, 191 P.2d 816, 817: "The plain language of the * * * section leaves no room for construction. Its obvious purpose is to provide a general administration of the estate during the delay and uncertainty attendant upon a will contest or litigation over the appointment, suspension or removal of an executor or administrator. The order granting the special administratrix the additional powers authorized under section 465 of the Probate Code in effect made her letters general rather than special. [Citation.] Having all the powers of a general administratrix, she had the power to sell property of the estate."

Since general administration is provided for by such an appointment, the probate court clearly had jurisdiction to determine a previously filed petition for partial distribution. The cases relied on by appellant are not helpful since they did not involve special administrators with general powers appointed pending an appeal from an order removing an executor. Indeed, it is pointed out in Re Estate of Davis, 175 Cal. 198, 165 P. 525, 527 (on which appellant relies), in explaining the holding in In re Welch's Estate, 106 Cal. 427, 39 P. 805 (on which appellant also relies) that: "* * * the court had no authority, while there was a special administrator in charge of the estate *and during the time when the general administration was suspended,* to make a partial distribution." (Emphasis added.) Thus the deficiency pointed out in the Welch case, viz., the absence of general administration, was supplied in the instant matter by clothing the special administrator with general powers pursuant to the authority of Probate Code section 465.

[22] These conclusions effectively dispose of appellant's next contention that "the notice of appeal from a consolidated trial, in which part is reviewable on appeal, removes the jurisdiction of the superior court and the trial judge should have therefore stayed all of the proceedings until after the decision on appeal." This proposition is not here applicable because, as above pointed out, the several matters were to be separately and individually decided on the evidence relevant to each. Hence an appeal from the removal order could not possibly serve to deprive the superior court of jurisdiction to consider the petition for partial distribution while the appeal from the former order was pending. Code Civ.Proc., sec. 946; 3 Cal.Jur. 2d 682, sec. 193. See, also, In re Estate of Thayer, 1 Cal.App. 104, 106, 81 P. 658. Appellant's error lies in his mistaken belief that all the proceedings before the probate court were truly consolidated. As disclosed by the record, such is not the fact. Hence his asserted proposition is wholly without any appropriate factual foundation. Appellant relies on Evans v. Superior Court, 107 Cal.App. 372, 290 P. 662. Examination of that case, however, discloses that it does not support his proposition.

[23, 24] Appellant argues that the court erred in ordering partial distribution to petitioner on the ground that "The Estate was not in such a shape as to permit the partial distribution at the time." Section 1001 of the Probate Code authorizes the court to order partial distribution if it appears that the estate "is but little in-

12. The pertinent portion of section 465 reads:

"When a special administrator is appointed * * * pending an appeal from an order appointing, suspending or removing an executor or administrator, the special administrator shall have the same powers, duties and obligations as a general administrator and the letters of administration issued to him shall recite that such special administrator is appointed with the powers of a general administrator. * * *"

debted"; that the State has consented thereto in writing; and that the distribution may be made "without loss to the creditors or injury to the estate or any person interested therein." The section further provides that when the time for presenting claims has expired and "all uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond." Whether an estate "is but little indebted" or partial distribution can be made "without loss to the creditors or injury to the estate or any person interested therein" are questions of fact to be determined by the trial court upon a comparison of the value of the estate with the amount of debts, the character of the property, the expense of its maintenance and operation where it is a part of a business venture, the extent of the net income therefrom and all other relevant factors. In re Estate of Chesney, 1 Cal.App. 30, 34, 81 P. 679; In re Estate of Hinkel, 176 Cal. 563, 567, 169 P. 70; In re Estate of Morelli, 102 Cal.App.2d 39, 42, 226 P.2d 716. In the instant matter, the findings disclose that the estate had some $60,000 in cash at the date of the accounting; the value of the estate at that time was approximately half a million dollars; that the two parcels of improved real property were encumbered only to about 40% and 25%, respectively, of their value, and that the net income therefrom to the estate was some $3,000 per month; and further, that the unsecured debts and expenses of administration would not exceed $25,000. Appellant does not contend that the evidence does not support these findings. It is also to be noted that the time for filing creditors' claims had long passed and the State of California had consented to the distribution. In light of these facts it cannot be said, as a matter of law, that the trial court abused its discretion in ordering $24,000 distributed to respondent out of an estate of this magnitude, which was yielding a substantial monthly net income and was relatively little encumbered.

[25] Appellant further complains that no bond was required of respondent. However, the time for filing claims had passed. There was ample security left in the estate. In discussing the necessity of a bond in such circumstances it was pointed out in the Morelli case, supra, 102 Cal.App.2d at page 42, 226 P.2d at page 718, that "The court must require a bond if the time for the presentation of claims has not expired, but after that time it may dispense with the bond if there is sufficient security left in the estate." The facts herein recited justify the implied finding that "no injury" could result "to the estate" by dispensing with the bond. Prob.Code, sec. 1001. On this point we may say, as did the court in Re Estate of Johnson, 218 Cal. 501, 23 P.2d 1012, that "The question of a bond on partial distribution, under the facts here, was one of discretion and we see no showing of an abuse thereof." 218 Cal. at page 504, 23 P.2d at page 1013.

[26–28] As his final contention, appellant assigns as error the court's disposition of three items in connection with the settlement of accounts: (1) He complains of the order requiring him to reimburse the estate forthwith in the amount of $6,000 despite the fact that his fees as executor would exceed this amount. This determination was correct. It was conceded that appellant owed this amount to decedent.[13] The order properly treated this indebtedness as cash in the hands of the executor for which appellant was chargeable in his accounting. Prob.Code, sec. 602; In re Estate of King, 19 Cal.2d 354, 361, 121 P. 2d 716; Minifie v. Rowley, 187 Cal. 481, 486, 202 P. 673; In re Estate of Clary, 203

13. The transcript shows the following:
"Mr. Devor: * * * there is no doubt he is indebted to the estate for $6,000.
"The Court: Yes, he would have to ask for instructions or otherwise if he claims it against the estate, and a debt of the executor or administrator becomes cash in his hands. You concede that is true?
"Mr. Lavine: Yes, your honor, I concede that. There is no question about that. We have some matters in connection with which we will take up with the special administrator, however.
"The Court: Yes. Well, it wouldn't preclude you later on showing the facts, whatever they are."

Cal. 335, 264 P. 242; In re Estate of Jones, 115 Cal.App. 664, 669, 2 P.2d 483. (2) The record also shows that appellant was properly surcharged in the sum of $665. This sum was listed as a disbursement for a tombstone for decedent's father, which decedent had contracted to pay. However, the item appeared twice as a credit, apparently by mistake,[14] and the court adjusted the matter to avoid duplication. (3) The last item relates to the sum of $2,515, which appellant paid to a Chicago mortician as the cost of decedent's funeral. The record shows that there was no question as to the reasonableness of the amount, and that appellant testified he had paid the money therefor out of his personal assets. The transcript shows that the court stated: "The funeral expenses will be allowed." In its formal findings, the court found to be true paragraph XIII of appellant's first and final account and report and first account current and report, which alleges, in part, that appellant advanced $2,515 in personal funds to Furth & Coe, of Chicago, for the funeral expenses of the decedent. The order shows that the above-named accounts were settled and allowed as rendered, except with respect to the surcharge of $6,000 and $665 which have been heretofore discussed. This indicated that the court did not disallow the sum of $2,515 for funeral expenses, but considered appellant to be entitled to credit therefor as prayed. Apparently by inadvertence, this item was not specifically included in the order. The order should accordingly be modified to credit appellant's account with this sum.

The order decreeing partial distribution is affirmed. The order settling accounts is modified to include the following: "Hamlin K. Buchman is hereby authorized to credit himself for funeral expenses disbursed by him personally the sum of $2,515.00" and, as so modified, the order is affirmed. The costs on appeal are apportioned as follows: Appellant 90% and respondent Claire Morse 10%.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

14. The record discloses this colloquy:
"The Court: Well, then when you see it appearing in the corporation too it is probably a duplication, isn't it?
"Mr. Lavine: We are not asking for duplication, your Honor. The executor only wants it once, your Honor.
"The Court: Then that would be a $625 [sic] surcharge, on the double. Are you satisfied with that, Mr. Devor?
"Mr. Devor: Yes, your Honor, we will allow him to have it once, but not twice.
"Mr. Lavine: We are agreeable. It was an error in bookkeeping there."

Hilbert RANGEL, a minor, by Hazelle Duncan, his Guardian ad litem, Plaintiff and Appellant,

v.

Joseph G. BADOLATO et al., Defendants,

Joseph G. Badolato and Oakland California Towel Co., Respondents.

Civ. 8493.

District Court of Appeal, Third District, California.

April 7, 1955.

Rehearing Granted May 6, 1955.*

Action arising out of striking of highway pedestrian by truck, brought by minor pedestrian through guardian ad litem. From a judgment of Superior Court, Sonoma County, Hilliard Comstock, J., entered upon verdict in favor of the driver and owner of the truck, the pedestrian appealed. The District Court of Appeal, Finley, J. pro tem., held that a requested instruction that both the truck driver and pedestrian were chargeable only with exercise of ordinary care, but that a greater amount of such care was required of the truck operator, was objectionable as possibly implying that something more than ordinary care was required of the truck operator, and was properly refused.

Affirmed.

* Opinion vacated 284 P.2d 138.

1. Automobiles ⇐246(4)

In action arising out of striking of highway pedestrian by truck, requested instruction to effect that truck owner and pedestrian were both chargeable only with exercise of ordinary care, but that greater amount of such care was required of truck operator, was objectionable as possibly implying that something more than ordinary care was required of truck operator.

2. Automobiles ⇐246(4, 30)

In action arising out of striking of highway pedestrian by truck, trial court properly instructed that it was duty of every person using public highway, whether pedestrian or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid collision, and this instruction and usual instructions on subject of ordinary care and obligations of respective parties thereunder were adequate for the case without special instructions as to relative amounts of care required under particular circumstances of case.

3. Negligence ⇐4

Expression "ordinary care" refers to that degree of care which would be exercised at all times or at any particular time under existing conditions by the ordinarily prudent person.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

4. Appeal and Error ⇐1064(4)

Juries may be influenced by technical inaccuracies in instructions, and reviewing court cannot with confidence say that mere inaccuracy of expression is unimportant and unworthy of consideration.

5. Trial ⇐203(1), 228(1)

Incorrect statement of law in an instruction is error, even though it may not be of sufficient significance to merit reversal, and failure to state to jury all those rules of law, particularly those requested, which must be deemed reasonably necessary to permit persons of ordinary intelligence to apply law of case to evidence, is also error.

6. Trial ⇐253(4), 296(3)

In action arising out of striking of highway pedestrian by truck, wherein evidence conflicted as to whether pedestrian was on shoulder or on paved portion of highway, instruction that person who can choose between perfectly safe way and way which is subject to risks and dangers and who voluntarily chooses dangerous way and is injured cannot recover was objectionable as omitting element of proximate cause, but was not ground for reversal where court otherwise fully advised upon issues of contributory negligence and proximate cause and emphasized proximate cause as applied to both principal negligence and contributory negligence upon reinstructing jury.

7. Trial ⇐295(1), 296(1)

Though misstatement of essential principle of law is ordinarily not cured by other instructions on subject, all instructions must be considered as whole, and giving of instruction deficient in a respect covered by other instructions does not always warrant reversal.

8. Trial ⇐295(1)

In reviewing instructions, appellate court must read charge as a whole and give instructions reasonable construction from standpoint of their probable effect upon jury.

9. Trial ⇐260(8)

In action arising out of striking of highway pedestrian by truck, trial court properly refused to give, without qualification, requested instruction that it was duty of automobile driver when view is unobstructed to see persons walking on highway in front of automobile, in view of fact that "duty to see" rule was covered by instruction as to lookout and instruction as to keeping machine under control was given.

10. Automobiles ⇐246(58)

In action arising out of striking of highway pedestrian by truck, instruction that it was duty of person walking on highway to use ordinary care in looking for objects that might cause injury and to see and heed that which, by such looking, might have been visible, in exercise of ordinary

care and caution, and that pedestrian had no right not to look or to look carelessly, and that to look carelessly or heedlessly is as negligent as not to look at all, was apparently intended to relate general instruction regarding degree of care required to facts of case and was not objectionable as imposing absolute "duty to look" separate from duty to exercise ordinary care.

11. Automobiles ⇐204, 218, 226(2)
Highways ⇐183

Though pedestrian has no legal duty to look back or watch behind to see if he or she is in danger of being struck by vehicle approaching from rear, pedestrian and all persons traveling highways by any means must exercise reasonable or due amount of care, considering conditions, for their own safety, and if they fail to exercise such care and thereby solely cause or contribute proximately to cause of injury at hands of one who has equal right to use highways, they cannot recover.

Sutter, Elledge & Carter, Modesto, for appellant.

Keith, Creede & Sedgwick, San Francisco, and Geary, Spridgen & Moskowitz, Santa Rosa, for respondents.

FINLEY, Justice pro tem.

This appeal is from a judgment entered upon the verdict of a jury in favor of defendants.

Plaintiff and appellant, a nineteen-year-old pedestrian, commenced this action through a guardian ad litem seeking damages for personal injuries suffered when struck by a delivery truck owned by defendant Oakland California Towel Co., a corporation, and driven by defendant Joseph Badolato. There were other defendants named, but as to them the action was dismissed.

The accident happened about 7 P.M. on October 5, 1951, when plaintiff, a sailor on a weekend pass from the Naval Net Depot at Tiburon, California, was walking with a friend down San Quentin Road in Marin County on his way to the Richmond-San Rafael Ferry. Both, dressed in the Navy uniform of dark blue with white caps, were walking on the right-hand side of the road expecting to catch a ride. At the same time defendant Badolato was also proceeding toward the ferry on the same road driving a truck belonging to defendant Oakland California Towel Co., when the right front fender of the truck collided with plaintiff.

At the point of collision, San Quentin Road is a two-lane road with asphalt surface 21 feet in width and having oiled shoulders three feet in width and outer gravel shoulders five feet wide.

The night was dark and clear. Plaintiff testified that he neither heard nor saw the truck prior to being hit. In a deposition taken prior to the trial, defendant Badolato stated that the first he saw of plaintiff was at the moment of impact when he saw the white cap. At the trial he testified that all he saw was plaintiff's white cap at the moment of impact, but he also testified that he saw the two sailors when he was about 15 or 20 feet away. Badolato further stated that he was traveling between 40 and 45 miles per hour, his lights were on "low beam", and his vision was in no way obscured, although an oncoming car was driving with its "high beam" lights on. He testified that as soon as he saw plaintiff he applied the brakes, swerved to the left, and his truck then swung back and forth across the highway, coming to rest in a ditch on the right-hand side of the road about 230 feet from the point of impact.

There is some question as to where plaintiff was when struck. Badolato testified by way of deposition that plaintiff and his companion were "not on the highway, they were on the shoulder * * * or near the shoulder", but further that they couldn't have been on the shoulder but were on the paved portion of the highway. At the trial he testified that plaintiff was on the paved portion of the road when struck. Plaintiff and his companion testified that plaintiff was on the gravel shoulder of the road. Two witnesses for defendant stated that plaintiff was on the paved portion of the road.

Upon these facts the defendants raised issues of contributory negligence and unavoidable accident. The jury returned a verdict for the defendants. After judgment on the verdict, plaintiff moved for a new trial, which motion was denied.

On appeal the only assignment of error is the giving of certain instructions and the refusal to give others.

[1–5] Appellant first contends that it was error for the trial court to have refused to give the following instruction requested by plaintiff:

> "You are instructed that the plaintiff and defendant were both chargeable only with the exercise of ordinary care, but a greater amount of *such* care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway." (Italics added.)

Appellant's position is that said instruction states a rule of law applicable to the issues and evidence in the case, that the jury was not otherwise properly instructed with reference to the relative "amounts" of caution required of the driver of a motor vehicle and a pedestrian. It is argued that it was prejudicial error to refuse to so instruct, since there might have been a plaintiff's verdict upon the facts but that the jury was precluded from considering the facts in the light of this aspect of the law and was misled by the giving of the following instruction:

> "It is the duty of every person using a public highway, whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision."

Respondents in answer contend that the refused instruction is unnecessary, archaic and misleading, and would have served only to confuse the jury, particularly in view of the fact that it was carefully instructed as to the definition of negligence in accordance with the standard of the reasonably prudent man and instructed as to the duty of the defendant driver to keep a vigilant lookout ahead. As to the instruction last above quoted, which was given by the court, respondents also point out that appellant submitted the identical instruction.

The most recent pronouncement of our Supreme Court on the question here involved appears in Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 265 P.2d 513. The court, 42 Cal.2d at page 80, 265 P.2d at page 519, after citing a long list of cases wherein instructions similar in language to the one here involved were approved, had this to say:

> "It is apparent that the intent of the instructions approved in the cited cases was to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances. If the particular instruction here requested by plaintiffs (No. 201–E) had consisted of only the first sentence thereof, which contains the expression 'amount of caution,' it perhaps would have been confusing to a jury. With the added explanation, however, set forth in the instruction, of the meaning of the quoted expression as related to the respective duties of driver and of pedestrian, the instruction as a whole correctly states the law and explains that what is meant by varying amounts of caution is that the elements of conduct entering into ordinary care or caution will vary and must be related to the particular circumstances involved, including the character of the act being performed."

Among the cases to which the court was referring in the language just quoted is Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002. In that case plaintiff, a pedestrian, was struck by an automobile driven by defendant. A judgment entered upon

the jury's verdict in favor of defendant was reversed on the ground that the court refused to give the same instruction as that quoted above, which is the instruction refused by the court here. In the Dawson case, however, the court, 22 Cal.App.2d at page 315, 70 P.2d 1002, in reasoning upon the question of the trial court's refusal to give the instruction, made this observation:

> "* * * The error in failing to give the instruction becomes more apparent when it is considered that the court gave at the request of the defendant the following instruction: 'No higher or greater *degree* of care was required of the defendant to avoid the accident than was required of the plaintiff. Each was required to exercise ordinary care under the conditions confronting him.' The refused instruction was not covered in any of the instructions given by the court." (Emphasis added.)

It does not seem that the reasoning in Dawson v. Lalanne, supra, concerning these instructions, is entirely accurate. Under the rule announced in Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486, 487, the last instruction hereinabove quoted from the Dawson case and disapproved there appears to be a correct statement of the law. A careful analysis of the instruction approved in the Dawson case, which is the identical one refused by the trial court in this case, and of which refusal appellant here complains, would indicate that it is not an entirely accurate statement of the law.

The expression "ordinary care" is in one sense a general, and in another sense a specific term. It refers to that degree of care which would be exercised at all times or at any particular time under existing conditions by the ordinarily prudent person. It assumes definition as to a specific amount of care only when used in connection with some particular situation usually referred to as "under the circumstances". But if the expression "ordinary care" is to have any significance at all, the word "ordinary" cannot be modified by such words as "more" or "less". Care is either of that degree which is ordinary under the circumstances or it is not. It may be more than ordinary or less than ordinary, but it cannot be more ordinary or less ordinary. If it is more or less than ordinary it thereupon ceases to be ordinary at all.

Unquestionably if the word *such* were to be deleted from the proposed instruction there could be no question concerning its propriety as a correct statement of the law or its application to the facts of this case. But in its present form the compelling interpretation of the language used therein is that the words "such care" refer to the composite expression "ordinary care" and not merely to the word "care" alone. Unless this be considered as the correct interpretation, then the word "such" is superfluous and has no meaning, for why would the simple word "care" be referred to as *such* care if it were being thought of only as a generic term? In English expression and particularly in legal phraseology, use of the word "such" is an accepted method of referring back, but in so doing the reference is specific and refers to the exact subject matter theretofore named or described, which in this case would be not merely "care" but "ordinary care". If this interpretation be correct then in the questioned instruction appellant was asking the court to instruct the jury that a greater amount of "ordinary care" was required of defendant. This would have been an inaccurate statement of the law and misleading.

It may be argued that even conceding the merits of the foregoing discussion, the idea sought to be conveyed to the jury would still have been obvious and that the members thereof would not have been misled by any such fine distinctions. But we cannot with confidence say that a mere inaccuracy of expression is unimportant and unworthy of consideration for we are committed by a long line of decisions to the proposition that juries may be influenced by such technical inaccuracies. In Lasater v. Oakland Scavenger Co., supra, it was held that an instruction containing the expression "'a greater degree of care'" was erroneous because the word "degree" rather than the word "quantum" or

"amount" was used to indicate the character of the variations in care. It is stated in the opinion, 71 Cal.App.2d at page 221, 162 P.2d at page 487:

> "* * * The degree of care required of a person for his own safety is always the same, i. e. ordinary care, although in some circumstances the quantum or amount of care required to reach the degree of ordinary care is greater than in others. While neither courts nor lawyers have uniformly observed this distinction in terminology, it is a *substantial* one and well established in our law." (Emphasis added.) See also Barry v. Maddalena, 63 Cal.App.2d 302, 146 P.2d 974.

It would seem then, in view of the rule just quoted from Lasater v. Oakland Scavenger Co., supra, that the instruction disapproved in Dawson v. Lalanne, supra, and hereinbefore quoted, is a correct statement of the law and the instruction approved therein, which is the identical one refused by the trial court here, is not a correct statement. It is a little difficult to believe that the ordinary lay person, sitting as a juror, would within the usual period of service absorb enough from the proceedings and association to recognize such fine distinctions, but legally they are charged with this duty, though their ability to perform may not always measure up to this responsibility.

As stated, the expression "a greater amount of *such* care", meaning a greater amount of ordinary care, is a technically inaccurate statement of the applicable rule of law. The inaccuracy may have meant but little to a jury but a careful reading and analysis of the proposed instruction by one exposed to training in the law would seem to imply that the driver or operator of the automobile was required to use something in the way of care over and above the ordinary care with which the instruction first states that both plaintiff and defendant were chargeable. Such, of course, is not the law and since the instruction does not represent an accurate statement thereof, it was not error for the court to refuse to give it.

In Cucinella v. Weston Biscuit Co., supra, we also find this language at pages 81–82 of 42 Cal.2d, at page 520 of 265 P.2d:

> "* * * The fault in this case is not one of affirmative misstatement of any rule of law but of failure to explain more fully that in the application of the general rules of law which were correctly declared, the jury, as a matter of law, as well as factually in using common sense, good judgment and general knowledge, should recognize that the force of inertia of a heavy, fast moving vehicle is greater than that of a comparatively light and slow moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly."

With this pronouncement in mind and also bearing in mind that the trial court in the case before us gave the commonly accepted definition of ordinary care, together with a proper definition of negligence, it would seem that if a jury is to be charged with the knowledge, which of course is common knowledge, "that the force of inertia of a heavy, fast-moving vehicle is greater than that of a comparatively light and slow-moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly", that they here must be charged with ability to apply the given definitions of ordinary care and negligence to this knowledge which must result in the inevitable conclusion that ordinary care in the operation of a "heavy, fast-moving vehicle" of necessity involves a greater amount or quantum of care than would be involved in the walking of a "comparatively light and slow-moving pedestrian" on the highway.

An incorrect statement of law in an instruction to a jury is error, even though it may not be of sufficient moment to merit reversal, as is also failure to state to the jury all those rules of law, particularly if submitted by the parties as instructions, which must be deemed reasonably necessary to permit persons of ordinary intelligence to apply the law of the case to the

evidence. Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 62 P.2d 1387. But it would appear a bit inconsistent to assume that a jury can absorb, remember and apply all the definitions and rules with the occasional alternatives and distinctions contained in the ordinary set of instructions, taking perhaps the better part of an hour for the court to give, and then to say that they lack the simple intelligence to apply them, unless selected ones are emphasized and explained. Here the usual and proper instructions were given on the subject of ordinary care and the obligations of the respective parties thereunder. This, aided by the instruction concerning the duty of persons using a highway, were adequate and no further or special instruction pertaining to the relative amounts of care required of the parties was under the circumstances of this case necessary.

[6–8] Appellant next contends that it was error for the court to have given the following instruction requested by defendant:

> "You are instructed that where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the dangerous way, and is injured, such person is guilty of contributory negligence and cannot recover damages against the defendant."

Appellant's most serious contention here is that the instruction is defective as omitting the element of proximate cause.

There is no question that standing alone this instruction does omit the element of proximate cause, but it would seem from a consideration of other instructions given on this subject that no prejudicial error resulted from such omission. Although it is true that a misstatement of an essential principle of law ordinarily is not cured by the giving of other instructions on the subject, it is also well settled that all instructions must be considered as a whole, and it does not always follow that the giving of an instruction deficient in a respect which is covered by other instructions, will always mislead the jury and warrant a reversal.

> "In reviewing instructions, the appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury." Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, 475; O'Connor v. City and County of San Francisco, 92 Cal.App.2d 626, 207 P.2d 638; Dennis v. Gonzales, 91 Cal.App.2d 203, 205 P. 2d 55.

Here, prior to the giving of the questioned instruction, the court fully advised the jury upon the issues of contributory negligence and proximate cause. After the jury had retired, it returned to court and requested a re-reading of the instruction pertaining to proximate cause, at which time the court elaborated at length upon the subject. In view of this re-instruction with emphasis on proximate cause it is extremely doubtful that the failure to include it as an element of the questioned instruction misled the jury. It was not re-read when the jury was returned to court. Other proper instructions explaining proximate cause in connection with the issue of contributory negligence were re-read and the very last statement by the court before the jury re-retired was as follows: "The element of proximate cause is involved either in the principal negligence or in the contributory negligence feature of this case. All right, you will retire again and attempt to arrive at a verdict." We find that under those circumstances there was not reversible error.

[9] Appellant next contends that it was error for the trial court to have refused to give this instruction requested by the plaintiff:

> "It is the duty of a driver of an automobile when the view is unobstructed to see persons walking on the highway in front of the car."

As its reasons for refusing to so instruct, the court indicated that the principle had been covered elsewhere and that the proposed instruction was not sufficiently qualified with respect to distance, exceptional conditions, etc. It would appear that the court was correct, for the instruction con-

tains no qualification as to distance or otherwise and this "duty to see" rule was fully and fairly covered by the instruction concerning defendant driver's duty "to keep a vigilant lookout ahead for other persons lawfully using the highway and to anticipate the presence of such persons" and his "duty under the law to keep his machine under control as would enable him, under the exercise of ordinary care, to avoid collision." There was no error in refusing to instruct in the unqualified language of plaintiff.

[10] Finally, appellant contends that it was error for the trial court to give this instruction requested by defendant:

> "You are instructed that it is the duty of a person walking upon a highway to use ordinary care in looking for objects that may cause him injury and to see and heed that which, by such looking, may have been visible to him, in the exercise of ordinary care and caution. He had no right not to look or to look carelessly. To look carelessly or heedlessly is as negligent as not to look at all."

In support of this contention appellant alleges that said instruction is not a correct statement of the law applicable to the case and that to so instruct led to prejudicial error in view of the conflict in the evidence regarding plaintiff's physical position at the time of the accident.

Although there is no legal duty placed upon a pedestrian "to look back or watch behind to see whether he or she is in danger of being struck or run down by any vehicle approaching him or her from the rear", pedestrians as well as every person who travels over the highways by whatsoever means or mode, "must exercise reasonable or the due amount of care, considering the conditions existing as to the highways, for their own safety. If they fail in the exercise of such care and themselves thereby contribute proximately to the cause of any injury they may sustain at the hands of one having an equal right to use the highways, or if such failure is the sole cause of the damage they have suffered, then, of course, they have no ground upon which to base just complaint." Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 95, 239 P. 709, 713, 41 A.L.R. 1027; see also La Branch v. Scott, 82 Cal.App.2d 1, 185 P.2d 823.

[11] That the instruction herein questioned by appellant was erroneous is doubtful in view of the rule above noted. A fair construction would seem to indicate that the court was merely instructing the jury that a pedestrian using a highway must in the exercise of his primary duty to exercise ordinary care take heed of others traveling thereon, for purposes of self-preservation, and was not instructing that plaintiff as a pedestrian had an absolute "duty to look" separate and apart from his duty to exercise ordinary care. It was an instruction apparently intended to relate the general instruction, regarding the degree of care required, to the facts of the instant case.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Morton FREEDLAND and Charles L. Drake, Plaintiffs and Respondents,

v.

Domenick R. GRECO, Defendant and Appellant.

Civ. 20568.

District Court of Appeal, Second District, Division 2, California.

March 30, 1955.

Hearing Granted May 25, 1955.*

Action to foreclose chattel mortgage and for deficiency judgment in event proceeds of sale were insufficient to pay debt. The Superior Court, Los Angeles County, Allen W. Ashburn, J., foreclosed mortgage and provided for such deficiency judgment. Mortgagor appealed. The District Court of Appeal, McComb, J., held that although there was no specific statutory authorization for a deficiency judgment upon fore-

* Opinion vacated 289 P.2d 463.

closure of chattel mortgage, such omission was legislative inadvertence made when legislature amended statute providing for foreclosure of both real and chattel mortgages, and that procedure before such amendment should be followed.

Judgment affirmed.

1. Courts ⇐89

Expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases.

2. Mortgages ⇐375, 559(2)

Deficiency provisions of code are directed to a shortage upon the note secured by the particular trust deed or mortgage, and they do not effect the enforcement of any additional security for the same debt or recovery of the unpaid balance. West's Ann.Code Civ.Proc. §§ 580b, 580d.

3. Mortgages ⇐375

Statute providing that there shall be no deficiency judgment upon a note secured by a deed of trust or mortgage on real property in any case in which the real property has been sold by mortgagee or trustee under power of sale in such mortgage or trust, is applicable only to a deficiency upon the single note secured by the real estate trust deed or mortgage. West's Ann.Code Civ.Proc. § 580d.

4. Chattel Mortgages ⇐287

Statute providing that there shall be no deficiency judgment in any event after any sale where chattel mortgage and deed of trust have been given to secure payment of balance of combined purchase price of both real and personal property, was not applicable in case where note and trust deed were given as additional security for note and chattel mortgage given for purchase price of chattels. West's Ann.Code Civ.Proc. § 580b.

5. Chattel Mortgages ⇐287

Provision of statute that where both a chattel mortgage and deed of trust have been given to secure payment of balance of combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof, leaves pre-existing law in effect as to chattel mortgages, in all other situations, and a deficiency judgment after foreclosure sale which does not yield enough to pay the debt in full is proper. West's Ann.Code Civ.Proc. § 580b.

6. Chattel Mortgages ⇐287

Where chattel mortgagor had given note and trust deed on realty as additional security for purchase price of chattels, and trust deed foreclosure did not satisfy debt, mortgagee could foreclose chattel mortgage and have a deficiency judgment for balance due after chattel mortgage foreclosure sale. West's Ann.Code Civ. Proc. §§ 580a, 580b, 580d.

7. Chattel Mortgages ⇐287

The amount of deficiency judgment upon chattel mortgage is not limited by provision of statute limiting deficiency judgment in real estate foreclosures to amount of difference between debt and fair market value of property mortgaged. West's Ann. Code Civ.Proc. § 726.

8. Chattel Mortgages ⇐287

There is no specific authorization in statute providing limits to deficiency judgments in foreclosure of real estate mortgages for deficiency judgment upon a chattel mortgage note. West's Ann.Code Civ. Proc. § 726.

9. Chattel Mortgages ⇐287

Omission by legislature of provision for procedure for obtaining deficiency judgment upon chattel mortgage note in amendment of statutes which had provided procedures for foreclosures was a legislative inadvertence. West's Ann.Code Civ.Proc. § 726.

10. Chattel Mortgages ⇐287
Mortgages ⇐559(2)

Purpose of amendments to statute which had provided procedures for foreclosures of mortgages, both real and personal, was limitation of deficiency judgments in real estate foreclosures to difference between debt and fair market value of property, and not to prohibit deficiency judgments as to foreclosure of chattel mortgages. West's Ann.Code Civ.Proc. § 726.

11. Statutes ⇐230

A manifest legislative inadvertence in amending a statute may be treated as such, and the statute construed as if the inadvertence had not occurred, that is, as if the provision of the statute had not been mistakenly omitted in the process of amendment.

12. Chattel Mortgages ⇐287

Legislative inadvertence in failing to provide procedure for obtaining deficiency judgment on foreclosure of chattel mortgage showed lack of intent by legislature to abolish right to deficiency judgment. West's Ann.Code Civ.Proc. § 726.

13. Chattel Mortgages ⇐254

It is still necessary to foreclose in order to realize upon a chattel mortgage. West's Ann.Code Civ.Proc. § 726.

14. Chattel Mortgages ⇐287

Where legislature, by legislative inadvertence, failed to provide procedure for obtaining deficiency judgment on foreclosure of chattel mortgage, the right to recover the debt was not abolished, but there was merely no prescribed remedy. West's Ann.Code Civ.Proc. § 726.

15. Chattel Mortgages ⇐287

In action to foreclose chattel mortgage and for deficiency judgment, where statutory procedure for obtaining deficiency judgment had been omitted from statute by legislative inadvertence, court properly followed practice that existed before omission of procedure. West's Ann.Code Civ. Proc. §§ 187, 580b, 580d, 726.

Edmund F. Barker, Montebello, for appellant.

John M. Dvorin, Los Angeles, for respondents.

McCOMB, Justice.

Defendant appeals from a judgment foreclosing a chattel mortgage and providing for a personal and deficiency judgment against him as mortgagor.

The single question for decision is this: *Where there is but one obligation owing to a creditor which is secured by a chattel mortgage representing the balance of the purchase price of personal property sold by the creditor to the debtor and by a trust deed which constituted additional security for the debt, and the trust deed is foreclosed under the power of sale contained therein, leaving a deficiency, and the chattel mortgage is foreclosed to satisfy said deficiency, may provision be made for a deficiency judgment in the latter action?*

This question must be answered in the affirmative. The Honorable Allen W. Ashburn, the trial judge, prepared and filed an exhaustive and splendid opinion which fully sets forth the facts, appellant's contentions, and the applicable law thereto. Since we have reached the same conclusions as the learned trial judge, no useful purpose would be served by rephrasing the opinion of Judge Ashburn. Therefore we adopt the same with minor modifications as the opinion of this court. It reads as follows:

"Plaintiffs sue to foreclose a chattel mortgage and pray deficiency judgment in the event the proceeds of sale are not enough to pay the debt in full. It appears that plaintiffs sold to defendant the furniture, fixtures, etc., pertaining to a liquor store, all personal property, and that part of the purchase price was represented by a note and chattel mortgage of August 14, 1951, in the amount of $7,000; that defendant also gave plaintiffs 'as additional security' a second trust deed upon certain real property. Though there was but one debt of $7,000 (later reduced by agreement to $6,449.53) there were in fact two notes of even date delivered to plaintiffs. One of them * * * recites that it is secured by a mortgage of chattels and the other * * * that it is secured by deed of trust. The chattel mortgage note also contains this, 'This note is given in addition to the Deed of Trust in like amount as additional security to Mortgagees and Trustees.' The holder of a first trust deed upon the realty started foreclosure under power of sale and plaintiffs herein, as holders of the second lien, cured the default by paying sums aggregating $945.28 and the sale under the first lien was called off. But plaintiffs proceeded to foreclose their trust deed by

trustee's sale, bid in the property for $2,000 and, after deducting costs, a net credit of $1,685.63 was made upon the indebtedness. There had been previous credits and the amount now due on the debt is $5,515.84, with interest.

"Defendant does not resist foreclosure but asserts that plaintiffs are entitled to no deficiency judgment, a question which requires present solution so that a proper form of judgment may be entered. It was stipulated that, although the chattel mortgage represents the balance of the purchase price of personal property sold to defendant, the trust deed does not stand in that category and merely constitutes additional security for the debt.

"The attorney for the defendant contends that plaintiffs had an election to proceed under the one security or the other and that, having selected the trust deed for prior foreclosure, they precluded themselves from obtaining any deficiency judgment under the chattel mortgage. Reliance is placed upon Section 580d, Code of Civil Procedure, the first paragraph of which says:

> " 'No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust.'

"Counsel for defendant insists there was but one note and hence that Section 580d is squarely applicable, but, as shown, there were two notes, one representing the balance of the purchase price (chattel mortgage) and the other given as additional security for the debt (trust deed). It will be noted that the exact terms of Section 580d limit its application to the note secured by the trust deed.

"It was held in Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 183 [124 P.2d 353], that Section 580b, Code of Civil Procedure (which deals with purchase money mortgages and trust deeds, and precludes deficiency judgment), does not prevent the creditor from foreclosing an additional security such as a chattel mortgage or an assignment of rents. In other words, that there is no such automatic or preclusive election as defendant asserts at bar. In that case there was a purchase money trust deed upon an apartment house and a purchase money chattel mortgage upon the furnishings, both securing a single note. The property was sold under the trust deed and later the chattel mortgage was foreclosed. After applying the proceeds of both sales to the debt there was an unpaid balance of $43,790.16. Both the trust deed and the chattel mortgage contained a clause assigning rents as further security, a receiver had been placed in charge, and the controversy arose over conflicting claims to rents in the hands of the receiver. The trial court ordered the same paid to the holder of the note. Section 580b, Code of Civil Procedure, provides in its first paragraph:

> " 'No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.'

"Appellant, who stood in the shoes of the debtor, contended 'that the order of the court instructing the receiver to pay to the beneficiary the rents in his hands, is in effect the obtaining of a deficiency judgment which is barred by the provisions of Section 580b, Code of Civil Procedure.' The contention is also phrased thus at page 183 [of 51 Cal.App.2d, at page 354 of 124 P.2d]:

> " 'Appellant contends that the order of the court requiring the referee to pay over the rents to the respondent is a money judgment and therefore, a deficiency judgment. Moreover, appellant contends that Section 726, Code of Civil Procedure, precludes the recovery of the rents, because the mortgagee had elected to follow another form of action to recover his debt, namely, a sale under the power of sale in the deed of trust.'

"After reviewing Hatch v. Security-First National Bank, 19 Cal.2d 254 [120 P.2d 869], the District Court of Appeal

held at page 186 [of 51 Cal.App.2d at page 356 of 124 P.2d]:

"'Therefore, there is nothing to prevent the creditor from proceeding to foreclose upon any additional security which he may have, which in the Hatch case, was a pledge of personal property by the estate and a deed of trust upon additional property of the heirs, and which in the case at bar was a chattel mortgage and the assignment of rentals.'

"It also held that the creditor was entitled to rents collected after the appointment of the receiver but not before; that the order for payment of rents to the respondent-creditor was not a deficiency judgment within Section 580b; and added:

"'Therefore, in no event would the sale under the deed of trust of the real property therein described, prevent the creditor from proceeding to foreclose his chattel mortgage and to obtain the rentals which in the deed of trust were assigned to him for security.'

"The ruling clearly is to the effect that foreclosure of the trust deed does not preclude realization upon additional security such as a chattel mortgage given for the same debt. It was probably this ruling that led to the addition of a second paragraph to 580b in 1949. It says:

"'Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof.'

"This seems a clear reversal of the policy of the Sampsell case where both the trust deed and the chattel mortgage were purchase money instruments securing a single note.

"Ramsey v. Furlott, 14 Cal.App.2d 145, 147 [57 P.2d 1007, 1008], is quoted in the Sampsell case, as follows: 'It is well settled that such a sale, under the powers given by a deed of trust, will not bar a subsequent action to recover the remainder of the indebtedness.' But the report of the Ramsey case, which was decided in 1936, does not affirmatively disclose whether the amended form of Section 726 was under consideration.

"In Hatch v. Security-First National Bank, 19 Cal.2d 254 [120 P.2d 869], the creditor bank held (1) a trust deed upon realty executed by the executors of the will of a decedent, (2) a pledge of personal property belonging to the estate, and (3) a trust deed upon certain realty belonging to the three heirs individually. These securities were foreclosed in the order just mentioned and the properties bid in by the creditor, leaving an unpaid balance of the debt amounting to $45,969.78. The creditor made no claim of personal liability. But the heirs brought an action to quiet title and the trial court, adopting their theory, 'concluded that the pledge sale on February 28, 1939, and the sale under the individuals' deed of trust, held on March 28, 1939, were invalid. In each case it was determined that title to the property involved remained in the original owner thereof. This holding was based solely upon the finding that, after the trustee's sale of the real property belonging to the estate of Hulda F. Schmidt under the trust deed of April 15, 1935, neither of the defendants took any steps pursuant to Code of Civil Procedure, Sections 580a, 725a and 726, for the purpose of determining the existence of an actual deficiency.' ([19 Cal.2d at] pages 257–258 [120 P.2d at page 871.]) The Supreme Court upheld appellant's contention that those sections are not applicable where no deficiency judgment is sought. The heirs contended that 'Unless the creditor proceeds under section 580a to establish the existence of an unpaid balance after resorting to his security, * * * it will be presumed that he has realized enough to satisfy the debt in full.' ([19 Cal.2d at] page 259 [120 P.2d at page 872.]) Also: 'Plaintiffs argue that section 580a should be interpreted so as to require the creditor to obtain a judicial determination of the unpaid balance remaining after sale under a deed of trust or mortgage before resorting to any additional security which he may hold.' ([19 Cal.2d at] page 261 [120 P.2d at page 873.])

"To this the court replied: 'The language of section 580a does not indicate that the legislature had any intention of thus protecting property which is only secondarily liable as security for the principal obligation. By its express terms, the statute is concerned only with actions to recover deficiency judgments after the security is exhausted and plaintiffs have cited no convincing authority in support of their position.' ([19 Cal.2d at] page 261 [120 P.2d at page 873.])

"The court concluded [19 Cal.2d] at page 262 [120 P.2d at page 874]: 'Under the facts of the present cases, since the defendant has at no time attempted to secure a deficiency judgment against anyone, it is clear that section 580a is not applicable. It imposes no requirement which would invalidate the pledge sale or the sale under the individuals' deed of trust. It has already been pointed out that sections 725a and 726 have no application to the facts of this case (supra). Since the judgments in these cases are based solely upon the finding that defendant failed to proceed under these sections of the Code of Civil Procedure, it follows that each of the judgments appealed from is erroneous.'

"Again we have a definite ruling that foreclosure by sale under a trust deed does not constitute an election to forego enforcement of additional security for the debt, but no specific ruling upon the point involved in the case at bar.

"Brown v. Jensen, 41 Cal.2d 193 [259 P.2d 425], was an action upon a promissory note secured by a second trust deed. Both the first and the second trust deeds upon the property were purchase money obligations. The first was foreclosed, the property bought in by its holder and the second lien thus destroyed, hence the action on the note. The Supreme Court held that it could not be maintained because forbidden by Section 580b, Code of Civil Procedure,—this notwithstanding the fact that there had been no sale under the second trust deed. The essence of the ruling is found in these passages from pages 197 and 198 [of 41 Cal.2d, from page 427 of 259 P.2d]:

"'The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and she may look only to the security. That is the clear import of the wording of section 580b. The one taking such a trust deed knows the value of his security and assumes the risk that it may become inadequate. Especially does he know the risk where he takes, as was done here, a second trust deed.' ([41 Cal.2d at] page 197 [259 P.2d at page 427.]) 'Indeed the purpose of section 580b is that "* * * for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt." (Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 185 [124 P.2d 353, (355)].) The section states that in *no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. The purpose of the "after sale" reference in the section is that the security be exhausted and that result follows after a sale under the first trust deed.' ([41 Cal. 2d at] page 198 [259 P.2d at page 427]; emphasis by court.)

"In the course of its discussion the court also had this to say at page 196 [of 41 Cal. 2d, at page 426 of 259 P.2d]: 'Defendants pleaded section 580b of the Code of Civil Procedure, and as seen the facts here show that plaintiff's second trust deed is clearly a purchase money trust deed. It is urged, however, that inasmuch as there has not been a sale by plaintiff under her trust deed within the wording of section 580b, supra, it does not apply. It is further urged that it does not apply because the security has become valueless by reason of the sale under Federal's first trust deed, and the case is not one involving a "deficiency" as there cannot be a deficiency if there is no security to sell because it presupposes a partial satisfaction [of] the debt by a sale which exhausts the security.' And at page

196 [of 41 Cal.2d, at page 426 of 259 P.2d]: 'In order to solve this question there must be a further examination of the Code sections. There are other restrictions besides section 726, supra, and 580b, supra. Section 580a applies the fair market value test of section 726 to sales made without court assistance under a power of sale contained in a trust deed. Section 580d goes further and provides that no judgment shall be rendered for any deficiency on a note secured by a trust deed where the property has been sold under the power of sale (as distinguished from a sale in a foreclosure action) contained in the trust deed. These provisions indicate a considered course on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security. Next comes section 580b, supra, here involved, which deals with a special type of security transaction, a trust deed, given to secure to the vendor of property the purchase price agreed to be paid by the vendee. That section is necessarily intended to provide a protection for the trustor because if it were intended to cover only the situation where there has been an actual sale of the security under the power of sale in the trust deed, it would be superfluous. Section 580d covers precisely that situation in *all* trust deeds, whether purchase money or otherwise.'

[1] "This reference to Section 580d is of little assistance for it is but a paraphrase of the statute and has no relation to the exact contention now under consideration. 'But it is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases.' (City of Pasadena v. Stimson, 91 Cal. [238] 250 [27 P. 604, 606.])

"Bank of America, etc., Ass'n v. Hunter, 8 Cal.2d 592, 598, [67 P.2d 99, 102], points to the correct solution of our problem. It is there said that Section 580a, Code of Civil Procedure, and statutes in *pari materia*, e. g., Section 337, Code of Civil Procedure as amended in 1933, 'have to do solely with actions for recovery of deficiency judgments on the principal obligation after sale under trust deed or mortgage, as distinguished from a guarantor's obligation such as is here involved,' and have no 'application to an action of this character based on the independent obligation of a guarantor.' This case is quoted with approval in Hatch v. Security-First National Bank, supra, [19 Cal.2d] 261 [120 P.2d 873].

[2] "The effect of the decisions other than Brown v. Jensen seems to be that the deficiency provisions of the code are directed to a shortage upon the note secured by the particular trust deed or mortgage and they do not affect the enforcement of any additional security for the same debt or recovery of the unpaid balance. While Brown v. Jensen casts some doubt on this proposition, if it is correctly analyzed, seems not opposed, for the court does not there deal with enforcement of collateral securities. It cites and quotes with apparent approval the ruling in Mortgage Guarantee Co. v. Sampsell and deals only with a situation growing out of first and second purchase money trust deeds upon the same property.

[3] "The difference in phraseology of 580b (the one involved in Brown v. Jensen) and 580d seems quite significant. The former provides that there shall be no deficiency judgment '*in any event* after *any* sale of real property * * * under *a deed of trust,* or mortgage, given to secure payment of the balance of the purchase price of real property.' While Section 580d says that there shall be no deficiency judgment 'upon a *note secured by* a deed of trust or mortgage upon real property * * * in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in *such* a mortgage or deed of trust.' By its language and its apparent intent, Section 580d points to a deficiency upon the single note secured by the real estate trust deed or mortgage. (Emphasis added.)

[4, 5] "Moreover, the Legislature when it brought chattel mortgages within the scheme of the deficiency statutes did so in

language which excludes the present situation, for the second paragraph of Section 580b is limited by the condition that both a chattel mortgage and a deed of trust or mortgage on realty shall have been given 'to secure payment of the balance of the *combined purchase* price of both real and personal property.' There was no purchase of realty involved in the situation at bar. This amendment to Section 580b leaves pre-existing law in effect as to chattel mortgages where the conditions of the amendment have not been fulfilled and that connotes a right to a deficiency judgment after a foreclosure sale which does not yield enough to pay the debt in full. (Emphasis added.)

[6] "The essence of the matter at bar is a single obligation represented by two notes, one secured by a purchase money chattel mortgage and the other by additional security in the form of a trust deed. The trust deed has been exhausted and its proceeds applied to the debt. Plaintiff now seeks foreclosure of the chattel mortgage and if necessary a deficiency judgment upon the note secured thereby. The Court concludes that the plaintiff is entitled to this, that the exact language as well as the purpose and spirit of Section 580d support the conclusion. Judgment is ordered for plaintiff for the sum of $5,515.84 with interest, which judgment will provide for foreclosure sale, application of the proceeds to the debt, and an appropriate provision for deficiency judgment in the event the sale does not yield enough to liquidate the obligation.

[7, 8] "The amount of the deficiency judgment, if any, upon this chattel mortgage is not limited by the provisions of Section 726, Code of Civil Procedure. The deficiency provisions of that section are confined to real estate foreclosures. As it now stands there is no specific authorization in Section 726 for a deficiency upon a chattel mortgage note.

"In 10 Cal.Jur., 2d sec. 88, page 395, it says: 'But though the statute prescribes the method by which the plaintiff, on foreclosure of a real property mortgage, and subject to certain limitations, may recover from a defendant personally liable a balance remaining due after a sale of the mortgaged property under a foreclosure decree, no similar statutory provisions is made with respect to chattel mortgages. The amendment by which this procedure was established as to mortgages of real property eliminated a prior statutory provision applying generally to foreclosures under which, if it appeared from the sheriff's return or from the commissioner's report that the proceeds of a sale were insufficient, and a balance still remained due, a judgment must then be docketed by the clerk for such balance against the defendants personally liable for the debt. Since that amendment there appears to be no direct authority as to the procedure to be followed by a chattel mortgagee in recovering a deficiency. One case seems to indicate, however, that the chattel mortgagee could properly apply to the court in which the foreclosure proceedings were had for a deficiency judgment against a defendant personally liable.'[1]

[9, 10] "This omission appears to have been a legislative inadvertence. The attention of the law makers was directed to the emergency confronting home owners as a result of the prevailing financial chaos. 'The evil which led to the enactment of this legislation became pronounced during the recent period of economic depression when creditors were frequently able to bid in the debtor's *real property* at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt. (See [1934] 22 Cal.L.Rev. 170, 181.)' (Hatch v. Security-First National Bank, 19 Cal.2d 254, 259 [120 P.2d 869, 872]. Emphasis added.) 'These enactments were a part of a legislative plan to lighten the burdens of *trust deed debtors* as evidenced by numerous changes made in the laws at the same session of the Legislature.' (Reynolds v. Jensen, 14 Cal.App.2d 558, 559 [58 P.2d 687, 688]. Emphasis added.)[2]

"1. Citing First Nat. Bank v. Turnbull, 99 Cal.App.2d 764 [222 P.2d 494], which is quite inconclusive."

"2. The 1933 Legislature, in its efforts to relieve distressed debtors, passed or amended each of the following: Code of

"The amendments to 726 made in 1933 and 1937[3] authorize deficiency judgments in real estate foreclosures but restrict the amount to the difference between the debt and the fair market value of the property.[4] Never before the 1933 amendment of Section 726 had there been any distinction between chattel and real mortgages in this matter of deficiency judgment after foreclosure. That right was always recognized by the courts; but it was introduced into the statutes in 1860. (See 18 Cal.Jur. sec. 724, page 491.) It came to us as a part of the recognized practice in equity. (Rollins v. Forbes, 10 Cal. 299, 300; Rowland v. Leiby, 14 Cal. [156], 157; Cormerais v. Genella, 22 Cal. 116, 127.) It was definitely held in the Hatch case that the provisions of Section 580a, Code of Civil Procedure, do not operate to satisfy the principal obligation, and the court in Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 185 [124 P.2d 353, 355], says: 'But our statutes do not even purport to wipe out the debt, but only to apply in the contingency that a deficiency judgment is sought,' and cites the Hatch case to that effect. In view of the situation thus prevailing on real estate loans, it would be quite unreasonable to suppose that the Legislature intended, without using express language such as that incorporated in 580b and 580d, to abolish entirely personal liability upon a chattel mortgage note or to eliminate the deficiency judgment upon chattel mortgage foreclosure while retaining it in a limited way with respect to real estate mortgages and trust deeds.

[11] "It seems to be the law of this state that a manifest legislative inadvertence in amending a statute may be treated as such and the statute construed as if the inadvertence had not occurred—as if the provision of the statute had not been mistakenly omitted in the process of amendment. (See Pond v. Maddox, 38 Cal. 572, 574; Opinion of Attorney General in 19 [Op. Atty. Gen.] 107; City of Los Angeles v. Lelande, 11 Cal.App. 302, 306 [104 P. 717]; 23 Cal.Jur. sec. 116, page 738.) This appears to be contrary to the general rule (50 Am.Jur. sec. 234, p. 221; 82 C.J.S. [Statutes], § 328, page 635; 59 C.J. sec. 576, p. 974.)

[12, 13] "Though we reach the same result, the following process of reasoning seems to this court more satisfying. We recognize the fact of inadvertence in omitting from the statute the provision for deficiency judgment on chattel mortgage foreclosure, but that inadvertence spells lack of intent to abolish the right or the time-honored remedy. The practice has always been to adjudicate the personal liability for the debt, order a sale of the security to satisfy the same and entry of deficiency judgment in the event the proceeds of sale were insufficient. It is still necessary under Section 726 to foreclose in order to realize upon a chattel mortgage, and the first paragraph of that section continues to recognize the propriety of adjudication of the amount of personal liability and sale of the property to satisfy the same.

"Section 726, Code of Civil Procedure, reads in part: 'There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct

Civil Procedure, sections 725a, 726, 580a, 580b, 337; Civil Code, sections 2924, 2924b, 2924c, 2924½. Most of these sections were re-enacted in 1935 to remove any ambiguity created by the language of Civil Code, § 2924½. See note following section 580a in Deering's 1953 Code of Civil Procedure."

"3. Section 726 was amended in 1933 and again in 1937. The 1933 amendment implied a limitation of deficiency judgments to real estate mortgages and trust deeds, and the 1937 amendment, which revamped the procedure for obtaining a deficiency, used clearer language in this respect. The inadvertence above mentioned pervades both enactments."

"4. The opinion in Brown v. Jensen, 41 Cal. 2d 193, says at page 195 [259 P.2d 425, at page 426] that one of the conditions prescribed by Section 726 'is that any deficiency judgment is limited to the difference between the fair market value of the property and the amount for which the property was sold', which appears to be an inadvertence on the part of the court."

the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.'

[14] "This paragraph was not substantially changed in the process of 1933 or subsequent amendments[5] and there is tacit in it a recognition of continued liability for any deficiency after sale. The amendments of 1933 and 1937 were obviously intended merely to limit the amount of the deficiency judgment in the case of a real estate mortgage or trust deed. True, the third paragraph as it now stands specifically authorizes a deficiency in such foreclosures unless waived but the history of the statute shows that the purpose was limitation of amount of deficiency and not the restatement of an existing right to deficiency. While this section in its first paragraph continues to recognize implicitly the continued existence of a right to deficiency judgment upon a chattel mortgage note, we are left without a statutory guide as to procedure in the event of insufficient funds from the sale of the chattels. The right to recover the debt has not been abolished. There is merely no prescribed remedy.

"Section 187, Code of Civil Procedure, fills this gap. It provides: 'When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.'

[15] "The Court finds the former practice to be the one properly applied at bar and awards judgment accordingly; that is to say, judgment in favor of the plaintiff for $5,515.84 and interest, with provision for foreclosure sale and entry of deficiency judgment in the event of insufficient proceeds of sale."

Affirmed.

MOORE, P. J., and FOX, J., concur.

"5. The words 'form of' were introduced into the first sentence of Section 726 by another 1933 amendment. For present purposes it is deemed of no consequence."

132 Cal.App.2d 171

Gus E. SWANSON, Clark C. Burgess, and Rolland B. Hawk, Plaintiffs and Respondents,

v.

Del THURBER and Katherine E. Thurber, Defendants and Appellants.

Civ. 20551.

District Court of Appeal, Second District, Division 3, California.

April 8, 1955.

Brokers' action to recover from vendors commission allegedly due under brokers' contract to find purchaser for market. Vendors cross-complained against brokers and purchasers. The Superior Court, Los Angeles County, Joseph Maltby, J., dismissed cross-complaint as to purchasers and granted judgment for brokers on complaint. Vendors appealed. The District Court of Appeal, Shinn, P. J., held that where brokers' contract provided that they would receive 5% commission if sale was completed, but only one-half of any deposit forfeited if purchaser, without good cause, failed to complete purchase, liability of vendors to brokers could not be determined in absence of finding as to who was responsible for failure of consummation of sale, and parties should be permitted to amend pleadings for trial of that issue.

Judgment reversed.

1. Brokers ⇐64(2)

Where brokers' contract provided they would receive 5% commission if sale of market was completed, but only one-half of any deposit forfeited if purchaser, without good cause, failed to complete purchase, liability of vendors to brokers was limited to one-half deposit forfeited if purchasers without good cause failed to complete purchase.

2. Vendors and Purchasers ⇐168

Purchasers who had signed contract for purchase of realty had duty to deposit or offer to deposit in escrow everything that was required of them by agreement. West's Ann.Civ.Code, § 1439.

3. Brokers ⇐63(1)

Where brokers' contract provided they would receive 5% commission if sale of realty was completed, but only one-half of any deposit forfeited if purchaser without good cause failed to complete purchase, if purchase failed of consummation because of failure or refusal of vendors to consummate it, brokers would have been entitled to amount of commission they would have earned if sale had been completed.

4. Brokers ⇐63(2)

Even though a broker's contract provides that his commission is payable only when the transaction is actually completed, if the transaction fails of consummation solely because of vendor, broker is nevertheless entitled to commission, and condition upon which payment was made contingent is excused.

5. Brokers ⇐61(1)

In the absence of an agreement to the contrary, a broker's right to commissions for procuring a purchaser is not affected by the fact that the contemplated transaction fails of completion because the principal is not the owner of the property or because his title is defective.

6. Brokers ⇐84(2)

In brokers' action to recover from vendors commissions allegedly due under contract providing that brokers would receive 5% commission if sale of market was completed, but only one-half of any deposit forfeited if purchaser without good cause failed to complete purchase, brokers were required to prove that failure to complete purchase was not due to default of purchasers.

7. Brokers ⇐60

Where brokers' contract provided that brokers would receive 5% commission if sale of market was completed, but only one-half of any deposit forfeited if purchaser, without good cause, failed to complete purchase, mutual rescission of escrow instructions and contract of sale by vendors and purchasers, standing alone, would not defeat brokers' right to commission, as brokers were otherwise entitled to commission of 5% unless purchasers defaulted.

8. Evidence ⇐445(6)

In brokers' action, on contract which provided that brokers would recover 5% commission if sale was completed, but only one-half of any deposit forfeited if purchaser without good cause failed to complete purchase, court erred in excluding evidence of oral contract between a vendor and a broker, prior to contract of sale, that no commission was to be paid unless the sale was consummated.

9. Evidence ⇐442(6)

In brokers' action to recover commissions allegedly due under brokers' contract, where written escrow agreement called for delivery of notes in payment of commission into escrow, court erred in excluding evidence that a vendor and a broker agreed that notes would not be given unless the escrow was completed, as agreement for placing notes in escrow did not cover contingency that escrow might not be closed, and this uncertainty rendered admissible evidence of any oral agreement pertaining to that matter.

10. Brokers ⇐85(1)

In brokers' action to recover commissions allegedly due for sale of market, court erred in excluding vendors' evidence as to agreement with purchasers for waiver of matters affecting title.

11. Vendor and Purchaser ⇐50, 85

Contract of sale and escrow instructions entered into by vendors and purchas-

ers should be read together, unless the parties understood that the escrow instruction superseded contract of sale, but signing of escrow instructions did not, as a matter of law, abrogate contract of sale, and it was a question of fact whether parties intended contract to remain in effect.

12. Vendor and Purchaser ⇐141

If vendors' title to market was defective, and purchasers were not willing to accept it, purchasers had duty to point out defects in title, where contract gave vendors right to perfect title within a reasonable time.

13. Brokers ⇐85(1)

In brokers' action to recover commissions allegedly due for sale of market, vendors' evidence as to conversation between a vendor and a broker should have been admitted under allegations of vendors' cross-complaint of mutual mistake and mistake of a vendor known to and taken advantage of by broker regarding omission from brokers' agreement of provision that no commission would be payable unless purchasers consummated purchase.

14. Brokers ⇐64(2)

When a broker sues on a contract that provides for a commission to be paid out of deposit money in contingency that intending purchaser may contract to buy property and thereafter fail or refuse to complete his purchase, because of fault of purchaser, and no money was deposited, broker is entitled to nothing.

15. Brokers ⇐82(3)

In brokers' action to recover commissions allegedly due for sale of market, where necessary issues were not decided, parties would be permitted to amend their pleadings for trial of issues.

16. Contracts ⇐346(11)

A plaintiff who has been prevented from performing his contract may not recover under an allegation that he has fully performed.

17. Estoppel ⇐110

A defendant may not rely on a defense of estoppel without pleading it.

David A. Fall, San Pedro, for appellants.

Ball, Hunt & Hart, Long Beach, for respondents.

SHINN, Presiding Justice.

This is an appeal by Del Thurber and Katherine E. Thurber from a judgment in favor of Gus E. Swanson, Clark C. Burgess and Rolland B. Hawk for $17,500 claimed as a real estate broker's commission.

The property involved was about six acres in the County of Los Angeles which was known as the County Fair Market; the controversy arose out of a proposed purchase of the property by Ernest E. and Louise E. Belcher for $350,000.

It was alleged in the complaint that on February 28, 1953, defendants employed plaintiffs from that date to April 1, 1953, to find a purchaser for the property for the sum of $350,000 "for which plaintiffs would be paid by defendants 5% of the sale price, or $17,500.00, as their compensation and commission"; that pursuant to their employment plaintiffs negotiated the sale of the property to Belcher and wife upon terms and conditions required by defendants and that the proposed purchasers were willing, ready and able to complete the purchase; that plaintiffs have fully performed their services but have been paid nothing. A second cause of action was for $17,500 for services rendered as real estate brokers. It was alleged in the complaint that a copy of the employment agreement was attached to the complaint marked Exhibit "A". There is a copy of a written contract attached to the complaint marked Exhibit "A" but it is not the contract alleged. However, we find in the exhibits a written employment of the brokers which corresponds to the agreement alleged. It was signed by Del Thurber, addressed to plaintiffs, and it appointed plaintiffs Thurbers' agent to and including April 1, 1953, to sell the property for $350,000 on terms the seller might accept. It was a promise to pay plaintiffs 5 per cent of the selling price if the property was sold or exchanged while the employment was in force or if sold within 90 days thereafter

to anyone with whom the plaintiffs had negotiated, but it contained this additional provision: "In case deposit is forfeited, one-half of same shall be retained by or paid to said agent, and one-half to the owner." This employment agreement was accepted in writing by Rolland B. Hawk on behalf of plaintiffs. Following the word "terms" in the writing is the word "submit" and after the word "loan" are listed a first trust deed of $72,000 and a second trust deed of $97,000.

March 2 a writing labeled "Deposit Receipt" was signed by which Ernest E. Belcher agreed to purchase the property and defendants agreed to sell it "upon the terms and conditions herein stated." The writing contained a promise signed by Del Thurber reading as follows: "I agree to sell the above described property upon the terms and conditions herein stated and agree to pay said broker as commission the sum of 5% of total sales price Dollars, or one-half of the amounts paid hereon should same be forfeited by purchaser. One-half of said amount, however, shall not exceed said commission." This writing was in the form of a receipt for money received in the sum of "No and 00/100 Dollars" and it was signed by Hawk on behalf of plaintiffs. The terms stated in this writing listed the first and second trust deeds and called for a third trust deed to be executed by the buyer in the amount of the difference between the existing encumbrances and the sale price of $350,000, or approximately $180,000. On the third trust deed only interest at 6 per cent was to be paid during the three years commencing January 1, 1954, then $3,000 plus interest per year for three years, then $10,000 plus interest per year until paid in full. The writing contained the following provision: "Should the title to said property prove defective or unmerchantable and should the seller be unable to perfect same within a reasonable time from the date hereof all amounts paid hereon shall be returned to the purchaser unless the purchaser elects to accept the title in said condition." March 4, 1953, the parties went to escrow and they signed instructions which changed somewhat the payments on the purchase money trust deed but generally conformed to the earlier agreement and called for completion of the escrow on or before April 4, 1953. The escrow instructions read in part as follows: "If the conditions of this escrow are not complied with on or before April 4, 1953, you are to complete the same as soon as possible thereafter unless, subsequent to said date and prior to the recording of any document herein, the party not in default makes written demand on you for the return of the money and/or documents deposited by him." The instructions over the signatures of the sellers also contained the following: "From the money due me from this escrow, or from money which I will deposit, you are authorized to pay (a) all encumbrances necessary to enable you to obtain the Policy of Title Insurance above demanded; (b) one-half your escrow fee; (c) $198.00 for Internal Revenue Stamps; (d) costs of Policy of Title Insurance, and of drawing all documents executed by me, and recording documents in my favor, and (e) a commission of $17,500.00 to Swanson-Burgess Co. (Rolland Hawk)—72798 Pay remainder by check to Dell Thurber. * * *"

The sale was not consummated. It was shown by documents introduced by plaintiffs that on April 17 Belcher and wife withdrew from the escrow and demanded the return of all moneys and documents which they had deposited therein and on May 29 the Thurbers notified the escrow holder that they cancelled the escrow by letter stating: "As Mr. Belcher cancelled the escrow & failed to fulfill his end of the transaction please bill him for all expense." There was no evidence that any money was deposited in escrow by the Belchers although they agreed to pay for preparation of documents, recording fees and one-half of escrow expense, and no evidence that they deposited the note and trust deed.

It may be noted here that certain additional writings bearing date of March 4, 1953, were placed in escrow. There was a writing signed by defendants, approved in writing by plaintiffs, stating that certain promissory notes would be handed to the escrow holder "in lieu of $17,500.00 to cover commission in full due Swanson-Burgess

Co." The writing listed one promissory note for $7,875 bearing interest from date payable January 1, 1960 and a note for $9,625 bearing interest payable $100 or more each month beginning May 15, 1953, the payments to be increased to $200 per month December 15, 1953, the entire balance to become due February 1, 1960. The promissory notes as described were handed in by the Thurbers with the instruction but were not signed. Under date of March 4, on the back of the original listing agreement, Rolland B. Hawk, as broker, wrote and signed the following: "It is understood that if the sale to Ernest Belcher, now in escrow at the F & M Bank in Long Beach, is not consum[m]ated, this exclusive listing will be void and not apply to any purchaser other than Mr. Belcher." In addition to denials, the answer of the defendants alleged, as affirmative defenses, an oral agreement that commissions were to be paid only if a sale should be consummated and then only out of the purchase price which was to be paid January 1, 1960, and it was alleged that the action was prematurely brought. Defendants also filed a cross-complaint against plaintiffs and the Belchers in which they alleged that prior to their employment by plaintiffs the brokers represented that they could produce a buyer who could pay down no money but would pay for the property in about five years, and that it was agreed that if such a sale were made the commission would be paid out of the purchase price as the same was paid; thereafter, relying on said oral agreement, defendants signed the deposit receipt of March 2. It was alleged that the oral agreement for payment of a commission was omitted from the writing through the mutual mistake of the parties and also through the mistake of Thurber known to and taken advantage of by Hawk. Additional causes of action of the cross-complaint alleged the agreement of purchase, breach of the agreement, and purported to allege damages sustained through the failure of the Belchers to consummate the purchase. These causes of action were dismissed as to the Belchers by the court, presumably after the sustaining of a demurrer.

The court found the allegations of the complaint to be true and the affirmative defenses and the allegations of the cross-complaint to be untrue. In substance the findings were that the writings expressed the entire agreement of the parties and that plaintiffs had rendered services which entitled them to recover a commission. Substantially the court found there was no agreement to accept promissory notes as payment of a commission.

A copy of the deposit receipt was attached to the complaint as Exhibit A. It was not an unconditional promise to pay the brokers $17,500 for producing a purchaser ready, able and willing to purchase or one with whom defendants would enter into a contract of sale. There was an alternative promise to pay one-half of the amounts deposited and forfeited by a purchaser not exceeding a 5 per cent commission. It was not alleged in the complaint whether a sale was consummated and, of course, it was not alleged that the sale fell through as a result of the default of either the sellers or the purchasers. The complaint was defective in this particular in that it did not allege that the sale was not consummated and that the failure of consummation was not due to the fault of the buyers. However, no point was made of this defect at the trial nor is it made now. The question as to responsibility for failure of consummation of the sale was not tried and no finding was made thereon.

[1, 2] If the Belchers refused or without good excuse failed to complete the purchase, plaintiffs were not entitled to recover a commission. They would have been limited by their employment contract to one-half of any deposit that was forfeited not exceeding 5 per cent of the purchase price. In Kline v. Johnson, 121 Cal.App. 2d Supp. 851, 263 P.2d 494, brokers sued for a commission under an agreement substantially the same as the one before us. A contract of sale was entered into; no money was deposited; the purchasers refused to complete the purchase and a sale was not consummated. A judgment in favor of plaintiffs was reversed. It was held that the brokers were entitled to nothing

for the reason there was no deposit to be divided. We are thoroughly in accord with that holding. Although, as alleged in the complaint, the Belchers may have been ready, able and willing to make the purchase when they signed the agreement it would not follow that they did not thereafter fail or refuse to perform their agreement. They had a duty to deposit or offer to deposit in escrow everything that was required of them. § 1439, Civ.Code. The provision with respect to their possible default presupposed that they would have made an agreement to purchase and thereafter failed to go through with it.

[3–5] Upon the other hand, in the absence of an agreement to the contrary, if the purchase failed of consummation because of the unexcused failure or refusal of the defendants to consummate it, the plaintiffs would have established their claim to the amount of commission they would have earned if the sale had been consummated. Even if the commission was only to be paid out of the purchase money as it was received by defendants, and there was no agreement that it would be paid only upon a consummated sale, the plaintiffs would still have been entitled to recover since defendants could not by a breach of their agreement to sell defeat the rights of the brokers. The law is stated in 9 Cal.Jur.2d, pp. 272–273, as follows: "Even though a broker's contract provides that his commission is payable only when the transaction is actually completed, if the transaction fails of consummation solely through the fault of the vendor, the broker is nevertheless entitled to his commission. Under such circumstances, the condition upon which payment was made contingent is excused. * * * In the absence of an agreement to the contrary, a broker's right to commissions for procuring a purchaser is not affected by the fact that the contemplated transaction fails of completion because the principal is not the owner of the property, or because his title is defective." The text is supported by the cases cited thereunder, namely, Realty Bonds etc., Co. v. Point Richmond etc., Co., 171 Cal. 238, 152 P. 433; Stanton v. Carnahan, 15 Cal.App. 527, 115 P. 339; Zimmer v. Edinger, 91 Cal.App. 435, 267 P. 110. And see Ratzlaff v. Trainor-Desmond Co., 41 Cal.App. 586, 183 P. 269.

Of course, if plaintiffs had been employed under an unconditional contract for commission in case they sold the property they would have earned a commission when defendants entered into a contract of sale with the Belchers. But as we have seen there was the alternative agreement on their part to accept one-half of any deposit that might be forfeited by a purchaser; they would not have been entitled to a commission if the Belchers wrongfully withdrew from the escrow. There was no evidence that they had a reason for withdrawing other than the fact that the escrow was not completed by April 4. The question of their right to withdraw was not tried or decided. Neither was it determined that the Thurbers refused or were unable to furnish a title satisfactory to the buyers.

[6] Plaintiffs introduced in evidence a title report showing the existing trust deeds described in the instructions, certain leases, and pendency of an action against the holder of the second trust deed. The report also showed small liens existing but it was shown by plaintiffs' evidence that the Thurbers had caused these to be released. As to the pending action, it appeared that Thurber had been indemnified when he purchased the property. Defendants offered to prove a conversation had with Belcher and Hawk with relation to an indemnity agreement to be given to the Belchers but plaintiffs' objection to this evidence was sustained. Neither Mr. nor Mrs. Belcher testified. They did, however, request, through the escrow, that a payment due on the second trust deed June 1, 1953 be extended to January 1, 1954. Defendants' attempt to prove that this extension was obtained was objected to and the objection was sustained. It does not appear in the evidence that the Belchers made any objection to the condition of the title or that they were unsatisfied therewith. Neither the buyers nor the sellers made any demands upon the others for performance. As we have said, it was incumbent upon plaintiffs to prove that the failure to close the escrow

by April 4 was not due to the default of the buyers or, in other words, that the escrow could have been completed had the sellers complied with the conditions applicable to them. The evidence did not establish that fact.

[7] Although the evidence failed to show that the Belchers complied with their undertakings in the escrow, we shall assume as a fact most favorable to plaintiffs that there was a mutual rescission of the escrow instructions and the contract of sale, inasmuch as Thurber did not object to a cancellation by Belcher and himself gave notice of cancellation. However, mutual rescission, standing alone, would not defeat plaintiffs' right to a commission, inasmuch as they were otherwise entitled to a commission of 5 per cent unless the purchaser defaulted.

[8] This brings us to defendants' contention that the court erred in numerous instances in which evidence was excluded. Defendants offered to prove conversations between Thurber and Hawk, prior to the contract of sale, to the effect that no commission was to be paid unless a sale was consummated. They offered evidence of such an agreement at the time they were in the escrow office and the instructions were being prepared and also evidence that when the agreement was made to give the notes there was an agreement between Thurber and plaintiffs that the notes would be signed and delivered only in case the Belchers went through with their purchase. Plaintiffs' objections to all this offered testimony were sustained. We think these rulings were in error. As we have pointed out, plaintiffs had no unconditional contract for a commission for finding a buyer and they were entitled to nothing if they produced a buyer who paid nothing on account and defaulted in his agreement to purchase. To be sure Thurber agreed in the escrow instructions to deposit sufficient money to pay a commission of $17,500 but at the same time this was nullified by the agreement that notes would be given for the commission.

[9] Defendants offered to prove that while the escrow papers were being prepared Mr. Thurber had conversations with Mr. Hawk respecting the issuance of notes in payment of a commission and that it was agreed that the notes would not be given unless the escrow was completed. The court excluded the offered evidence. We think it should have been received. The written agreement called for delivery of the notes into escrow. This meant that they would not be delivered to plaintiffs unless the escrow was completed. Moreover, the notes remained payable as payments on the purchase money trust deed would be received by the sellers. These circumstances were to be considered with the further fact that no money whatever would be received by the Thurbers other than payments to be made on the trust deed. The evidence as a whole left the understanding of the parties uncertain with respect to the Thurbers' liability for a commission in case the Belcher sale fell through and we think the court should have received evidence of the negotiations and conversations as an aid in the interpretation of the agreements between plaintiffs and defendants and especially the agreement for the giving of the notes which modified the previous agreements. The agreement for placing the notes in escrow, while it was certain with respect to their delivery if the escrow was closed, did not purport to cover the contingency that the escrow would not be closed. This uncertainty rendered admissible evidence of any oral agreement pertaining to that matter. Williams v. Ashurst Oil, etc., Co., 144 Cal. 619, 78 P. 28; Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 41 P. 876; Savings Bank of Southern Cal. v. Asbury, 117 Cal. 96, 103, 48 P. 1081; Whittier v. Home Savings Bank, 161 Cal. 311, 119 P. 92; Wolters v. King, 119 Cal. 172, 51 P. 35; Lindsay v. Mack, 5 Cal.App.2d 491, 43 P.2d 350; Gardiner v. Burket, 3 Cal.App.2d 666, 40 P.2d 279. Moreover, if, as we assume for the purposes of our opinion, the Thurbers assented to cancellation of the escrow, and if they did so in reliance upon an agreement with plaintiffs that no commission would be payable under such circumstances, plaintiffs would be estopped to repudiate their agreement.

[10] There is another matter with respect to which defendants should have been permitted any available evidence of an agreement with the Belchers for the waiver of matters affecting the title as shown on the title report. We refer especially to conversations respecting the indemnity agreement which had been given Thurber when he purchased the property. It appears to have been the intention of defendants to prove an agreement with the Belchers that they would accept such an indemnity agreement. The evidence may have had a direct bearing upon the question of responsibility for failure to complete the sale inasmuch as there was no evidence that the Belchers made any objection to the state of the title.

[11, 12] We refer now to the provision of the deposit receipt that if the title was defective and was not perfected within a reasonable time any deposit should be refunded unless the purchaser was nevertheless willing to accept the defective title. Manifestly the contract of sale and the escrow instructions should be read together unless the parties understood that the former was superseded by the latter. Signing the escrow instructions did not, as a matter of law, abrogate the earlier contract. Womble v. Wilbur, 3 Cal.App. 527, 534, 86 P. 921. It was a question of fact whether the parties intended the contract to remain in effect. If so, another question arises. If the title was defective and the buyer was not willing to accept it, did he have a duty to point out the defects, and did the seller then have a reasonable time in which to correct them. If the parties so intended, the buyer could not refrain from making his objections until the time had expired for closing the escrow. It is the part of common sense and fair dealing that a buyer should announce any objection he may have to the state of the title, and he has a duty to do so if the contract gives the seller the right to perfect it within a given time, or a reasonable time. This is also the law. Easton v. Montgomery, 90 Cal. 307, 27 P. 280.

[13] Much as we dislike to prolong this opinion we must add that all the offered evidence as to conversations between Thurber and Hawk should have been admitted under the allegations of the cross-complaint of mutual mistake and mistake of Thurber known to and taken advantage of by Hawk respecting the alleged omission from the agreements of a provision that no commission would be payable unless the Belchers acquired the property.

Defendants contend that the writing that provided for termination of the listing if the sale to the Belchers was not concluded also in that event terminated their liability for a commission. We find no merit in this contention.

[14] The contracts respecting the payment of a commission are in a form that is in common use in that they provide for a commission to be paid in the contingency that an intending buyer may contract to buy the property and thereafter fail or refuse to complete his purchase. An affirmance of the present judgment would stand as a precedent for the decision of similar cases without a trial of the issues upon which liability depends, and would invite much confusion. When a broker sues on such a contract the question necessarily arises whether the sale fell through because of the fault of the sellers or the buyers. If the latter is at fault the law is settled by the case of Kline v. Johnson, supra. If the seller is at fault the case is governed by the rule previously stated that the principal cannot defeat the claim of the broker by refusing to go through with the sale either by disposing of the property or otherwise wrongfully preventing a sale.

[15–17] The judgment must be reversed. The parties should be permitted to amend their pleadings for the trial of the issues we have discussed. A plaintiff who has been prevented from performing his contract may not recover under an allegation that he has fully performed. Daley v. Russ, 86 Cal. 114, 24 P. 867; Herdal v. Sheehy, 173 Cal. 163, 159 P. 422; 12 Cal. Jur. 2, p. 450, et seq. A defendant may not rely on a defense of estoppel without pleading it.

Notwithstanding our assumption for the purposes of this opinion that there was a mutual abandonment of the contract of sale,

it will be for the trial court to decide whether the failure of consummation of the sale was due to the default of the Belchers or the Thurbers. The question may arise as to the applicability of the provision of the deposit receipt which gave the purchaser the right to withdraw if the title was imperfect with respect to matters that were not waived by the purchaser. The question will be whether the parties understood from this provision that the sellers would have a reasonable time to perfect the title after the buyers should make known their objections and their unwillingness to accept a title that was imperfect to the extent of being unmarketable.

The judgment is reversed.

PARKER, WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d Supp. 875

J. G. OPPENHEIMER, Plaintiff and Appellant,

v.

Julius DEUTCHMAN et al., Defendants and Respondents.

Civ. A. 8638.

Appellate Department, Superior Court, Los Angeles County, California.

March 3, 1955.

Rehearing Denied March 25, 1955.

Action wherein change of venue to another municipal court was granted. Plaintiff appealed, and pending appeal, the case was transferred. A demurrer to complaint was sustained and plaintiff failed to amend within time set by court. The Municipal Court of Beverly Hills Judicial District, Henry H. Draeger, J., gave judgment of dismissal with prejudice and order taxing costs against plaintiffs. Plaintiff appealed. The Appellate Department of Superior Court, Los Angeles County, Swain, J., held that where no supersedeas writ had been filed pending appeal from order for change of venue from one municipal court to another, the proceedings were not stayed and the municipal court to which cause was transferred had jurisdiction to hear demurrer to complaint and render judgment of dismissal.

Judgment modified and affirmed as modified. Order taxing costs affirmed.

1. Appeal and Error ⇐460(1)

Whether a supersedeas or stay of proceedings is effected by an appeal without more is largely dependent on statute.

2. Courts ⇐190(5)

Stay of proceedings pending appeal from an order granting change of venue from one municipal court to another is not authorized by statute governing appeals from municipal court, but may be obtained by writ of supersedeas under the rules of appeal from municipal courts in civil cases. West's Ann.Code Civ.Proc. § 985; Rules on Appeal from Municipal Courts—Civil Cases, rule 19.

3. Appeal and Error ⇐460(1)

Appeal from the Superior Court stays all judgments appealed from except those in which a stay bond is required. West's Ann.Code Civ.Proc. § 949.

4. Courts ⇐190(5)

Where no supersedeas writ was filed in municipal court pending appeal from order of change of venue to another municipal court, the court to which cause was transferred had jurisdiction to hear demurrer to the complaint. West's Ann.Code Civ.Proc. § 985; Rules on Appeal from Municipal Courts—Civil Cases, rule 19.

5. Motions ⇐19

Where a motion is required to be made for an order in a cause whereby the rights of an adverse litigant may be affected, it must be upon notice to such party.

6. Dismissal and Nonsuit ⇐51

The power of the court to dismiss an action is not limited to cases authorized by statute.

7. Pleading ⇐218(4)

Notice of motion to dismiss is not required after a demurrer has been sustained without leave to amend, as such judgment of dismissal does not affect right of adverse litigant because losing party has already had his hearing. West's Ann.Code Civ. Proc. § 581, subd. 3.

8. Pleading ⇐218(4)

Statute which permits court to dismiss an action after demurrer to complaint has been sustained and plaintiff has failed to amend complaint within time allowed by court and defendant moves for such dismissal does not require notice of motion, but court cannot dismiss without request of a party. West's Ann.Code Civ.Proc. § 581, subd. 3.

9. Pleading ⇐218(4)

Where court sustained demurrer to complaint and dismissed action after plaintiff failed to amend his complaint, dismissal was proper, but dismissal should not have been with prejudice, since judgment was not on the merits. West's Ann.Code Civ. Proc. § 581, subd. 3.

10. Costs ⇐149

Defendant had right to pay fees for transfer of case from municipal court of one judicial district to that of another on change of venue and was entitled to reimbursement for notary fees on affidavits in support of motion for change of venue, and affidavit on memorandum of costs, transmittal fee, and appearance fee, as costs.

J. G. Oppenheimer, in pro. per.

Edward M. Raskin and Rubin M. Lazar, Los Angeles, for respondents.

SWAIN, Judge.

The plaintiff appeals from a judgment of dismissal with prejudice and from the order taxing costs.

The action was originally brought in the Municipal Court of San Antonio Judicial District. A motion for change of venue to the Municipal Court of Beverly Hills Judicial District was granted. Plaintiff appealed from that order. Pending that appeal, the case was transferred, and the defendant's demurrer to the complaint was sustained with 10 days to amend. The plaintiff, though duly notified of that order, did not amend the complaint, and, on ex parte motion of the defendant, the action was dismissed with prejudice.

The appellant contends: 1. That the Municipal Court of Beverly Hills Judicial District had no jurisdiction to proceed, pending the appeal. (Note. After the demurrer was sustained, the order for change of venue was affirmed. (Civ.A. 8314).) 2. That appellant was entitled to notice of the motion for judgment. 3. It was error to dismiss with prejudice. 4. That the court erred in sustaining the demurrer to the complaint. 5. It was error to deny motion to retax costs.

I.

Taking an appeal from an order of a municipal court granting a change of venue does not of itself stay proceedings in the court to which the case was transferred.

[1] The modern rule is that the matter of stay of judgments, etc., when an appeal is taken, is regulated by statute. 4 C.J.S., Appeal and Error, § 626, p.1108: "Whether a supersedeas or stay of proceedings is effected by an appeal or writ of error without more is largely dependent on the statutes of the particular jurisdiction." 3 Am.Jur. 196: "The general rule in the various jurisdictions in this country is that the writ of error or appeal under modern statutes, which is in effect an error proceeding, does not of itself operate as a supersedeas. This matter is now governed by statute in most jurisdictions, which authorizes the supersedeas upon certain conditions."

Stays on appeal from superior courts are governed by C.C.P. § 949 which lays down the general rule, "* * * the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from." That section also lists certain exceptions to this general rule, one of which is an appeal from an order granting a change of venue, which may be stayed only by a writ of supersedeas. This section does not apply to appeals from municipal courts. C.C.P. § 959.

[2] Stays on appeal from municipal courts are governed by C.C.P. § 985 which

provides: "If a stay of execution is desired on any appeal from a municipal court, an undertaking must be filed on the part of the appellant with two or more sureties, for the sums and containing the conditions hereinafter stated, to wit." Then follows a list of four kinds of appeals in which a stay bond may be filed; none of these four includes an appeal from an order granting a change of venue. Such a stay may be obtained by a writ of supersedeas, 3 Cal.Jur. 2d p. 733, obtained under Rule 19 of Rules on Appeal from Municipal Courts in Civil Cases.

[3] There is this fundamental difference between stays on appeal from superior courts and stays on appeal from municipal courts. Under the language of C.C.P. § 949 an appeal from the superior court stays all judgments, etc. appealed from except those for which a stay bond is required; under C.C.P. § 985, an appeal from the municipal court does not stay any judgment, etc. unless a stay bond is provided for and filed.

[4] There having been no supersedeas pending the appeal from the order for change of venue, the Municipal Court of Beverly Hills Judicial District had jurisdiction to hear the demurrer to the complaint.

II.

[5–8] After failing to amend his complaint within the time allowed by law, the plaintiff was not entitled to notice of the motion to dismiss. C.C.P. § 581(3) provides that the court may dismiss an action "when, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court, and the defendant moves for such dismissal." This part just quoted was added to C.C.P. § 581 (3) in 1933. The first part of the foregoing was taken from C.C.P. § 890(3) which applied only to justice courts. The words "and the defendant moves for such dismissal" were new. Prior to that time no notice of motion to dismiss was necessary after failure to amend within the time allowed. Saddlemire v. Stockton Sav. & Loan Soc., 1904, 144 Cal. 650, 655, 656, 79 P. 381. The general rule as to when notice is required is stated in 18 Cal.Jur. 651. "Aside from certain motions as to which notice is specifically required, 'the codes do not specify the motions which may be heard only on notice, but leave the courts to determine whether each motion requires or does not require notice.'" Citing Arata v. Tellurium G. & S. Min. Co., 1884, 65 Cal. 340, 4 P. 195, 4 P. 344. "It is held that where a motion is required to be made for an order in a cause whereby the right of an adverse litigant may be affected, it must be upon notice to such party * * *." Citing Bohn v. Bohn, 1913, 164 Cal. 532, 531, 129 P. 981. Of course, the power of a court to dismiss an action is not limited to cases authorized by statute, Cunha v. Anglo Calif. Nat. Bank, 1939, 34 Cal.App.2d 383, 388, 93 P.2d 572. But it is inescapable that if a dismissal, after failure to amend within the time allowed by law, had "affected the right of an adverse litigant," a notice of motion to dismiss would have been required prior to 1933. Also, notice of motion to dismiss is not required after a demurrer has been sustained without leave to amend. Berri v. Superior Court, 1955, 43 Cal.2d 856, 279 P. 2d 8. The judgment of dismissal in such cases does not affect the right of adverse litigants because the losing party has already had his hearing. The statute itself, C.C.P. § 581(3), does not require notice. The words "on motion" mean that the court cannot dismiss the action without the request of a party.

III.

[9] Although the court properly dismissed the action, it should not have done it *with prejudice*. Matteson v. Klump, 1929, 100 Cal.App. 64, 65, 279 P. 669.

IV.

The special demurrer was properly sustained. Further elaboration of this would be of no assistance to the parties or the profession.

V.

[10] The plaintiff objected to the following items of cost claimed by the defendants: two affidavits (apparently notary fees) in support of motion for change of venue, the affidavit on the memorandum of

costs, the transmittal fee ($1.00) and the appearance fee in Beverly Hills Judicial District ($6.00). The defendant had the right to pay the fees for transfer to the Beverly Hills Court. Matmor Olive Co. v. Du Bois, 1944, 65 Cal.App.2d 467, 471, 150 P.2d 816. The objection to the notary fees was frivolous.

The judgment must be modified by striking therefrom the words "with prejudice." As thus modified, the judgment and the order taxing costs are affirmed. Each party will bear his own costs on appeal.

BISHOP, Acting P. J., and PATROSSO, J., concur.

44 Cal.2d 298

Ralph N. HIGHSMITH and John C. Allen, Plaintiffs,

v.

Max LAIR, Morton D. Goldberg, Katherine Goldberg, H. Marcus, United States Treasury Department, et al., Defendants.

Morton D. GOLDBERG and Katherine Goldberg, Cross-Complainants and Respondents,

v.

Max LAIR, Lawrence M. Price, State of California, Department of Employment, and United States Treasury Department, Cross-Defendants,

United States of America, Cross-Defendant and Appellant.

UNITED STATES of America, Cross-Complainant and Appellant,

v.

Morton D. GOLDBERG and Katherine Goldberg, Cross-Defendants and Respondents.

L. A. 22941.

Supreme Court of California.
In Bank.
April 15, 1955.

Action by judgment creditor's attorneys against judgment creditor, judgment debtors, judgment debtors' assignor, and the United States for judgment declaring that attorneys had a lien on amount deposited in court by judgment debtors and collected by levies on judgments, which were against judgment creditor, and which had been assigned to, and used as set-offs by judgment debtors. Judgment debtors cross-complained against United States, and others, for money on deposit. The United States, in answer to cross-complaint asserted lien on the deposit and cross-complained against judgment debtors for personal judgment against them in such amount. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for judgment debtors and another, and United States appealed. The Supreme Court, Edmonds, J., held that, where judgment debtors did not have notice of federal tax liens against judgment creditor at time judgment debtors acquired judgments against judgment creditor, such acquired judgments were properly set off against one held by judgment creditor, and the set-offs prevented property in possession of judgment debtor to be subject to foreclosure of federal tax lien, and, therefore, United States did not have cause of action against judgment debtors for personal judgment.

Judgment affirmed.

Traynor, J., and Gibson, C. J., dissented.

Opinion, 274 P.2d 10, vacated.

1. Internal Revenue ⇐1719

United States tax lien on property belonging to taxpayer who neglects or refuses to pay tax after demand is not valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been duly filed in office of county recorder of county within which the property is situated. 26 U.S.C.A. §§ 3670, 3672(a)(1), 3692, 3710; Government Code, § 27330.

2. Internal Revenue ⇐1783

Upon non-payment of federal taxes claimed, collector may levy upon all property belonging to taxpayer, or on which federal tax lien exists, for payment of such sum due. 26 U.S.C.A. § 3692.

3. Internal Revenue ⇐1719

Although United States, through its federal tax liens, acquired an interest as coowner in indebtedness of another to taxpayer, United States' rights were not greater than those of taxpayer whose property was sought to be levied on. 26 U.S.C.A. § 3710.

4. Judgment ⇐883(1)

Judgment debtor, who, by assignment or otherwise, has become owner of judgment or claim against his judgment creditor, may go into court in which judgment against him was rendered and have his judgment offset the first judgment. West's Ann.Code Civ.Proc. § 368.

5. Judgment ⇐883(13)

Judgment debtor may set off against judgment creditor claims which were acquired after assignment of judgment to third person prior to notice to debtor of the assignment, and there is no room for exer-

cise of discretion on such question. West's Ann.Code Civ.Proc. § 368.

6. Set-Off and Counterclaim ⇐49(2)

Under Code of Civil Procedure provision that, in case of assignment of thing in action, action by assignee is without prejudice to any set-off, or other defense existing at time of, or before, notice of the assignment, actual notice is necessary to defeat the right. West's Ann.Code Civ.Proc. § 368.

7. Internal Revenue ⇐1713

Right of set-off may not be ignored in determining effect of federal tax lien on claims against taxpayer, and the state law is controlling in determination of such rights. 26 U.S.C.A. §§ 3670, 3672(a)(1), 3692, 3710; Government Code, § 27330.

8. Internal Revenue ⇐1717

Where judgment debtors did not have notice of federal tax liens against judgment creditor at time judgment debtors acquired judgments against judgment creditor, such acquired judgments were properly set off against one held by judgment creditor, and the set offs prevented the property in possession of judgment debtor to be subject to foreclosure of the federal tax lien, and, therefore, United States did not have cause of action against judgment debtors for personal judgment.

Laughlin E. Waters, U. S. Atty., and Edward R. McHale, Asst. U. S. Atty., Los Angeles, for appellant.

Maurice Rose, Los Angeles, for respondents.

EDMONDS, Justice.

The question here presented for decision concerns the scope and effect of notices of tax lien of the United States of America. The appeal is from a judgment holding that the federal government may not recover from the judgment debtors of the taxpayer the amount stated in those notices to be due for unpaid taxes, and also that it has no right to money on deposit with the municipal court.

Max Lair sued Morton and Katherine Goldberg for money assertedly due him upon a contract. After the commencement of the action, but before Lair obtained judgment for approximately $4,000, the government filed its notices of tax lien. Subsequently, and before they received actual notice of these liens, the Goldbergs acquired, in the name of H. Markus, four judgments against Lair evidencing a total indebtedness by him of about $4,200.

Levies were made by each of Lair's judgment creditors, or his assignee, upon the indebtedness evidenced by the judgment against the Goldbergs. The State also levied upon this indebtedness claiming that Lair was delinquent in the payment of taxes. The Goldbergs then deposited $4,200 with the marshal of the municipal court to the credit of Markus. This deposit was made under an agreement between the Goldbergs and Markus whereby he was to collect the amount of it from the marshal less execution fees, and pay the balance to them. In the present action the trial court found that the Goldbergs made this deposit "in order to have the record manifest their set-offs of their acquired four judgments against said judgment in favor of Max Lair." Subsequently, upon the motion of the Goldbergs, Lair's judgment against them was satisfied of record.

The deposit is being held by the marshal pursuant to an order of the court obtained by the plaintiffs in the present suit who are alleged creditors of Lair. The prayer of the complaint was for a money judgment against him, and a declaration of the priorities of liens upon, and conflicting claims to, the indebtedness represented by the judgment obtained by Lair against the Goldbergs.

By cross-complaint, the Goldbergs named the United States of America as a cross-defendant. In its answer, the government asserted that it has first liens on the property of Lair. It asked the court to enforce those liens upon any of Lair's property held by Goldberg and, in particular, upon the deposit with the marshal. By way of cross-complaint against the Goldbergs, the gov-

ernment demanded a personal judgment against them. Only the government has appealed from the judgment which declared, inter alia, that the government never acquired any interest in the debt due from the Goldbergs to Lair, denied it the right to recover any amount against the Goldbergs and ordered that its cross-complaint be dismissed.

The United States claims that after the notices of tax liens were recorded, it had an interest in the Goldberg's debt to Lair which could not be divested by any act of the debtors. The Goldbergs contend that the United States has no interest in the deposit because the government's liens could only extend to property of Lair. It is their position that the deposit was made to satisfy claims against Lair, and he had no interest in it at any time. They also argue that the government is not entitled to a personal judgment against them because of their right of set-off against Lair and they had no property belonging to him in their possession at the time of the government's demand. Another point relied upon is that, if the court erred in applying the principle of set-off, under the rule of res judicata, the government is bound by the order satisfying the judgment in Lair v. Goldberg. Finally, they insist that no personal judgment can be rendered against them under the provisions of section 3710(b) of the Internal Revenue Code, 26 U.S.C., because, at the time of the government's demand, any property of Lair which they had in their possession had been levied upon by other creditors.

[1] The Internal Revenue Code provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount, including any interest or penalty, shall be a lien in favor of the United States upon all property and rights to property, belonging to such person. 26 U.S.C.1946 Ed. § 3670. The lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been duly filed in the office of the county recorder of the county within which the property subject to the lien is situated. 26 U.S.C.1940 Ed., 1953 Pocket Supp. § 3672(a)(1); Section 27330 Cal.Govt.Code.

[2] In the event of the non-payment of the amount of taxes claimed, the collector may levy upon all property and rights to property, (with certain exceptions not here pertinent) belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due. 26 U.S.C. 1940 Ed. § 3692.

Section 3710 of the Internal Revenue Code reads: "Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process."

"Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy." 26 U.S.C. 1940 Ed. § 3710.

[3] Although by its liens the government acquired an interest as co-owner of the indebtedness of Goldberg to Lair, United States v. City of Greenville, 4 Cir., 118 F.2d 963, its rights are not greater than those of the taxpayer whose property is sought to be levied upon. United States v. Winnett, 9 Cir., 165 F.2d 149, 151; accord: Karno-Smith Co. v. Maloney, 3 Cir., 112 F.2d 690, 692; United States v. Graham, D.C., 96 F.Supp. 318, 321. " 'The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above, or extend beyond, those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in, had the principal debtor's claim been enforced against him

directly; that the liability, legal and equitable, of the garnishee to the principal debtor, is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor, and can assert only the rights of the latter.' * * * It would be most unfair that a third person, merely by reason of his interposition, whether he was a sovereign or not, should be able to change the rights inter sese between the obligor of the chose in action and his obligee, who is the objective of the levy or attachment." United States v. Bank of United States, D.C., 5 F.Supp. 942, 945.

[4–6] In California, "a judgment debtor who has, by assignment or otherwise, become the owner of a judgment or claim against his judgment creditor, may go into the court in which the judgment against him was rendered and have his judgment offset against the first judgment. * * * under section 368 of the Code of Civil Procedure[1] the debtor may set off claims against the creditor which were acquired after the assignment of the judgment to a third person but prior to notice to the debtor of the assignment. * * * '[T]here is no room for the exercise of discretion upon the question.'" Harrison v. Adams, 20 Cal. 2d 646, 649, 128 P.2d 9, 11; also see: Haskins v. Jordan, 123 Cal. 157, 55 P. 786. Actual notice is necessary to defeat this right. See: McCabe v. Grey, 20 Cal. 509. The rights acquired by the government as co-owner of the debt never were greater than those which would have been acquired by an assignee of Lair.

In United States v. Bank of Shelby, 5 Cir., 68 F.2d 538, the government brought an action for penalties against the bank for refusal to surrender $3,500, the amount of the deposit of one Toler, a delinquent taxpayer. The government had assessed Toler for income taxes in March. In June, the Collector served upon the bank a notice of lien for the taxes and a warrant of distress, claiming thereby to have levied on the deposit of Toler. Just prior to the levy, Toler, to meet the claims of creditors, borrowed $10,000 from the bank, giving a mortgage on his plantation.

When Toler was unable to settle with his creditors, he and the bank agreed that, from the proceeds of the loan, he would pay the bank $6,500, the amount due to it upon his past due unsecured notes in its favor. The remaining $3,500 was credited to his account. It was held that the bank had a clear right to offset the $3,500 against the $10,000 note. At the time of the levy, said the court, "there was * * * no property or right to property of Toler which Toler could assert and consequently nothing which the tax could take a lien on or the tax officer could rightfully demand possession of." At page 539. The fact that the $10,000 note and the $3,500 deposit both stemmed from the same transaction was discussed, but was not considered to be the controlling factor in the case.

[7] The government cites United States v. Winnett, 9 Cir., 165 F.2d 149, and United States v. Graham, D.C., 96 F.Supp. 318, as supporting its position. In the first case, the court upheld the right of set-off which Winnett obtained prior to the date the lien was claimed. The decision does not bar a right of set-off which is obtained before actual notice of tax lien, but after the lien is recorded. In the Graham case, no consideration was given to the statutes and decisions relating to rights of set-off. In that case, the lien of the federal government was upheld solely upon the basis of its rights against the taxpayer. The right of set-off may not be ignored in determining the effect of tax liens on the claims against a debtor and the state law is controlling in a determination of those rights. Karno-Smith Co. v. Maloney, 3 Cir., 112 F.2d 690, 692.

[8] The Goldbergs had no notice of the federal government's liens at the time they acquired the judgments against Lair, and those judgments were properly set-off against the one in favor of Lair. Because of those set-offs there is no property in the possession of the Goldbergs against which

1. Code of Civil Procedure section 368: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; * * *."

the tax liens may be foreclosed, and no cause of action against them for a personal judgment. This conclusion makes it unnecessary to discuss other defenses against the claims of the United States.

The judgment is affirmed.

SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

On February 8, 1950, Lair brought an action against the Goldbergs and on March 26, 1951, he secured a judgment for $4,144.22. In the meantime, on April 13, 1950 and July 26, 1950, the United States filed notices of tax liens against Lair in Los Angeles County. Thereafter the Goldbergs purchased three judgments against Lair and another claim against him that was subsequently reduced to judgment. None of these judgments were entered, however, until after the notices of the tax liens were filed. Had Lair's creditors sought to enforce their claims against Lair instead of selling them to the Goldbergs, they could not have reached Lair's claim against the Goldbergs until the tax liens had been satisfied. United States v. Security Trust & Sav. Bank, 340 U.S. 47, 50–51, 71 S.Ct. 111, 95 L.Ed. 53; United States v. Acri, 348 U.S. 211, 75 S.Ct. 239; United States v. Liverpool & London Ins. Co., 348 U.S. 215, 75 S.Ct. 247. In such case, the United States would have been free to enforce its liens against Lair's property by collecting the judgment in his favor against the Goldbergs. The question presented, therefore, is whether the Goldbergs can defeat this right of the United States by purchasing claims against Lair that but for the purchase would be subordinate to the tax liens. In my opinion, they cannot do so.

It is true that the Goldbergs did not have actual knowledge of the tax liens at the time they purchased the claims against Lair and that in the absence of federal legislation their right to set off would not be prejudiced by an assignment without notice of the judgment against them. Harrison v. Adams, 20 Cal.2d 646, 649, 128 P.2d 9; Code Civ.Proc. § 368. It bears emphasis, however, that the Goldbergs did not pay their judgment creditor without notice of the tax liens against him. Instead, they purchased claims against their creditor that were subordinate, whether they knew it or not, to the tax liens, and there is no reason why these claims should have greater value against the United States in the Goldbergs' hands than they had in the hands of the Goldbergs' assignors.

Citing Karno-Smith Co. v. Maloney, 3 Cir., 112 F.2d 690, United States v. Winnett, 9 Cir., 165 F.2d 149, United States v. Bank of Shelby, 5 Cir., 68 F.2d 538, United States v. Graham, D.C., 96 F.Supp. 318, and United States v. Bank of United States, D.C., 5 F.Supp. 942, the majority opinion holds, however, that the right to set off must be determined by state law and that the Goldbergs may not be placed in a worse position toward their creditor because the United States has intervened. The cited cases considered situations in which the right to set off arose before the tax liens were perfected or in which the delinquent taxpayer at no time held an enforcible claim against his alleged debtor. It is settled, however, that once the tax lien has been perfected it may not be displaced by operation of state law, Michigan v. United States, 317 U.S. 338, 340, 63 S.Ct. 302, 87 L.Ed. 312; United States v. City of New Britain, Conn., 347 U.S. 81, 84, 74 S.Ct. 367, 98 L.Ed 520; United States v. Snyder, 149 U.S. 210, 214, 13 S.Ct. 846, 37 L.Ed. 705, and that the interests of the United States may not be prejudiced by the assertion of subsequently acquired rights of third parties against the tax delinquent. United States v. Security Trust & Sav. Bank, 340 U.S. 47, 50–53, 71 S.Ct. 111, 95 L.Ed. 53; Glass City Bank v. United States, 326 U.S. 265, 267–268, 66 S.Ct. 108, 90 L.Ed. 56; United States v. City of Greenville, 4 Cir., 118 F.2d 963, 965; Miller v. Bank of America, N. T. & S. A., 9 Cir., 166 F.2d 415, 417; Citizen's State Bank of Barstow, Tex. v. Vidal, 10 Cir., 114 F.2d 380, 383–384; In re Dartmont Coal Co., 4 Cir., 46 F.2d 455, 457; United States v. Graham, D.C., 96 F.Supp. 318, 321, affirmed State of California v. United States, 9 Cir., 195 F.2d 530; United States v. Rosenfield, D.C., 26 F.Supp. 433, 436.

The fact that the Goldbergs did not have actual knowledge of the tax liens when they

purchased the claims against Lair does not render the enforcement of the tax liens against them inequitable. The Goldbergs' indebtedness to Lair was an asset that the United States was entitled to levy upon for the payment of taxes due. As noted above, the Goldbergs did not pay the judgment in ignorance of the tax liens but instead purchased claims against Lair. That the value of these claims was problematical was apparent from the fact that Lair's creditors were willing to sell them for approximately one third of their face value and the Goldbergs could easily have determined from an examination of the records that they were subordinate to the tax liens. Under these circumstances it cannot reasonably be said that the United States attempted to prejudice the Goldbergs' position toward their creditor by asserting its tax liens. Instead, because they failed to investigate the sources of information available to them, the Goldbergs have been permitted to succeed in defeating the enforcement of the tax liens by advancing claims that were subordinate to them.

GIBSON, C. J., concurs.

44 Cal.2d 306

ESTATE of S. P. A. SORENSEN, Deceased.

Ben H. BROWN, Public Administrator, Petitioner and Respondent,

and

The State of California, Petitioner and Respondent,

v.

Petra SORENSEN, Petitioner and Appellant.

L. A. 23131.

Supreme Court of California.
In Bank.
April 15, 1955.

Probate proceedings. The Superior Court, Los Angeles County, John Gee Clark, J., entered the order challenged on appeal. The Supreme Court, Edmonds, J., held that even though no probate or other proceeding to effect distribution of property had been commenced during five year period within which non-resident alien was required to "appear and demand" her interest, her failure to appear and demand her share of estate within time allotted would require that property escheat.

Affirmed.

Opinion, 276 P.2d 623, vacated.

Escheat ⇐4

Even though no probate or other proceeding to effect distribution of property had been commenced during five year period following death of decedent within which non-resident alien entitled to property by succession was required to "appear and demand" her interest, her failure to appear and demand her share of estate within time allotted would require that property escheat. Probate Code, § 1026.

Danielson & St. Clair, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondents.

EDMONDS, Justice.

The question here presented for decision concerns the right of the heirs of S. P. A. Sorensen, deceased, to the assets of his estate. The appeal is from a decree which determines, *inter alia*, that distribution must be made to the State of California for failure of the heirs "to appear and demand the property within five years from the date of succession" as required by section 1026 of the Probate Code.[1]

Sorensen died intestate in 1934. His only heirs were three sisters and a brother, all of whom were nonresident aliens within the meaning of the statute. About 15 years later, bank accounts in his name were

1. "A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; oth-

found which, with interest, amounted to $1,150.

Until notified of these facts by the public administrator, none of the heirs knew of either Sorensen's death or the existence of the bank accounts. A claim of interest on behalf of herself and certain other heirs was filed by Petra Sorensen, the decedent's sister and a resident of Norway. Petitions for distribution were filed by the Attorney General of California and by the Attorney General of the United States as successor to the Alien Property Custodian. Only Miss Sorensen has appealed from an order which settles the first and final account of the public administrator, determines heirship and distributes the property to the state.

It is conceded that Miss Sorensen's right of inheritance is governed by section 1026 of the Probate Code. That section fixes a period of limitation within which a nonresident alien must establish his right to succeed to the estate of a decedent or be barred from doing so. Speaking of the statutory predecessors of section 1026,[2] this court has said: "They clearly imply that upon the death of the deceased the estate vests as a conditional estate in the nonresident alien heir, subject only to the contingency that, if he fails to appear and claim the same within five years, his right ceases, and the property then vests in the state, not strictly by escheat for want of heirs, but by virtue of the effect of the statute." Estate of Pendergast, 143 Cal. 135, 140, 76 P. 962, 964; see also People ex rel. Attorney General v. Roach, 76 Cal. 294, 296, 18 P. 407; Estate of Laurence, 84 Cal.App.2d 500, 505–506, 191 P.2d 109.

Miss Sorensen does not dispute the finding that she did not "appear and demand" her interest within five years from the time of succession, but she asserts that she was excused from doing so because no probate or other proceeding to effect a distribution of the property was commenced during that period. She concedes, however, that this position is contrary to Estate of Pendergast, supra, 143 Cal. 135, 76 P. 962.

In the Pendergast case, probate of the estate was commenced some 23 years after the decedent's death. The heirs included four nonresident aliens, two of whom did not "appear and claim" the property until the initiation of the probate proceeding. Insofar as the decree distributed property to the latter two heirs, it was reversed with directions to retain their shares of it in the state treasury subject to escheat proceedings. "The provisions of the Code above quoted [former sections 672 and 1404 of the Civil Code] are clear and unambiguous," it was said, "and the two nonresident alien petitioners are embraced within their terms." 143 Cal. at page 140, 76 P. at page 964.

It is urged, however, that the Pendergast case is no longer controlling. Miss Sorensen contends that it has been impliedly overruled by Estate of Caravas, 40 Cal. 2d 33, 250 P.2d 593, and, in any event, did not give sufficient consideration to the terms "appear and demand", or "appear and claim" as the statute then read. As she construes the statute, "appear" contemplates an appearance in a legal proceeding, and "demand" implies the existence of some one who may comply with it.

Estate of Caravas was not concerned with the effect of delaying the institution of probate proceedings beyond the five-year period specified by section 1026. That decision determined the nature of the rights

erwise, his rights are barred and the property shall be disposed of as escheated property."

2. Former Civil Code, § 672: "If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title eight, Part 3, Code of Civil Procedure [relating to escheat]."

Former Civil Code, § 1404: "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

of a nonresident alien arising after the property has been distributed to the state. It was unnecessary to determine what acts by a nonresident alien, *before* the property is distributed to the state as the result of a proceeding in probate, are sufficient to satisfy the requirement that he "appear and demand" it. Section 1026, said the court, does not establish any procedure for doing so, although the requirement might be satisfied by a proceeding commenced under another statute. Certainly, application by the alien for the probate of the estate, or the institution of any other action to establish his right, would meet the requirements of section 1026.

Although the Pendergast case did not discuss the sufficiency of the acts by which an alien may appear and make claim to the property, dictum in a case relied upon in that decision supports the conclusion that any act by which he makes known to the person possessing or controlling it his claim of interest suffices. In State v. Smith, 70 Cal. 153, 12 P. 121, it was said that "[t]he clause of section 672 is a limitation, applicable * * * not alone to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise. The claim may be *in pais*, as by taking possession of the property, or conveying, or contracting with respect to it." 70 Cal. 156, 12 P. 123. This dictum was approved in Estate of Aufret, 187 Cal. 34, at page 37, 200 P. 946, 947, where the court said: "We can perceive no reason why this statement is not a correct interpretation of the statute."

In the present case, there is no contention that Miss Sorensen has performed any act which might be construed as amounting to an appearance and demand as to her share of the decedent's estate. Therefore, it is unnecessary to determine more explicitly the acts which might suffice for that purpose.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

132 Cal.App.2d 243

Natalie KALMUS, Plaintiff and Respondent,

v.

CEDARS OF LEBANON HOSPITAL, Defendant and Appellant

Civ. 20514.

District Court of Appeal, Second District, Division 3, California.

April 14, 1955.

Action against hospital for malpractice. Hospital cross complained to recover for use of hospital and facilities. The Superior Court, Los Angeles County, Henry M. Willis, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held, inter alia, that evidence supported findings that nurse had used infected needle and had failed to follow standard hospital procedure, and that injection had caused infection.

Judgment affirmed.

1. Trial ⇐395(1)

Court's findings, in malpractice action against hospital wherein plaintiff alleged negligence in use of an unsterile needle and syringe, that, with certain exceptions, all allegations of complaint were true and none of allegations or denials of answer were true, were sufficient findings on issue of unsterile instruments.

2. Trial ⇐393(1)

It is not necessary for trial court, in making findings, to follow language of pleadings.

3. Trial ⇐396(2)

A finding outside issues is surplusage and should be disregarded.

4. Trial ⇐396(2)

Parties may enlarge issues by voluntarily canvassing a matter not technically included within pleadings, and a finding on such matter is appropriate.

5. Trial ⇐396(2)

Where, in malpractice action against hospital wherein complaint alleged use of

unsterile needle and syringe, question of accepted standards in hospitals was opened, without objection, on examination of hospital's director of nurses, and both sides explored subject and no claim was made that matter was outside issues, finding on issue of accepted standards was appropriate. West's Ann.Code Civ.Proc. § 2055.

6. Appeal and Error ⇐219(2)

Where defendant made no point in trial court respecting alleged insufficiency of findings, or need of a particular special finding, objection was waived.

7. Appeal and Error ⇐931(1)

On appeal from judgment for plaintiff in malpractice case, all conflicts in evidence were resolved in favor of plaintiff and all legitimate and reasonable inferences supporting plaintiff's case were indulged.

8. Hospitals ⇐8

In action against hospital for damages for infection allegedly caused by injection. evidence supported findings that nurse had used infected needle and had failed to follow standard hospital procedure, and the injection had caused infection.

9. Hospitals ⇐5

Where patient, in her first stay in hospital, received injury through hospital's negligence, hospital could not recover for use of hospital and facilities during patient's second stay, which was occasioned by the injury sustained during first stay.

Spray, Gould & Bowers, Los Angeles, for appellant.

Shacknove & Goldman, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

In this action for malpractice the trial was had without a jury, judgment was rendered for plaintiff for $3,000, and defendant appeals.

Appellant's counsel make three contentions; first, that the findings are fatally defective; second, that the evidence is insufficient to sustain the complaint allegation of specific negligence; and, third, that the court erred in denying recovery by defendant Cedars of Lebanon of its charge for use of its hospital and facilities during plaintiff's second stay there, while being treated for an infection which forms the basis of the malpractice charge and which was received during plaintiff's first visit to the hospital.

First as to the sufficiency of the findings.

Plaintiff's allegation of negligence is found in paragraph VI of the complaint. It says that defendant Jane Doe "while acting within the course and scope of her employment as a nurse, administered to plaintiff a hypodermic injection in her right thigh; the hypodermic needle and syringe used by the said Jane Doe in administering said injection were unsterile and unfit for the purpose for which they were used, and the said Jane Doe, while acting within the course and scope of her employment, did negligently and carelessly employ and make use of the aforesaid unsterile needle and syringe." The court found that "one of the aforesaid nurses, while acting within the course and scope of their employment as such nurses, administered to plaintiff a hypodermic injection in her right thigh. * * * The aforesaid employees of the defendant did not exercise the care and skill required of them in the administration of the aforesaid hypodermic injection, and did not follow the procedure customarily followed by nurses following their profession in the Los Angeles area at said time. * * * As a direct and proximate cause of the negligence of the aforesaid employee nurses, or one of them, plaintiff's hip became infected * * *"; also in paragraph IX: "Except as otherwise hereinabove specifically found, all of the allegations of plaintiff's Complaint are true and none of the allegations or denials of the Answer is true." And the findings contained no exception which has any bearing upon the problem now in hand.

Defendant filed a cross-complaint for recovery of $513.29, its charge for plaintiff's second stay in the hospital. In her answer thereto plaintiff repeated the allegations of paragraph VI of her complaint, above quoted, and the court found in paragraph

X: "Except as otherwise hereinabove specifically found, none of the allegations of the Cross-Complaint is true and all of the allegations of the Answer to the Cross-Complaint are true." Again the exception is without significance.

Appellant argues that the complaint was specific in charging as negligence only the use of unsterile and unfit needle and syringe; that the finding was limited to failure to follow the accepted standard of care in administering the injection; that the court therefore failed to find upon the negligence alleged and there is a fatal variance in that respect. Counsel rely upon Frascona v. Los Angeles Ry. Corp., 48 Cal. App. 135, 191 P. 968, and similar cases, which do support their position to an extent if their assertion as to the condition of the findings be accepted. But findings IX and X have been overlooked by counsel.

[1, 2] They do encompass the issue of unsterile instruments and are sufficient findings upon the subject. It is not necessary for the court to follow the language of the pleadings, 24 Cal.Jur., § 213, p. 984. And it has been held repeatedly that findings couched in such general terms as paragraphs IX and X herein are sufficient. See Gale v. Bradbury, 116 Cal. 39, 40, 47 P. 778; County of San Diego v. Seifert, 97 Cal. 594, 597, 32 P. 644; In re Estate of Scherer, 58 Cal.App.2d 133, 138–139, 136 P.2d 103; Bole v. Lovejoy, 138 Cal.App. 211, 215, 31 P.2d 1074; Wilbur v. Kemp, 80 Cal.App.2d 787, 789, 182 P.2d 206; Rohl v. Van Cleve, 90 Cal.App.2d 317, 322, 202 P.2d 807; Silver v. Shemanski, 89 Cal.App. 2d 520, 542, 201 P.2d 418; Witkin on California Procedure, §§ 114–115, pp. 1846–1848.

Concerning findings in form similar to those at bar the court said in Chatfield v. Continental Bldg., etc., Ass'n, 6 Cal.App. 665, 669, 92 P. 1040, 1042: "And where the court, in such a case, makes a general finding, we do not think it is wholly lost because the court also undertakes to make, in addition to the general finding, certain specific findings upon facts covered by the general finding. The latter loses none of its certainty and clearness by specific findings." This is peculiarly pertinent here, for the general finding necessarily includes the matter of use of an unsterile needle. It may include more, but it clearly does cover that issue.

[3–5] If it were true, as appellant claims, that failure to pursue accepted standards of care in other respects was outside the issues, the findings thereon would be surplusage, to be disregarded as such. 24 Cal.Jur., § 212, p. 983. But the parties may enlarge the issues by voluntarily canvassing at the trial a matter not technically included within the averments of the pleadings. When that occurs a finding on that subject is appropriate. Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 87, 25 P.2d 415; 24 Cal.Jur., § 210, p. 981. At the instant trial the subject of accepted standards was opened on examination of Miss Huisman under § 2055, Code Civ. Proc. She was defendant's director of nurses. No objection was made by defendant; both sides explored the subject and no claim was made in the trial court that the matter was outside the issues.

[6] Lastly, it does not appear that appellant's counsel made any point in the trial court respecting the alleged insufficiency of the findings, or the need of a specific determination of the charge that an unsterile needle was used. The point was thereby waived. Goss v. Fanoe, 114 Cal.App.2d 819, 824, 251 P.2d 337.

[7] In reviewing the claim of insufficiency of the evidence to support the finding that an unsterile needle and syringe were used in giving the injection, we must, of course, resolve all conflicts in favor of respondent and indulge in all legitimate and reasonable inferences supporting plaintiff's case. Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886.

[8] It appears that plaintiff entered defendant's hospital for observation and diagnosis on July 23, 1950. On the 24th at about 10:00 p. m. she was given an injection to relax her nerves. Her physical examination was negative on entrance to the hospital. The record of her case contains no indication of any infection prior to

that time. And her regular physician testified that she had had no previous abscesses or blood disorder. Plaintiff said that the nurse, who seems to have been Miss Girouard, came into the room with the needle in her hand and gave the injection. "Q. What did she do to prepare you for the injection with the hypodermic needle? A. She didn't do anything. She just came in and jabbed the needle in my hip and pulled it out suddenly and sort of gasped, and then put it back in again and gave me the shot." This was in the right thigh. Standard practice requires not only that the instrument be sterilized but also that the skin be scrubbed with an alcohol sponge. Plaintiff's testimony warrants the inference that this was not done. She also said the place began to hurt and sting at once, began to swell, and by morning was badly swollen and red. Her physician, Dr. Louise Mand, saw it that morning, the 25th, and turned her over to Dr. Kahn. Dr. Mand testified that plaintiff then complained of a painful injection; that there was redness on the right thigh, a diffused redness, and the patient complained of pain. On the 27th, when plaintiff went home with Dr. Kahn's sanction, Dr. Mand found an abscess formation at the location of the injection and plaintiff's temperature was over 101. The hospital record of the 26th says: "Pt. has large inflamed area on rt. thigh, painful to touch." On the 28th, when she returned to the hospital, this notation was carried into the record: "Pt. received injection in thigh rt, which has since become swollen & tender and inguinal region is tender & swollen." The laboratory report says: "The culture showed a staphylococcus aureus hemolytic," which is a common organism often found upon the skin of a patient. The word abscess spells infection, and there is no real dispute that plaintiff did have an abscess. It was excised at the hospital where plaintiff remained until August 11th. Her return on the 28th was caused by Dr. Mand's alarm about her condition.

Dr. Mand testified that the abscess was at the point of the injection, on the thigh, and in her opinion there certainly was a connection between the two. Defendant's witness, Dr. Ludwig Strauss, testified: "If witness, Dr. Ludwig Strauss, testified:

"Q. If an infection occurs at the point of an injection, would you say that there was or was not any connection between the two? A. I would say there was.

"Q. There was? A. Yes, sir." He also said he did not determine the cause in this instance. But Dr. Mand supplied that information:

"Q. * * * Can you say with any degree of medical certainty, reasonable medical certainty, that the abscess she complained of was caused by the hypodermic injection? A. Yes, I can.

"Q. You can? A. That could be the only causative factor.

"Q. It could be the only causative factor; is that true? A. That is correct." Again:

"Q. Now, you have told us, doctor, that you can state with reasonable medical certainty that this abscess was caused by this injection; is that right? A. Yes, sir.

"Q. All right. Now, tell us, will you please, what there was about this injection that caused the abscess? A. A severe bruising might have caused it or an infected needle might have caused it.

"Q. A severe bruising might have caused it or an infected needle might have caused it? A. That's right.

"Q. Could anything else have caused it? A. No.

"Q. Nothing else; is that right? A. Not this abscess.

"Q. Not this abscess? A. No.

"Q. You are quite sure that this was— A. I am very sure.

"Q. This was a very, very distinct type of abscess, wasn't it, doctor? A. Yes. It developed in the usual way of an infection through a bruise or an infection carried into the deeper tissues."

There is no evidence of any bruising in this case, none that anyone saw or men-

tioned as a fact. And the only conclusion flowing from Dr. Mand's testimony is that the abscess was caused by use of an infected needle. We necessarily find that the evidence does support the allegation in that respect. This renders unnecessary any discussion of appellant's argument that plaintiff cannot prevail without the aid of res ipsa loquitur and that it does not apply here. For we have direct expert evidence that the use of an unsterile needle was the cause of the abscess. This same evidence disposes of appellant's alternative argument that there is no showing of any failure to follow standard hospital procedure. Obviously the use of an infected needle does violate that standard and the witnesses so testified.

Defendant cross-complained for recovery of $513.29, a hospital bill for the period from July 28, 1950 to August 11, 1950, while she was being treated for the infection and abscess caused, as the court found, by negligence of defendant's nurse on July 24, 1950. The cross-complaint was in two common counts which the court found to be untrue; it also found with respect to the period covered by this bill that "* * * plaintiff was forced to and did necessarily return to the hospital for further treatment to eliminate the aforesaid infection, and did necessarily undergo a painful and serious operation, and suffered great pain and discomfort." Accordingly, recovery on the cross-complaint was denied. Appellant claims this was error, relying upon Dameron v. Ansbro, 39 Cal.App. 289, 300–301, 178 P. 874.

[9] That case involved two actions which had been consolidated for trial; one was brought by a physician, Dr. Dameron, to recover for his professional services and "for room, board and nurse hire furnished to Mr. Ansbro at his request in the sum of $490", 39 Cal.App. at page 301, 178 P. at page 880; the other action was brought by Ansbro against the doctor for malpractice. Judgment went for Ansbro. The appellate court held that the verdict was not without substantial support in the evidence, but reversed because of certain errors. At pages 300–301 of 39 Cal.App., at page 880 of 178 P., it said: "We think the court should have instructed the jury as requested by appellant, that Dr. Dameron was entitled to recover the reasonable value of the use of the room and of board and nurse hire, regardless of the question whether he exercised ordinary care and skill in the treatment of the defendant. * * * There was no contention that the board and nurse hire, etc., were not reasonably worth the amount charged, and their value to respondent was not affected by any question of the correct treatment of the fractures. The jury should have been instructed to allow plaintiff credit for those items." Ansbro had been severely injured in an accident before Dr. Dameron's services were sought, 39 Cal.App. at page 291, 178 P. at page 875; he needed hospitalization regardless of any question of subsequent negligence of the physician; the hospital was conducted by Dr. Dameron himself; and the reviewing court found that the value of "board and nurse hire, etc." to the patient Ansbro "was not affected by any question of the correct treatment of the fractures." In other words, he needed this hospital care for his injuries and that was true whether his surgeon was careful or negligent. The factual setting in the instant case is quite different. Mrs. Kalmus' second hospitalization was proximately caused by defendant's negligence. It would be a new and surprising doctrine that would enable the tort-feasor to recover from the injured party a part of the cost of curing his injuries. Had plaintiff gone to another hospital while being treated for the effects of defendant's negligence that expense would be recoverable from defendant in addition to the $3,000 awarded by the court. First principles demand that it not recover for the care in question.

Judgment affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 275

Wallace HOBSON and Loretta Hobson, Petitioners and Appellants,

v.

George R. REILLY, James H. Quinn, William G. Bonelli, Paul R. Leake, and Robert C. Kirkwood, as members of and constituting the State Board of Equalization of the State of California, Respondents.

No. 16255.

District Court of Appeal, First District, Division 1, California.

April 15, 1955.

Rehearing Denied May 13, 1955.
Hearing Denied June 8, 1955.

Proceeding on petition for writ of mandate to annul order of State Board of Equalization revoking petitioners' on-sale liquor license. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., denied the petition and the petitioners appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that petitioners employed girls on the premises to solicit buying of drinks in violation of statute.

Judgment affirmed.

Intoxicating Liquors ⇐108(5)

In proceeding to revoke on-sale liquor license, evidence sustained finding that licensees employed girls to solicit buying of drinks by customers. Pen.Code, § 303; Government Code, § 11503; West's Ann. Bus. & Prof.Code, §§ 24200–24202, 25657; West's Ann.Const. art. 20, § 22.

Frank J. Comaich, Harold Brown, Everett H. Roan, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Respondent State Board of Equalization revoked petitioners' general on-sale liquor license. On the hearing of a petition for writ of mandate to annul the order of revocation, the superior court found that the findings of the board were supported by substantial evidence and by the weight of evidence and denied the petition. Solely contending that the evidence does not support the findings of the board and court, petitioners appeal from the judgment of denial.

Record.

The matter was heard in the superior court on the transcript and record of the proceedings before the board, and on oral and written argument of counsel. Petitioners were charged before the board with violating section 40(2), Alcoholic Beverage Control Act, Business and Professions Code, §§ 24200–24202, and section 303, Penal Code, employment of B-girls. The board found petitioners guilty of violating section 303 and section 57, Alcoholic Beverage Control Act, Business and Professions Code, § 25657.[1]

Section 303 makes it unlawful for anyone engaged in the sale of alcoholic beverages under an on-sale license to employ upon the premises "any person for the purpose of procuring or encouraging the purchase or sale of such beverages," or to pay any person a percentage of commission for so doing. As the board expressly found that the girls involved did not receive and petitioners did not pay a percentage or commission on the sales hereafter discussed, we are only concerned with the portion of the section prohibiting employment to solicit the buying of drinks.[2]

Petitioners are the owners and licensees of the "Arabian Nights" club on Pacific

1. Petitioners were not charged with violating section 57. The accusation, therefore, did not comply as to that alleged violation with Government Code section 11503. The board having failed to find on the charge of violating section 40(2) and petitioners not being charged with violating section 57, the only question before the superior court was and before us is the sufficiency of the evidence concerning a violation of section 303, Penal Code.

2. Article XX, section 22, Constitution, provided in part: "The State Board of Equalization * * * shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

Avenue, San Francisco. Petitioner Wallace testified that during the times in question they employed one Lili, one Diane and one Norma, also called Norell, as dancers or entertainers and one Marie and one Bobbie as waitresses. He denied that at any time any of them were employed to, or did, solicit the buying of drinks by customers, although they were permitted to mix with and drink with customers.

Liquor Control Officer McDonald testified that on the night of March 26, 1953, he bought Marie at her request four drinks of vermouth. Each time he paid the bartender for her drink the bartender took a penny out of the cash register and dropped it in a glass beside the register. When he bought a drink for himself alone, before Marie accosted him, the bartender did not transfer a penny. Officer Cute testified that on the night of March 27th he bought Diane at her request three drinks of vermouth. He also bought a drink for Diane's friend Norell, at Diane's request. Each time he paid for Diane's drinks the bartender transferred a coin from one compartment of the cash register to another. Petitioner Wallace spoke to the girls while they were drinking with Cute and went behind the bar. Cute's testimony was corroborated by Officers McDonald and Feeney to the extent that they witnessed him buy the drinks and saw the bartender transfer the coin. On two nights in succession Officer McDonald bought Lili champagne, and each time he paid for it the bartender dropped a penny in a glass beside the register. Petitioner Wallace was behind the bar at its end the second night. The officers that night made arrests and seized four glasses containing pennies and other coin. Each glass was marked with a name, "Marie," "Lili," "Dottie," and "Bobbie."

Diane testified that she was employed as a dancer and was not employed to solicit, nor did she solicit, the buying of drinks. She admitted that she and Norell drank with Officer Cute, but denied asking for the drinks. She and Norell merely accepted his invitation to have the drinks. Earlier in the evening she had bought her own drinks, paying for them at the end of the week. She had not noticed the bartender drop a penny in a glass when she was served the drinks bought by Cute. It was the practice when she bought her own drinks for the bartender to drop a penny in the glass, so that she could pay later.

The business representative of the entertainers' union testified that his union is opposed to the use of B-girls. He inspected petitioners' place four or five times a week and had never seen any of the girls soliciting drinks.

It was stipulated that the other girls named by the officers would testify substantially the same as did Diane, that they were not employed to solicit the buying of drinks nor did they solicit any of the officers to buy them a drink, but, in fact, were requested to have a drink by said officers at all times in question. Evidence of the salaries paid all the girls was given showing that they were paid a straight weekly salary or wage and not a percentage or commission.

Petitioner Wallace's explanation of the dropping of the coins in the glasses with the girls' names labeled thereon, was that it was a method he had devised for accounting for the drinks each girl bought for herself. Whether the particular girl bought herself an alcoholic or a soft drink the bartender would drop a coin in her glass. At the end of the week the girls would pay Wallace 50 cents for each coin in her glass, that being the price charged her for each drink, whether it be a highball, champagne, or a soft drink.

Petitioners contend that as the board found that petitioners did not pay the girls a percentage or a commission for soliciting drinks there is no evidence, as required by section 303, Penal Code, that petitioners employed the girls to solicit the buying of drinks. While it is true that there is no direct evidence that the girls were employed to solicit drinks, the obvious and only reasonable conclusion from the facts is that they were. Coupling the fact that petitioners admit that the girls mixed and drank with the male customers, with the bartender's method of keeping track of the number of drinks bought at their request, one would

have to be very gullible indeed, to believe that the practice was to keep track of the drinks the girls bought themselves. It would be stretching the court's credulity beyond the breaking point to believe that these girls were buying their own drinks instead of the customers buying drinks for them, or that the petitioners did not include the soliciting of drinks as a part of each girl's employment. The facts in this case are almost identical with those in Chosick v. Reilly, 125 Cal.App.2d 334, 270 P.2d 547, where the court held that the inference that the licensees employed girls to solicit drinks was a reasonable one. The only difference from our case lies in the method of keeping track of the drinks solicited by each girl. There a different Roman numeral was rung up on the cash register for drinks bought for a girl from the numeral used when drinks were bought by the male customers for themselves. There, as here, the board found that the girls received no percentage or commission for soliciting drinks. The reviewing court held that the denials of the licensee and his employees only created a conflict with the circumstantial evidence, which conflict was resolved by the board against the licensee and that the board's factual decision was binding on the courts. The same is true here.

In Cornell v. Reilly, 127 Cal.App.2d 178, 273 P.2d 572, the only substantial difference from the facts in our case was that track was kept of drinks solicited by the girl employees by the bartender making a tally notation on a pad. There, too, it was claimed that these notations were only for drinks purchasesd by the girls themselves, to be paid for at the end of the week. There, as here, the defendant contended that all that was proved was mere solicitation by the employees; that employment for that purpose was not proved. After pointing out that guilt in disciplinary administrative proceedings of this kind must be proved to a reasonable certainty and cannot be based on surmise, suspicion or theoretical conclusions, the court held that there was sufficient evidence to support the finding of a hiring for the purpose of solicitation. In our case, the fact that the girls were employed and were permitted to drink with the patrons is admitted. The fact that they on several occasions solicited drinks from the officers and that petitioners devised and used a method of keeping tally of those drinks is established by substantial evidence. While, apparently, the tally of drinks solicited by the girls was not kept for the purpose of paying them a commission, it obviously was kept for the purpose of determining the efficiency of each girl in increasing the employer's business. As we said in the Cornell case, supra, 127 Cal.App.2d at page 186, 273 P.2d at page 578, "Under such a state of facts the inference that such solicitation was an integral part of the employment of the entertainers is not only reasonable, but almost inevitable."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

132 Cal.App.2d 269

Lewis GUERRIERI, Angel Lehman and Ophelia Divizia, copartners doing business under the firm name and style of Santa Fe Vintage Co., Plaintiffs and Appellants,

v.

Phil J. SEVERINI and Severini Winery and Distillery, Defendants and Respondents.

Civ. 494f

District Court of Appeal, Fourth District, California.

April 14, 1955.

Buyer's action for breach of contract to sell wine. The Superior Court, Fresno County, Edward L. Kellas, J., found that no contract had been entered into between the parties, and an appeal was taken. The District Court of Appeal, Mussell, J., held that

evidence did not support such finding of the trial court.

Judgment reversed.

1. Appeal and Error ⇐173(2)

Where seller in buyer's action for breach of contract to sell wine did not attempt to plead as defense in answer any excuses for nonperformance, reviewing court could not be concerned with such excuses.

2. Sales ⇐26, 33

Contract to sell, or a sale, may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from conduct of the parties.

3. Frauds, Statute of ⇐103(1)

Under statute of frauds requiring that contract or some note or memorandum thereof be in writing, writing essential need not be formal contract, drawn up with technical exactness or even one intended by parties to create obligation. West's Ann. Civ.Code, § 1724.

4. Sales ⇐52(5)

In buyer's action for breach of contract to sell wine, evidence, partly written and partly oral, did not support trial court's finding that no contract was entered into between parties.

5. Frauds, Statute of ⇐113(3)

Under circumstances shown in buyer's action for breach of contract to sell wine, document which described kind and quantity of wines and stated "terms cash for entire amount immediately" and ".36¢ gal" and stated "sold to (named buyer)" and which was signed by seller was sufficient to meet requirements of note or memorandum in writing. West's Ann.Civ.Code, § 1724.

Wild, Carlson & Reeve and Robert M. Barnard, Fresno, for appellants.

Iener W. Nielsen and Mikio Uchiyama, Fresno, for respondents.

MUSSELL, Justice.

This is an action for damages for breach of a contract to sell approximately 200,000 gallons of wine. Plaintiffs appeal from the judgment entered in favor of defendants and contend that the evidence does not support the trial court's finding that there was no contract entered into between the parties wherein the defendants agreed to sell to plaintiffs and plaintiffs agreed to buy the wine involved.

Plaintiffs, copartners doing business under the firm name and style of Santa Fe Vintage Co., were engaged in the business of producing, buying, bottling and marketing wine. Defendant Phil J. Severini and his wife were the owners of the Severini Winery and Distillery. On March 27, 1953, Severini had on hand about 180,000 or 190,000 gallons of wine, after taking out the lees and shrinkage, and on that date one Fritz Kyer, a wine broker, came to him and stated that he had an offer from the Santa Fe Vintage Co. to purchase his wine. In this connection Severini testified as follows: "He came to me, and he says, 'I have an offer by Santa Fe Vintage Company to buy wine for them.' He says, 'Let's offer your wine for 36¢ a gallon.' I says, 'That is all right with me providing I get my money immediately.' So he says, 'OKay.' He says, 'Let's go into the office.' So I went into the office"; that in the office he read and signed a document prepared by Kyer; that he told Kyer he wanted "cash for the entire amount immediately"; that he wanted Kyer to have Santa Fe to send a man up to gauge the tanks and give him a check for the full amount within 48 hours; that Kyer said "OKay. I will submit it to them"; that 15 minutes to half an hour later he called up Kyer and "I says, 'Have you sent that offer in yet?' And he says, 'No, but I phoned it in.' I says, 'Well, I'm coming right down to see you.' So I went down to see him. And I says, 'Fritz, I'm having trouble with my wife, domestic difficulties, and it's possible she'll take out a restraining order on me, and being as I don't want no trouble, why don't we offer them my half of the wine, and let's submit the offer that way.' He says, 'No, I can't. I already phoned it in.' I says, 'Well if that's the way it is, there's nothing we can do about

it. We'll have to go through with it' "; that a week or so later he asked Kyer if he had heard anything and Kyer stated that he had not; that he then on April 24, 1953, through his attorney, wrote a letter to Kyer withdrawing his offer.

The document prepared by Kyer which Severini read and signed is as follows:

"Instructions to Severini Winery & Distillery Madera, Calif.

Sold To Santa Fe Vintage Co
1700 N. Spring St
Los Angeles, Cal.

Ship Via As Instructed When _____

Invoice No. 1733
Date March 27, 1953
Lewis G
Buyer's Order No. _____
Terms Cash for entire amount immediately

Packages	Commodity
Approx.	200,000 Gals Sweet Wines, Assorted as Follows: Finished
	60,000 Gals 100% pure muscat
	60,000 " Port
	30,000 " Angelica
	50,000 " Sherry

.36 Gal
In bond, fob truck or cars, Winery, Madera, Cal.

All of the above Wine to be out by August 1, 1953.

Accepted: Severini Winery & Distillery
by Phil J. Severini (Signed)

Commission
.01¢ Gal From Severini Winery

Fritz Kyer
1115 South Fifth Street
Alhambra, California
By _____"

Kyer testified that on March 27, 1953, he told Severini that he had talked to Mr. Guerrieri of the Santa Fe Vintage Company and that Mr. Guerrieri had approved the samples of Severini wine that had been sent to him and that he would take the wine, the entire lot; that the price mentioned was 36¢ a gallon and the amount mentioned was approximately 200,000 gallons; that Severini said that was okay with him and that he accepted the order. Kyer further testified that this was a cash deal and that the wine was to be paid for as soon as it was delivered; that Severini said "Well, you have Mr. Guerrieri send up his man to gauge the tanks and then we'll invoice it accordingly"; that he got in touch with Mr. Guerrieri and asked him if he wanted to do that and Guerrieri stated he would take Mr. Severini's figures and that Severini could do the gauging; that the deal was made up on March 27, 1953, but that the written order was made up and signed on March 31, 1953; that he told Severini that Guerrieri had called him and wanted a signed order; that after the order had been prepared and

signed, Severini called him on the telephone and asked him if he had sent the order in to Mr. Guerrieri; that he told Severini he had and Severini then stated that he could not deliver the wine, that "His wife had got out a restraining order against delivery of it". Kyer further testified that he acted as broker for both Mr. Severini and for the Santa Fe Company; that he communicated the written order to the Santa Fe company after Severini signed it and informed them of its contents and terms; that Guerrieri said he would pay for the wine in any manner Mr. Severini requested; that he told Mr. Guerrieri it was "cash for entire amount immediately" and that this was confirmed by Guerrieri.

Mr. Guerrieri testified that about a week or ten days before March 27, 1953, he had received samples of the Severini wine; that he received the written order in the mail "right after March 31"; that he wrote a letter to Kyer confirming the transaction and that on March 27, 1953, he had confirmed it by telephone.

[1–3] It appears from the uncontradicted evidence herein that Kyer, as agent for the Santa Fe Vintage Company, offered in behalf of his principal to purchase approximately 200,000 gallons of wine which the defendant then had on hand; that the price to be paid therefor was 36¢ per gallon "cash for entire amount within 48 hours"; that plaintiffs agreed that Severini could gauge the wine and that they would accept his "figures"; that Kyer informed defendant Severini that Mr. Guerrieri wanted a signed order; that the order was prepared by Kyer and accepted by Severini; that Kyer informed Guerrieri of the terms of the order and that Guerrieri confirmed the order by telephone on March 27, 1953. This evidence clearly shows that a valid, binding and enforceable contract to buy and sell was executed by the parties. It further appears that within half an hour after the written order had been sent in by Kyer, Severini called him on the telephone and wanted to submit a new order; that when Kyer stated that he had telephoned the order in, Severini said "Well, if that's the case, that's all that can be done. We'll have to go through with it." No contention was made by Severini that the contract was uncertain, indefinite or that anything further was required to make it a valid and enforceable agreement. Severini stated that he would not be able to deliver the wine as agreed and under such circumstances plaintiff was not required to make immediate payment therefor in full. Moreover, we are not here concerned with excuses for nonperformance as such matters were not pleaded as a defense in the answer. Eucalyptus Growers Ass'n v. Orange C. N. & L. Co., 174 Cal. 330, 335, 163 P. 45. A contract to sell, or a sale, may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties, and under the statute of frauds, Sec. 1724, Civil Code requiring that the contract "or some note or memorandum thereof" be in writing, the writing essential need not be a formal contract, drawn up with technical exactness or even one intended by the parties to create an obligation. Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 631, 152 P.2d 774, 787. In that case it is said, citing Buckner v. A. Leon & Co., 204 Cal. 225, 227, 267 P. 693:

> "It has long been the rule that when parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms; and that when there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears."

[4, 5] In the instant case the contract was partly oral and partly in writing, evidenced by the order of sale. Under the circumstances shown herein the document signed by Severini is a sufficient "note or memorandum of the contract." We conclude that the trial court's finding that no contract was entered into between the par-

ties is not supported by the evidence and that the judgment based thereon is not supported by the record.

The judgment is reversed.

GRIFFIN, Acting P. J., concurs.

BARNARD, P. J., being disqualified to participate, takes no part in this decision.

132 Cal.App.2d 207

FINANCIAL INDEMNITY COMPANY, a corporation, Plaintiff and Appellant,

v.

COLONIAL INSURANCE COMPANY, a corporation, Defendant and Respondent.

No. 16211.

District Court of Appeal, First District, Division 1, California.

April 11, 1955.

Suit for declaratory relief. The Superior Court, County of Alameda, Cecil Mosbacher, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Bray, J., held that even though two separate public liability policies issued to same insured provided for defense of insured in case of suit, defending insurer was not entitled to contribution from other insurer for expenses incurred in defense of personal injury action brought against assured.

Affirmed.

Insurance ⇐604

Even though two separate public liability policies issued to same insured provided for defense of insured in case of suit, defending insurer was not entitled to contribution from other insurer for expenses incurred in defense of personal injury action brought against assured. Insurance Code, § 554.

Theodore Tamba, Myron A. Martin, San Francisco, for appellant.

Low & Duryea, San Francisco, for respondent.

BRAY, Justice.

Plaintiff sued for declaratory relief to determine the rights and obligations of the parties arising from two public liability policies issued respectively by the parties to one Charles Tamagri, a trucking service operator, and particularly to recover half of the amount expended by plaintiff for attorney's fees and investigation expenses in defense of an action against the insured. Plaintiff appeals on an agreed statement of facts from the judgment denying recovery.

Questions Presented.

Defendant contended that prior to the accident upon which the action against the insured was based its policy had been cancelled and avoided. As the trial court found against defendant, on this defense and defendant has not appealed, we deem it unnecessary to discuss this contention.

The principal question is: Where policies of separate insurers provide for defense of the assured in case of suit, is one insurer entitled to contribution from the other insurer for expenses incurred in defense of a personal injury action brought against the assured?

Facts.

Both parties are California insurance corporations. Each delivered to Tamagri and filed with the Public Utilities Commission a policy of public liability insurance, $10,000–$20,000 personal injury and $5,000 property damage, and provided for defense of the assured in the event of suit. Defendant's policy was first in time of issue. Tamagri, driving a vehicle covered by both policies, was involved in an accident with an auto driven by Louis A. Ortiz, in which accident both Tamagri and Ortiz were killed. Ortiz's administratrix sued Tamagri's estate for Ortiz's death. Tamagri's administrator cross-complained for Tamagri's death. After two trials Tamagri's administrator obtained judgment for $20,000. Approximately one year and five months after the accident occurred defend-

ant was informed by the manager of plaintiff of the pending lawsuit against the assured and requested to participate therein. Defendant refused. In the defense of the litigation plaintiff incurred expenses in the sum of $5,799.76. Defendant refused to pay any portion thereof.

Plaintiff brought this action for a declaratory judgment requiring defendant to contribute to the defense of the Ortiz action and for reimbursement of half of the expenses incurred and to be incurred by plaintiff in defending that action.

Is Defendant Liable For Contribution?

The issue of defendant's indemnity liability is immaterial. Each policy provided for defense of the assured in the event of suit. Plaintiff's policy provided for pro rata payment of a loss in the event there was other insurance. Defendant's policy provided, in case of other insurance, that it would pay only the excess of the loss over the amount of the other insurance. Attached to each policy was a "Standard Form of Endorsement Prescribed by the Public Utilities Commission of the State of California" known as "Form T & S 391" which apparently reduced the liability under each policy to $5,000 for personal injury. Most of the trial and a large portion of the briefs were devoted to the question of whether under the policies and the endorsement defendant's liability in the event Ortiz had recovered damages against Tamagri, would not have accrued until plaintiff had paid the full face value of its policy as limited by the rider, $5,000 or when it had paid only $2,500. The trial court found that the insured's policy with plaintiff constituted "other insurance" and that defendant's policy was excess over and above the limits of plaintiff's policy and not pro rata insurance. Plaintiff attacks this finding. However, we fail to understand how this question is relevant or important to the real issues in this case. Tamagri won the personal injury action, so neither insurer was called upon to pay any amount of indemnity. Ortiz sued Tamagri for $100.680.58. Until the action was fully tried and judgment rendered, neither insurer would know what its indemnity liability was. Obviously the amount sued for was in excess of the total liability of both insurers under any theory. Each party was required by its own policy to defend Tamagri in that suit.*

Assuming that defendant's indemnity liability did not attach until plaintiff had paid out the full value of its policy, defendant, had it been called upon by Tamagri to defend, could not have refused to do so until a judgment was obtained in the Ortiz action in excess of $5,000. Under its policy, Tamagri had the right to require defendant, on demand, to defend even though plaintiff was also required to defend, and even though later no recovery was had by Ortiz (as was the fact) or even though a recovery was had by Ortiz of a sum less in amount than plaintiff's liability under any theory. Therefore we have a situation where defendant, obligated to defend Tamagri regardless of the ultimate outcome of that litigation, did not do so, and is now being asked for contribution of the costs of that defense, not by the assured, but by plaintiff, who was also required to defend Tamagri. There being no contract between plaintiff and defendant, does the law provide for contribution?

The assured at no time requested defendant to defend. The court found that the fact that the assured did not report the accident to defendant as required by the terms of the policy did not make the policy void nor release defendant from the obligations of its policy. This finding does not constitute a holding that in order to charge defendant with the expense of the assured's defense, a request by the assured for defense was not necessary. It is merely a finding that the assured's actions did not avoid the policy. See Insurance Code, § 554, and Gibson v. Colonial Ins. Co., 92 Cal.App.2d 33, 206 P.2d 387, as to waiver. Assuming that plaintiff's request to defendant to join in the defense of the Ortiz action constituted a request by the assured, nevertheless we know of no

* The policies required defending in the name and on behalf of the assured any suit brought against the assured to enforce a claim, if groundless or not.

requirement of contribution between the insurance companies involved. Here, the duty to defend was an absolute one by each insurer and is severable and independent of the undertaking for payment of damages. (See 3 Richards on Insurance, 5th ed., § 421, p. 1390.) Plaintiff was obliged to defend the assured whether defendant did or did not. Defendant was likewise obligated to defend the assured whether plaintiff did or did not.

Plaintiff contends that as to the obligation to defend the two insurance companies were cosureties and not coinsurers, and that therefore the rule set forth in Fidelity & Casualty Co. of New York v. Fireman's F. I. Co., 38 Cal.App.2d 1, 5, 100 P.2d 364, should apply. It was there held as to indemnity that where two insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the other, but that if both policies contain a pro rata or coinsurer clause, the insurers are deemed to be coinsurers and not cosureties and neither can recover from the other any amount it may have paid in excess of its pro rata share of the entire loss. While the fact that here both companies in their policies agreed to defend the assured bears some analogy to the situation where both companies have agreed to indemnify the assured against the total loss, nevertheless the agreement to defend is not only completely independent of and severable from the indemnity provisions of the policy, but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services. The insurer must investigate, and conduct the defense, and may if it deems it expedient, negotiate and make a settlement of the suit. These matters each insurer is required to do regardless of what the other insurer is doing. While both may join together in the services and share expenses, there is no requirement that they do so. Conceivably, one might disagree with the other as to the strategy of the investigation and defense. It could act independently of the other. Thus the relationship is more that of coinsurer than cosurety. As to the assured, neither one is excused to any extent from its full duty to defend, no matter what the other does. The duty to defend is personal to the particular insurer. It is not entitled to divide that duty with or require contribution from the other.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Jasper Ernest LAIL, as Executor of the Last Will and Testament of Jasper E. Lail, Sr., deceased, Plaintiff and Respondent,

v.

Robert L. LAIL, also known as R. L. Lail and Pearl A. Lail, also known as Perle A. Lail, Defendants and Appellants.

Civ. 20583.

District Court of Appeal, Second District, Division 3, California.

April 5, 1955.*

Action by executor against testator's son for alleged breach of trust and for money had and received. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgment for plaintiff and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeals, Vallée, J., held that where decedent stated, in early valid will, that he held certain property in trust for his son, and devised this property to son, an express trust was created, and it continued in absence of evidence that it was ever revoked, notwithstanding that early will was revoked by a later will which made no mention of the declaration in the earlier instrument.

Judgment reversed; appeal from order dismissed.

Parker Wood, J., dissented.

* Opinion vacated 284 P.2d 907.

1. Appeal and Error ⇐110

Order denying motion for new trial was not appealable, and appeal therefrom was dismissed.

2. Trusts ⇐20, 25(1)

A trust in real property may be declared by a written instrument subscribed by trustee, and no particular language or terminology is necessary to declare a trust, nor need words "trust" or "trustee" be used. West's Ann.Civ.Code, § 852.

3. Trusts ⇐13

Where owner of land gratuitously declares himself trustee for another in writing, a valid trust is created.

4. Trusts ⇐39

In order that trust in realty be valid and enforceable, beneficiary need not express acceptance or even be informed of transaction.

5. Trusts ⇐59(4)

Power to revoke a trust will not be deemed to have been exercised by a will unless will clearly indicates an intention to exercise it. West's Ann.Civ.Code, § 2280.

6. Trusts ⇐59(4)

A mere devise by trustee of his residuary estate, wherein trust property is held, will not revoke trust, even though devise expressly includes all property as to which testator has power of testamentary disposition.

7. Trusts ⇐20, 59(4)

Where decedent stated, in early valid will, that he held certain property in trust for his son and devised this property to son, an express trust was created, and it continued, in absence of evidence that it was ever revoked, notwithstanding that early will was revoked by a later will which made no mention of the declaration in the earlier instrument.

8. Evidence ⇐60

There is a presumption of innocence of crime or wrong.

9. Evidence ⇐69

There is a presumption that private transactions have been fair and regular.

10. Bills and Notes ⇐493(1)

There is a presumption that a bill of exchange was given for sufficient consideration.

11. Bills and Notes ⇐493(1)

There is a presumption that a check is drawn in payment of so much money due to payee.

12. Contracts ⇐45

There is a presumption that when blanks appear in an instrument the person in possession thereof has a prima facie authority to complete it by filling up the blanks. West's Ann.Civ.Code, § 3095.

J. Robert Maddox, Beverly Hills, and Wm. J. Clark, Los Angeles, for appellants.

W. Floyd Cobb, Los Angeles, for respondent.

VALLÉE, Justice.

[1] Appeal by defendants from a judgment for plaintiff as executor of the will of Jasper E. Lail, Sr., deceased, in an action for alleged breach of trust and for money had and received. Defendants also appeal from the order denying their motion for a new trial. That order is not appealable, and the appeal therefrom will be dismissed. Defendant Robert L. Lail will be referred to as defendant. Defendent Pearl A. Lail is the wife of defendant Robert L. Lail.

Jasper E. Lail, Sr., died in Beverly Hills on April 17, 1950. He was about 90 years of age. At the time of his death, his wife was 80 years of age. The decedent and his wife had 5 children living at the time of his death—4 sons and 1 daughter. Defendant is the eldest. Plaintiff is his brother.

Decedent lived on a ranch in Texas until 1930. The ranch consisted of 2,960 acres. Included in the 2,960 acres is a section known as section 151. Section 151 was purchased during the years 1910 to 1913 under a contract of sale. Defendant was not living at his father's home at the time. Defendant testified that sometime in 1909 he received a letter from his mother stating that his father had an opportunity to buy

a section of land which he had theretofore leased, that his father did not have the money to pay for it, and asked if defendant would pay half, if he would make the first payment his father would make the next, and they would buy it together; he wrote back and "told them to go ahead and make the deal and let me know how much the amount was to be paid and I would have the money to pay it"; he sent the money to make the first payment which was about $400 (it was $416); the other payments were "somewhere in the neighborhood of $400 or a little better" (they were four payments of $416 each with 6% interest); he paid half the purchase price by sending checks and money to his father in Texas; he does not remember the exact amount of the purchase price—it was somewhere around $1,800 or $1,900; part of the money was sent in cash and part by check; he does not remember exactly how much money he sent; his "mother kept track of all I sent." Title to section 151 was taken in the name of decedent.

In 1930 defendant induced decedent to sell his cattle and horses, lease the Texas ranch, and move to California. Since 1930 the 2,960 acres have been subject to a lease for grazing. The first grazing lease was negotiated by decedent. Thereafter all grazing leases were made by decedent with the advice of defendant. From 1930 until the death of decedent, defendant helped and advised decedent in every transaction in which decedent engaged. In caring for his business and affairs, decedent gave defendant checks signed in blank and defendant filled them in and paid the bills. Decedent obtained cash by giving defendant checks signed in blank which defendant filled in, cashed, and gave the cash to decedent. Defendant never demanded or received any compensation for the services so rendered. For many years prior to and up to the time of his death, decedent had a commercial account in Winters State Bank in Winters, Texas.

On June 6, 1936, while decedent was in Texas and defendant was in California, decedent executed a witnessed last will and testament which contained this provision:

> "To my oldest son, R. L. Lail, I give, devise, and bequeath the North One-Half of Section No. 151, Block No. 64, of the H & T. C. Ry. Co. surveys of Taylor County, Texas, in fee simple, because in reality he owns the property and the title of same merely in my name in trust for my use during my life."

On January 23, 1950 decedent executed another will which revoked "all Wills and other testamentary dispositions by me heretofore made," provided for payment of last illness and funeral expenses, and devised and bequeathed the residue "of my property" to his wife, but made no mention of the declaration in the 1936 will.

In February 1948 defendant negotiated an oil and gas lease on 649.1 acres of land described as section 160 belonging to decedent, from which a bonus check of $2,921.58 was received. On receipt of the check, decedent endorsed it, and a joint tenancy savings account, Number 1154, was opened in Bank of America, Wilshire and LaBrea Branch, Los Angeles. Decedent, defendant, and defendant's wife signed the signature card. The signature card provided that any one of them could withdraw funds from the account. Defendant's wife did not withdraw any funds from the account.

In November 1949 defendant negotiated another oil and gas lease which covered section 151 and other parts of the Texas ranch. Prior to December 18th defendant received a bank draft of $10,560 payable to decedent as a bonus for the lease. Decedent endorsed the draft and it was deposited in the Bank of America savings account. The bonus was at the rate of $9 an acre. There was testimony that decedent told defendant to deposit the draft in the Winters State Bank account.

On December 18, 1949, in the afternoon, a meeting was had at decedent's home at which decedent, his wife, all of the children, and some of the sons' wives were present. Plaintiff testified that the purpose of the meeting was to have the children sign something stating the parents did not "owe anybody any money whatever." Neither decedent nor his wife said anything at the meet-

ing. Conversation was had about the oil bonus money. Plaintiff asked defendant if he had received the oil bonus check. Defendant said he had and that it was for $10,560. Defendant stated he felt he was entitled to part of the revenue from section 151, to which plaintiff replied, "That's a deal between you and my father, and whatever my father agrees to is perfectly all right with me." Defendant was shown a typewritten statement which read that decedent and his wife were not indebted to any of the children in any amount. Decedent and his wife signed the original; defendant's brothers and sister signed the original and 4 copies of the instrument; defendant did not sign. Plaintiff's wife testified that at the request of her mother-in-law she took a typewriter to decedent's home on the morning of December 18th and typed the statement.

On January 6, 1950 decedent signed two checks and gave them to defendant. The first check reads:

"16–146 Wilshire-LaBrea Branch 16–146
Bank of America No. 2
National Trust and Savings Association
Los Angeles, Calif., Jan 6 1950

Pay to the
Order of R. L. Lail $3380/00
Three Thousand Three Hundred Eighty and 00/100 Dollars
account #1154
J. E. Lail"

on the reverse side, there appears the following:

"Grazing Lease on 320 acres of Section 151 Taylor Co., Texas

20 yrs @ 65¢ Per acre	$4160.00
Dec 1–1949 To June 1–1950 @ 75¢ Per acre	120.00
	$4280.00
Less Taxes (20 yrs)	– 400.00
" 1 Mile fence	– 500.00
Balance	$3380.00

R. L. Lail [Signed]"

The check is perforated "Paid 1–21–50." The second check reads:

"16–146 Wilshire-La Brea Branch 16–146
Bank of America No. 3
National Trust and Savings Association
Los Angeles, Calif., Jan 6 1950

Pay to the
Order of R. L. Lail $2880/00
Two Thousand Eight Hundred Eighty and 00/100 Dollars
account # 1154
J. E. Lail"

On the reverse side, there appears the following:
"Oil Bonus on 320 acres of Section 151 Taylor Co., Texas 320 acres @ $9.00 Per acre $2880.00
R. L. Lail [Signed]"

This check is also perforated "Paid 1-21-50." All of the handwriting on the two checks, except the signatures, is that of defendant. It will be noted that the checks are drawn on a commercial account. Decedent did not have a commercial account in Bank of America. However, it would appear it was intended that the checks should be charged against the savings account since each check bears the notation, "account # 1154." The checks total $6,260. This amount was debited to the savings account by Bank of America on January 21, 1950 and paid to defendant.

Defendant testified with respect to the receipt of the two checks that he dropped in to see his parents, and further:

"Q. What was said by your father or mother about this check, if anything? A. Mother asked Dad to settle up with me. She says, 'There is going to be trouble with the rest of the children and I think you better do it now.'

"Q. What did your father say, if anything? A. He said, 'Let's go ahead and figure it out and settle it up.'

"Q. What did you do then? A. We went into the dining room table and sat down to figure out what we thought the amounts were and what he thought the amounts should be.

"Q. What he thought the amounts should be? Did your mother go with you there? A. No.

"Q. Who did the figuring? A. I did. * * *

"Q. Did your father figure it? A. No. Dad never does any figuring. He just takes what is worked out and what he thinks is right and then that is the way it is settled.

"Q. He takes whatever you take to be right? A. Whatever was figured, and if it is satisfactory with him, why, that is the way it went.

"Q. Did you submit your figures to him? A. I did.

"Q. Did he check them? A. He was sitting right there looking at them.

"Q. What happened after you arrived at a figure? A. After we arrived at the figure, I wrote out the check then and put everything on there so that we would have a definite record between the oil lease and the grass lease, and that is why there was two checks made out.

"Q. You wrote out two checks? A. That is right.

"Q. Which check did you write first? A. That I wouldn't remember which one was written first.

"Q. Was there anything said that you can remember now prior to the time that you wrote the checks? A. Well, we were just talking about what we thought, what Dad thought was right for me to have and bring it up to sixty. Dad thought at that time it still would be seventy-five cents for the grass lease. That was what was agreed on on the night of the 18th or day, and he still was in his mind that it was seventy-five cents and he was willing—I told my father, I says, that as long as they were willing, I was willing to cut it down, because I was afraid there might be an oversight and I didn't want one dime—I didn't want to take one dime away from the other children, and make it out sixty-five cents for the lease. The last six months of the lease, then, he said, 'We will leave that stand seventy-five cents because nobody can doubt that.' * * *

"Q. Then you proceeded to write the checks, is that correct? A. After we got it all figured out, why, I wrote the checks out then.

"Q. Did you write the checks together, both checks together at the same time before he signed them? A. Yes, I wrote both checks before they was signed. * * *

"Q. You stated that you carried these checks around with you for several days, is that correct? A. That is right.

"Q. Where did you get those checks that you wrote on? A. We had a little check book that Dad had there in the drawer.

"Q. Your dad had a check book there in the drawer? A. Yes.

"Q. What bank account was that check drawn on? A. On the Bank of America, Wilshire and La Brea.

"Q. I show you Defendants' Exhibit A and Defendants' Exhibit I and ask you if those are the checks to which you have testified? A. They are.

"Q. Can you look at those checks and tell me whether or not they are drawn on a savings account or a commercial account? A. This was drawn on—which I thought at the time when we made out the checks, of course, it was for the record and I didn't give it any thought—I just drew the checks —whether it was a savings or commercial.

"Q. Your father had no commercial account at the Bank of America at that time? A. No. After we found out he didn't.

"Q. Now tell the Court when he got checks on a commercial account. A. When I made this deposit and I also brought—just picked up a little check book and I brought the deposit slip back and the book and I handed them all to my father.

"Q. It was the savings account? A. It was the savings account."

Plaintiff further testified that his father said "he wanted it all paid before he passed away or anything happened to him"; that the grazing lease "ranged from $1 down to 52 cents an acre"; and they agreed on 65 cents an acre less taxes and cost of erecting a fence.

Plaintiff brought the action to recover the $6,260 on the theory that defendant was trustee thereof and that it is a part of the estate of decedent. Judgment was for plaintiff, as prayed.

The answer of defendant alleged that property in Texas which stood in the name of decedent was held in trust by decedent for the benefit of defendant and that defendant was the owner thereof. Among other findings, the court found that these allegations were untrue. As will appear, this finding was erroneous and is unsupported by any evidence.

[2] The decedent, in the will of 1936, referring to the north half of section 151, specifically stated that defendant "owns the property and the title of same merely in my name in trust for my use during my life." A trust in relation to real property may be declared by a written instrument subscribed by the trustee. Civ.Code, § 852. No particular language or terminology is necessary to declare a trust; nor need the words "trust" or "trustee" be used. Neel v. Barnard, 24 Cal.2d 406, 412, 150 P.2d 177. See also De Laurencel v. De Boom, 48 Cal. 581; Garnsey v. Gothard, 90 Cal. 603, 27 P. 516; Moore v. Hoar, 27 Cal.App. 2d 269, 81 P.2d 226.

The Restatement says:

"A trust may be created by

"(a) a declaration by the owner of property that he holds it as trustee for another person; * * *" Rest., Trusts, § 17.

Nossaman says that a transfer in trust "may be effected by a declaration on the part of the trustor that he holds the property in trust." Nossaman, 1 Trust Administration and Taxation, 39, § 41.

Pomeroy says:

"The written evidence of the trust which will satisfy the statute *may* come from the grantor,—the one who intends that a trust shall be created for a certain beneficiary,— * * * he may declare himself a trustee, and that he holds the land in trust, without conveying the legal title." 3 Pomeroy's Equity Jurisprudence, 5th ed., 1001, § 1007.

Scott says:

"A trust can be created without a transfer of the property. The owner of property can by a declaration of trust make himself trustee of the property for others. Such a trust is valid even though the settlor receives no consideration for declaring the trust. No transfer of the property is necessary for the creation of such a trust, since the purpose is that the settlor himself shall continue to hold the property, no longer, it is true, for his own benefit, but for the benefit of others. * * * Where the owner of property wishes to make himself trustee of the property for another, the simplest method of accomplishing his purpose is to execute an instrument declaring that he holds the property in

trust." 1 Scott on Trusts, 136, § 17.1. See also Lynch v. Rooney, 112 Cal. 279, 44 P. 565.

[3] The rule is well settled that where the owner of land gratuitously declares himself trustee for another in writing, a valid trust is created; no consideration is necessary. 1 Scott on Trusts, 178, § 29; Taber v. Bailey, 22 Cal.App. 617, 622, 135 P. 975. In Taber v. Bailey, supra, it is said, 22 Cal.App. at page 620, 135 P. at page 977:

"When one expresses the intention to hold the legal title but that another should have the beneficial interest, the implication necessarily follows that the former intended to create a trust." [1]

[4] In order that the trust be valid and enforceable the beneficiary need not express acceptance or even be informed of the transaction. Booth v. Oakland Bank of Savings, 122 Cal. 19, 25, 54 P. 370; Cahlan v. Bank of Lassen County, 11 Cal.App. 533, 540, 105 P. 765.

Scott also says:

"A statement in a will as to the existence of an oral trust may be a sufficient memorandum of the trust, even though the will is later revoked." 1 Scott on Trusts, 273, § 47.

Bogert says:

"Often a person attempting to make a will recites in the instrument over his signature that he was at the time of the execution of the instrument the trustee of a trust, created by virtue of a transaction taking place before the attempted making of the will. The failure of the attempted will, or its later revocation, does not prevent the use of the paper as an admission of the existence of a trust, sufficient to make a trust or realty or personalty enforceable." 1 Bogert, Trusts and Trustees, 473, § 102.

In Keith v. Miller, 174 Ill. 64, 51 N.E. 151, 153, a will of a wife read:

"'I also give and bequeath to my dear relatives above named a certain tract or parcel of land which belongs to my husband, J. A. Keith, and myself, after we are done with it * * *.'"

The court said that, 51 N.E. 154:

"The question of revocation, or whether those wills were valid and operative as wills, is immaterial, but the real question is, was there evidence in writing, manifested and proved by these wills, of the existence of a trust?"

and held that a declaration of trust was "manifested and proved." In Hiss v. Hiss, 228 Ill. 414, 81 N.E. 1056, it was held that a revoked will which stated that certain realty had been conveyed to the maker in trust for the payment of an annuity sufficiently manifested the existence of a trust. See also In re McAuley's Estate, 184 Pa. 124, 39 A. 31; Innis v. Michigan Trust Co., 238 Mich. 282, 213 N.W. 85, 86. Cf. Rest. Trusts, § 330, Comment j.

[5, 6] Plaintiff does not contend that the trust declared in the will of 1936 was revoked by the will of 1950. The power to revoke a trust, Civ.Code, § 2280, will not be deemed to have been exercised by a will unless the will clearly indicates an intention to exercise it. A mere devise of the testator's residuary estate will not revoke the trust. This is so even though the devise expressly includes all property as to which the testator has a power of testamentary disposition. Mayer v. Tucker, 102

1. See Kingsbury v. Burnside, 58 Ill. 310, 328–332, 11 Am.Rep. 67; Moore v. Pickett, 62 Ill. 158, 161; Nesbitt v. Stevens, 161 Ind. 519, 69 N.E. 256, 258; DeLeuil's Ex'rs v. DeLeuil, 255 Ky. 406, 74 S.W.2d 474, 476–477; Barrell v. Joy, 16 Mass. 221, 222–223; Urann v. Coates, 109 Mass. 581, 583–585; Bates v. Hurd, 65 Me. 180, 181; McClellan v. McClellan, 65 Me. 500, 504–506; Nolan v. Garrison, 151 Mich. 138, 115 N.W. 58, 61; Winters v. Winters, 165 Or. 659, 109 P.2d 857, 860; Wallace v. Pruitt, 1 Tex.Civ. App. 231, 20 S.W. 728, 730; Holmes v. Holmes, 65 Wash. 572, 118 P. 733, 734, 38 L.R.A.,N.S., 645, Ann.Cas.1913B, 1021; Gates v. Paul, 117 Wis. 170, 94 N.W. 55, 60; Bingen v. First Trust Co. of St. Paul, 8 Cir., 103 F.2d 260, 263–264; 21 Tex.L.Rev. 726.

N.J.Eq. 524, 141 A. 799, was a suit by a trustee against the executor of the settlor's will to recover trust property. The trust was created in 1914. Power of revocation was reserved. In 1924 the settlor, Mrs. Tucker, executed her last will. By the terms of her will, she gave one-fifth of her estate to her husband. The residue she gave to her husband in trust to divide into four equal parts, one of said parts to be held by the trustee for each of her four children. The will contained no revocation of the deed of trust. No revocation of the deed of trust was ever expressly made. It was contended the will revoked the trust. The court held, 141 A. 800, 801:

"We are of the opinion that in the first place there is insufficient evidence either in the will or in the so-called extrinsic circumstances to warrant the conclusion that the execution of the will revoked the deed of trust. In the second place, we consider that the deed of trust could not be revoked by a will, as the right of revocation had to be exercised during the life of the donor. * * *

"In the case of Farnum v. Pennsylvania Co. for Insurance on Lives, etc., 87 N.J.Eq. 108, 99 A. 145, it was held that the general residuary bequest of 'my estate' referred to the testator's own estate, and not property over which she had a power of appointment. * * *

"In the will of Mrs. Tucker, there was no express revocation of the deed of trust. It is not mentioned in the will. * * *

"But, if it was the purpose of Mrs. Tucker to revoke the trust agreement in her will, it seems to us that this purpose failed. In the case of Stone v. Hackett, Ex'r, 12 Gray (Mass.) 227, a similar situation was presented. There one Kittredge appointed a Miss Stone as trustee of a certain portion of his property, the trust estate to be devoted to the purposes specified in the instrument. Kittredge retained 'the right to modify said uses or to revoke said trust.' The question presented was whether the trust was revoked by his will. Mr. Justice Bigelow, writing the opinion of the court, over which Chief Justice Shaw then presided, states this rule on page 232 of the opinion:

"'A power of revocation * * * does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, * * * until after the death of the donor, it can have no effect on the validity of the trust or the right of the trustee to hold the property.'

"The same principle is set out in 26 R.C.L. p. 1206, where it is stated that:

"'If the right of revocation is not exercised during the lifetime of the donor or other person in whose favor it was reserved, the validity of the trust remains unaffected as though there never had been a reserved right of revocation.'

"The case cited in the footnote to this statement fully support[s] it. In view of this principle, which seems to us to be a sound one, it would seem immaterial whether Mrs. Tucker intended by her will to exercise the power of revocation or not."

See also Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N.E. 801; Irving Bank-Columbia Trust Co. v. Rowe, 213 App.Div. 281, 210 N.Y.S. 497, 500; Syracuse Trust Co. v. Fuller, 140 Misc. 918, 252 N.Y.S. 90, 98; Broga v. Rome Trust Co., 151 Misc. 641, 272 N.Y.S. 101, 108; Barlow v. Loomis, C.C., 19 F. 677.

[7] The validity of the will of 1936 was not challenged. The decedent, by its terms, declared an express trust. He declared that the title of the north half of section 151 was in his name in trust for his use during his life and that defendant was the owner of the property. There is no evidence that the trust was ever revoked. The court erred to the prejudice of defendant

in not finding the facts with respect to the will of 1936 and concluding, as a matter of law, that defendant is the owner of the north half of section 151.

[8–12] The error compels a reversal of the judgment. We cannot say that the same result would have followed had the court found, as it should have, that a trust was declared. The legal title to section 151 was in decedent; the equitable title was in defendant. Defendant did not at any time realize anything from his interest in section 151 unless it was from the settlement he claims to have had with his father. Whether the checks for $6,260 were the result of an accounting by decedent to defendant and a settlement between them of any obligation of decedent to defendant should be determined in the light of the fact that a trust existed in the north half of section 151. For 20 years, while decedent was between 70 and 90 years of age, defendant alone managed and cared for all of his father's affairs without demanding or receiving any compensation. There is no evidence that during that time and up to the present charge defendant took the slightest advantage of his father. The judgment brands defendant a forger and a thief. And it does that contrary to these presumptions: innocence of crime or wrong; private transactions have been fair and regular; a bill of exchange was given for a sufficient consideration; a check is drawn in payment of so much money due to the payee; and when blanks appear in an instrument the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. Civ.Code, § 3095. The evidence with respect to the meeting of December 18, 1949 is susceptible of inferences unfavorable to plaintiff. The oil bonus had just been received. The other children knew defendant claimed an interest in the revenue from section 151. The parents took no part in the meeting except to sign the written statement. As none of the other children claimed any indebtedness from their parents, all of them signed it. Defendant, who claimed an indebtedness, did not. Plaintiff's wife typed the statement. It is couched in legal phraseology. The record is barren of any evidence of solicitude on the part of any of the other children concerning the welfare of the parents until the oil bonus check was received. We mention these matters as indicative that a different outcome might not have been unlikely had the existence of the trust been found. Considering the entire record, it cannot be said that in the absence of the error with respect to the trust, a different result would have been improbable.

Counsel argue the question whether the testimony of defendant with respect to his contributions to the purchase of section 151 effected a resulting trust. Plaintiff's counsel criticizes defendant's lack of memory as to events which took place between 1909 and 1913—more than 40 years prior to the trial of this action. It is not surprising that defendant was not able to remember the details of what took place 40 years ago. Human memory is far from infallible. The question is not material. The trust results as a matter of law from the will of 1936 and is an express trust. When there is an express trust, the question whether there was a resulting trust is of no consequence. Kingsbury v. Burnside, 58 Ill. 310, 328, 11 Am.Rep. 67; Gates v. Paul, 117 Wis. 170, 94 N.W. 55, 60.

We deem it unnecessary to discuss other assignments of error.

The appeal from the order denying a new trial is dismissed. The judgment is reversed.

SHINN, P. J., concurs.

PARKER WOOD, Justice.

I dissent. In my opinion the written statement by the father that he was not indebted to any of the children in any amount presented a substantial conflict in the evidence. Further, if there was a trust as stated in the 1936 will, the father was entitled to the use of the land during his life, and he was not required to account to defendant. The writing of defendant on the back of one of the checks purported to be an accounting for grazing rental for 20 years; and his writing on the back of the other check purported to be an accounting for oil bonus.

132 Cal.App.2d 114

Alfred L. LA COM and Milton F. Finch, Plaintiffs and Appellants,

v.

PACIFIC GAS AND ELECTRIC COMPANY, San Francisco Bay Airport, Charles Kleinclaus, Jr., Esther Kleinclaus, Alfred W. Nelson, et al., Defendants,

Pacific Gas and Electric Company, Defendant and Respondent.

Civ. 16200.

District Court of Appeal, First District, Division 2, California.

April 4, 1955.

Action by owner and pilot of aircraft to recover for damage incurred when pilot was attempting to land aircraft at an airfield and it crashed into electric poles and wires. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment upon sustaining demurrer to complaint, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that since it appeared that such poles had been clearly visible to the pilot, failure of company owning poles to have them painted in accordance with federal regulations was not a contributory cause of the collision.

Judgment affirmed.

Dooling, J., dissented.

1. Trespass ⇐10

Any aircraft flying over land and structures or on land of another is a trespasser. Public Utilities Code, §§ 21402, 21403.

2. Trespass ⇐10

Temporary invasion of airspace by aircraft is a privilege, and so long as invasion does not interfere unreasonably with the possessor's enjoyment of land, privilege exists. Public Utilities Code, §§ 21402, 21403.

3. Electricity ⇐15(1)

Trespass ⇐10

An airplane operated at an altitude which was dangerous to persons and property lawfully on another's land was trespasser on such land, and where such aircraft collided with electric wires, any remedy which aircraft owner or operator might have against electric company would depend upon whether such electric wires were lawfully upon land. Public Utilities Code, §§ 21402, 21403.

4. Pleading ⇐37

Where pertinent matters of fact within knowledge of pleader are not alleged in complaint, court will assume that such facts are unfavorable to pleader and that they are true.

5. Pleading ⇐37

In action against electric company by owner and pilot of airplane to recover for injuries when airplane operated at an altitude dangerous to persons or property lawfully on land collided with electric wires, court would assume, on demurrer to complaint containing no allegations to contrary, that wires were installed where they had lawful right to be, that they were erected prior to construction of nearby airport, that they were plainly visible to any pilot, and that pilot knew of location and dangerous character of wires and deliberately moved into them. Public Utilities Code, §§ 21402, 21403.

6. Pleading ⇐193(5)

Where contributory negligence appears on face of complaint, demurrer to complaint is properly sustainable on that ground.

7. Negligence ⇐80

Negligence of defendant is immaterial when contributory negligence of the plaintiff is obvious and conclusive.

8. Constitutional Law ⇐278(1)

To require a company owning electric poles near an airport erected before regulation requiring them to be specially painted to expend its own funds to so paint such poles would be to take property without due process of law.

9. Evidence ⇐17

Court would take knowledge that in month of May, and with daylight saving time operating, the hour of 6:55 p. m. was actually 5:55 and that sun did not set until after 7 p. m.

10. Electricity ⇐18(1)

Where pilot, in attempting to land at a nearby airport, deliberately moved his aircraft toward electric wires which were plainly visible to him, which were installed where they had lawful right to be, and which were installed prior to erection of airport, pilot was contributorily negligent as matter of law when aircraft collided with wires, even if poles supporting wires were not painted in accordance with federal regulations.

Leonard Horwin, Beverly Hills, Richard Kelton, Beverly Hills, of counsel, for appellants.

Robert H. Gerdes, Frederick W. Mielke, Jr., San Francisco, Gardiner, Riede & Elliott, San Rafael, for respondents.

Alfred L. Wolf, Merrill Armour, Washington, D. C., for Aircraft Owners and Pilots Ass'n, amicus curiae, in support of appellants' position.

NOURSE, Presiding Justice.

Plaintiffs La Com, as operator of an airplane, and Finch, as its owner, jointly sued the defendants for damages to La Com for personal injuries and to the airplane he was flying over defendants' property. The demurrers of the airport and of the defendant land owners were sustained without leave to amend. No appeal was taken from that order. An amended complaint was filed against the P. G. & E. alone a demurrer to which was sustained, and, on plaintiffs' statement that no leave to amend was desired, judgment was entered for that defendant. The appeal from this order raises the question whether the electric company, as matter of law, is liable for the injuries and loss to plaintiffs which, of course, are not here controverted.

The issues raised on the appeal are whether the electric company should respond in damages because of the hazard created by its overhead wires.

No question is raised that the wires were not maintained by the company under proper license from the land owners; not that they were not in full compliance with all statutory requirements. The pertinent question is whether they were maintained in conformance with the pertinent regulations relative to air travel as a whole. A minor question whether this airplane which was used almost exclusively in trips between San Francisco and Los Angeles was engaged in interstate commerce to such extent as to place it within interstate commerce regulations is not important since we shall find that no federal regulation was violated.

[1] Primarily it should be stated that any aircraft flying over the land and the structures on the land of another is a trespasser. Strother v. Pacific Gas & Elec. Co., 94 Cal.App.2d 525, 529, 211 P.2d 624; Restatement, Torts, § 159.

[2] A temporary invasion of the air space by aircraft is a privilege. So long as it "does not interfere unreasonably with the possessor's enjoyment * * * it is privileged" (Restatement, Torts, § 159). These principles are stated in our Public Utilities Code which reads: "§ 21402. * * * The ownership of the space above the land * * * is vested in the * * * owners of the surface beneath, subject to the right of flight described in Section 21403." The latter section provides that "Flight in aircraft * * * is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land * * *."

[3] Manifestly the plane here having been operated at an altitude which was dangerous "to persons or property lawfully on the land" was a trespasser on the land. Therefore plaintiffs' remedy, if any, must be based wholly on the issue whether the electric wires were "lawfully on the land".

[4, 5] When pertinent matters of fact within the knowledge of the pleader are not alleged in the complaint the court must assume that such facts are unfavorable to the pleader and that they are true, otherwise that the complaint would have included them. Thus the facts that the electric wires were installed and maintained where they had a lawful right to be; that they were erected prior to the construction of

the airport; that they were plainly visible to any pilot approaching the airport, must, in a ruling on a demurrer to the complaint, all be presumed to be true under the well settled rule that, when a pleader fails to state pertinent facts in his complaint, those facts must be taken as true and the court will conclude that his failure to plead them was because they would have weakened his case. See Smith v. Buttner, 90 Cal. 95, 100, 27 P. 29; Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 585, 159 P.2d 674; Strother v. Pacific Gas & Elec. Co., 94 Cal.App.2d 525, 530–531, 211 P.2d 624.

On this basis we must presume that the plaintiff La Com "knew of the dangerous character of the wires and their exact location and condition, and deliberately moved * * * into them * * *." Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 227, 23 P.2d 1058, 1070.

[6] The conclusions must follow: that the wires were lawfully installed and maintained prior to the construction of the airport, that they were plainly visible to aircraft in approaching the airport. But more damaging is the necessary presumption on the face of the complaint that La Com, being a trespasser was guilty of contributory negligence as matter of law. Where contributory negligence appears on the face of the complaint a demurrer to the complaint is properly sustainable on that ground. Routh v. Quinn, 20 Cal.2d 488, 493, 127 P.2d 1, 149 A.L.R. 215.

[7] Appellants devote a large part of their briefs to a discussion of the failure of some one to paint the respondent's poles in colors of alternate white and orange. On the accepted theory that negligence of a defendant is immaterial when the contributory negligence of a plaintiff is obvious and conclusive it would serve no good purpose to discuss appellants' arguments at length. The complaint alleges that the towers were located "on the east border" of the "landing approach". Whether the wires crossed the runway or were alongside of the border is not alleged, nor whether, if alongside of the landing approach, they were within a few feet or half a mile from the border.

[8] It cannot be ascertained from the complaint whether the poles and electric wires were constructed after the erection of the airport. We must presume that they were not. The rule of the federal authorities that the poles should be painted an alternative white and orange was applicable to those poles erected after the rule was in effect. To require the company to expend its own funds for marking the poles previously erected would be a taking of property without due process of law. It would be just as reasonable to say that the owner of a tall building could be compelled to remove it at his own expense for the benefit of the airport and air traffic.

[9, 10] But a pertinent fact is that the landing was attempted at about 6:55 p. m. of May 6, 1951, and hence in broad daylight. (The court can take knowledge that in the month of May, and with daylight saving time operating, the hour of 6:55 p. m. was actually 5:55 and that the sun did not set until after 7 p. m.) Hence, in the absence of any allegation to the contrary, the court must presume that the poles and wires were clearly visible to the pilot and that the failure to have them marked was not a contributory cause of the accident. The contributory negligence of La Com is therefore complete.

Substantial authority for these views is found in Strother v. Pacific Gas & Elec. Co., 94 Cal.App.2d 525, 211 P.2d 624; Capitol Airways v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E.2d 776. The Strother case is precisely in point and though we are well aware that there is a difference of opinion as to the binding effect which the opinion and judgment of one district court of appeal may have on the court of another district, where, as here, the case is so closely in point, both as to the facts and as to the questions of law involved, we have no hesitancy in resting our judgment on the opinion in the Strother case which we feel is a correct statement of the law. It should also be stated that no other case has been found in either the federal or state courts which is contrary to the Strother case.

Judgment affirmed.

KAUFMAN, J., concurs.

DOOLING, Justice.

I dissent. The opinion in this case applies horse-and-buggy law to the airplane age.

The amended complaint must be liberally construed. Section 452 Code Civ.Proc.; Mix v. Yoakum, 200 Cal. 681, 687, 254 P. 557; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867; Hudson v. Craft, 33 Cal.2d 654, 661, 204 P.2d 1, 7 A.L.R.2d 696. The opinion of my associates not only disregards this rule but in some instances actually misconstrues the plain language of the pleading. The amended complaint alleges that the power lines were "on the east border of the San Francisco Bay Airport and *on* the landing approach thereto." (Emphasis mine.) The entire meaning of this allegation is changed by the expedient of omitting a few words and changing the second preposition from "on" to "of", so that it is made to read that the power lines were on the east border *of* the landing approach. Having done this by another easy transposition they are speculated into a position half a mile away. The preposition "on" denotes "contiguity" or "contact". (Webster's New International Dictionary, 2d Ed.) A town half a mile from a river cannot be said to be located on the river.

The complaint alleges the failure to paint the towers in alternate bands of white and orange and to provide for lighting them from the hours of sunset to sunrise as required by the rules of the United States Civil Aeronautics Administration and that in their unmarked condition they constituted a danger and hazard to aircraft using said airport, "which fact was well known to defendant."

The complaint further alleges that the casualty to the airplane occurred *"at* or *about* the hour of 6:55 p. m. * * * and *after the hour of sunset."* (Emphasis mine.) In the face of the specific allegation that the casualty happened "after the hour of sunset", the majority seizes on the allegation of the time to write out the allegation of the fact that the sun had set. The allegation that it was "after the hour of sunset" is specific and must be construed as true against the indefinite "at or about" allegation of the time. The complaint alleges that plaintiff pilot "failed to see said towers and power lines" and by reason of the failure of the defendant to mark and light them as required by the aforesaid regulation "said airplane was caused to collide with said power lines." In my judgment the allegations of the complaint are sufficient to state a cause of action.

I differ with my associates on both grounds of their opinion. It needs no citation of authority at this stage of the development of our constitutional law to support the settled rule that all private property is held subject to reasonable police regulation for the protection of the public. I simply cannot agree that such simple requirements as painting and lighting structures which are so near to an airfield as to constitute a danger, when unmarked and unlighted, to airplanes using the field, constitute an unreasonable regulation. To compare this to a requirement that a man tear down a high building is to disregard the elementary distinction between regulation which is reasonable and that which is unreasonable.

Nor can I follow my associates in their conclusion that the complaint shows as a matter of law that the pilot was guilty of contributory negligence. After sunset, as every driver of an automobile will recognize, many objects have a deceptive appearance. We cannot take judicial notice that from the air the exact height of towers and wires is at any time clearly perceptible and we may assume, from the federal regulations for their marking and lighting, that it is not. In any event I am satisfied that my associates have usurped the function of triers of the fact without hearing the evidence when they assert that they "must presume that the poles and wires were clearly visible to the pilot."

In my view the extreme position taken by the court in Strother v. Pacific Gas & Elec. Co., 94 Cal.App.2d 525, 211 P.2d 624 should be reexamined. I would reverse the judgment.

132 Cal.App.2d 120

Beryl McVEY, Plaintiff-Appellant,

v.

Paul McVEY, Defendant-Respondent.

Civ. 20614.

District Court of Appeal, Second District, Division 3, California.

April 5, 1955.

Wife's action for separate maintenance on grounds of extreme cruelty, desertion, and wilful neglect. Her husband answered and cross-complained for a divorce on the ground of extreme cruelty. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., denied the wife the relief she sought and granted the husband a divorce. On the wife's appeal, the District Court of Appeal, Vallée, J., held that the record established that a miscarriage of justice had resulted.

Reversed.

1. Evidence ⇐318(7)

Statements in wife's affidavit, with respect to what she had been told by her counsel as to what had transpired in judge's chambers at conference of judge and counsel, held at conclusion of wife's case in chief for separate maintenance, was hearsay.

2. Appeal and Error ⇐204(2)

No objection having been made at hearing of motion for new trial to any part of affidavit containing hearsay, such hearsay became competent evidence and objection thereto could not first be heard on appeal.

3. Evidence ⇐594

An uncontradicted and unimpeached affidavit may not be arbitrarily disregarded.

4. Trial ⇐29(4)

A trial judge should not prejudge issues but should keep an open mind until all evidence is presented to him.

5. Trial ⇐29(4)

When a trial judge sits as trier of facts he takes place of jury, and his conduct is subject to same rules, one of which is that before case is submitted to him he should not form or express an opinion thereon.

6. Appeal and Error ⇐1046(1)
Trial ⇐18

Trial of case should not only be fair in fact, but it should also appear to be fair; and where contrary appears, it shocks judicial instinct to allow judgment to stand.

7. Trial ⇐29(4)

A judge must not place himself in an attitude of hostility to law or to party.

8. Election of Remedies ⇐4

Where wrong is done for which law affords more than one remedy, question of whether party shall seek one remedy rather than another rests alone with him.

9. Trial ⇐29(4)

If under the law a party has a good cause of action and the law gives him more than one remedy, judge should not for any reason assert that action should not have been brought or that party should not have asked for relief he seeks.

10. Trial ⇐29(4)

A trial judge is not obliged to approve of every statute or precedent by which his decision is governed, but it is nevertheless his sworn duty to enforce it in proper case.

11. Husband and Wife ⇐285½

It is duty of trial judge to enforce statute giving spouse with cause of action for divorce a right of action for permanent support and maintenance without applying for divorce. West's Ann.Civ.Code, § 137.

12. Husband and Wife ⇐298½

Record on wife's appeal, from denial of her petition for separate maintenance and granting of her husband's cross-complaint for divorce, sustained wife's contention that she had not had a fair trial of her cause by reason of the trial judge's preconceived and declared aversion to actions for separate maintenance. West's Ann.Civ. Code, § 137.

13. Appeal and Error ⇐1026

Whether error complained of has produced substantial injury to appellant is al-

ways proper question for consideration on review.

14. Appeal and Error ⇐1170(1)

A judgment should not be reversed unless, after an examination of entire record, it appears that alleged error has resulted in miscarriage of justice. West's Ann.Const. art. 6, § 4½.

Hahn, Ross & Saunders, Los Angeles, for appellant.

J. George Bragin, Hollywood, for respondent.

VALLÉE, Justice.

Plaintiff and cross-defendant wife appeals from a judgment awarding defendant and cross-complainant husband a divorce.

Plaintiff filed an action for separate maintenance on the grounds of extreme cruelty, desertion, and wilful neglect against defendant. Defendant answered and cross-complained for a divorce on the ground of extreme cruelty. Plaintiff answered the cross-complaint. After a contested trial, plaintiff was denied a decree of separate maintenance and defendant was granted an interlocutory decree of divorce. Plaintiff's motion for a new trial was denied.

Plaintiff contends the trial judge had a personal prejudice against an action for separate maintenance and by reason thereof she did not have a fair or an impartial trial. In support of her motion for a new trial plaintiff filed an affidavit made by her in which she stated that: before the case proceeded to trial the judge invited her, defendant, and their counsel into his chambers for a conference; no reporter was present; the judge stated to her that in his opinion a husband and wife who were separated without possibility of reconciliation should become divorced, that separate maintenance was socially and morally undesirable, that defendant and his counsel had indicated that if she amended the prayer of her complaint to seek a divorce he (defendant) would not contest the action and would consent to the award of substantially all property of the parties and reasonable alimony to her, that she should reconsider her decision as to the type of relief she demanded, that he had not yet heard the evidence and that his decision might be in favor of defendant; that she stated to the judge that her counsel had informed her of the various possible results of the lawsuit but that she knew she had a meritorious case; the judge then suggested that she reconsider the matter in private conference with her own counsel; she considered the matter and conferred with her counsel, but reaffirmed her desire for separate maintenance, and the case thereupon proceeded to trial.

The affidavit further stated that after plaintiff had concluded her case in chief, the judge called counsel for both parties into chambers. No reporter was present. The affidavit said that after the conference, plaintiff was informed by her counsel that the judge had stated: that her case in chief entitled her to a divorce if she would ask for one; that if she would accordingly change her prayer for relief there would be no need to take further testimony and she would get the utmost to which she was entitled; that if she insisted upon separate maintenance, then he (the judge) would hear the testimony on behalf of defendant; that said testimony might convince him that defendant, and not plaintiff, was entitled to relief, with the result that she would become divorced anyway, she would receive no alimony, and would be awarded less than 50 percent of the community property. The affidavit continued: plaintiff reiterated that she insisted upon separate maintenance and not divorce; thereupon the trial was resumed, and the court found for defendant and against plaintiff; that she believes she was deprived of a trial by a fair and impartial judge, and the judge had a personal prejudice against granting separate maintenance. The statements in the affidavit were not denied.

[1–3] The statements in the affidavit with respect to what plaintiff was told by her counsel as to what transpired in the judge's chambers after she had concluded her case in chief are, of course, hearsay. The record does not indicate that at the hearing of the motion for a new

trial defendant objected to any part of the affidavit on the ground of hearsay or any other ground. It is now too late to urge, as does defendant, that those statements are hearsay. Maguire v. Corbett, 101 Cal.App.2d 314, 315, 225 P.2d 606. The hearsay statements became competent evidence. Fallon v. Fallon, 86 Cal.App.2d 872, 873, 195 P.2d 878; Vartanian v. Croll, 117 Cal.App.2d 639, 647–648, 256 P.2d 1022. An uncontradicted and unimpeached affidavit may not be arbitrarily disregarded. Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 228–229, 257 P.2d 727.

[4–10] A trial judge should not prejudge the issues but should keep an open mind until all of the evidence is presented to him. Rosenfield v. Vosper, 45 Cal.App. 2d 365, 371, 114 P.2d 29. When a trial judge sits as a trier of the facts he takes the place of a jury, and his conduct is subject to the same rules, one of which is that before the case is submitted to him he should not form or express an opinion thereon. Martin v. Martin, 79 Cal.App. 2d 409, 410, 179 P.2d 655. The language of the court in Pratt v. Pratt, 141 Cal. 247, at page 252, 74 P. 742, at page 744, is applicable to the present case:

> "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears it shocks the judicial instinct to allow the judgment to stand."

A judge must not place himself in an attitude of hostility to the law or to a party. Where a wrong has been done for which the law affords more than one remedy, the question whether a party shall seek one remedy rather than another rests alone with him. The courts have nothing to do with the matter, however much the judge personally may disapprove of the action, except to enforce the law. If under the law a party has a good cause of action and the law gives him more than one remedy, the judge should not for any reason assert that the action should not have been brought or that the party should not have asked for the relief he seeks. While a judge is not obliged to approve every statute or precedent by which his decision is governed, it is nevertheless his sworn duty to enforce it in a proper case.

[11] When a spouse has a cause of action for divorce the statute expressly gives him or her a right of action for permanent support and maintenance without applying for a divorce. Civ.Code, § 137. The statute has been on the books since 1872. It was the duty of the trial judge to enforce the statute if plaintiff established a cause of action.

In Hiner v. Hiner, 153 Cal. 254, at pages 256, 257, 94 P. 1044, at page 1045, it is said:

> "The policy of the law, as illustrated by the enactment of section 137, is to afford the wife, when cause for a divorce exists under section 92, the right to enforce support from her husband, which springs from the marital *status*, without praying for or requiring a total dissolution of such *status*. * * * The policy of the present age, following an instinct of humanity and justice, and crystallizing it into legislative enactment, has been to afford facilities to the wife to compel the delinquent husband to discharge his marital duty of support without seeking a divorce, and no one has ever deprecated the justice or wisdom of the provision except the delinquent husband himself. Particularly in this country has the doctrine of our courts and the legislation of the states furthered that right."

[12] It is apparent that plaintiff did not have a fair trial of her cause by reason of the preconceived and declared aversion of the trial judge to an action for separate maintenance. Plaintiff was faced with the handicap of his predetermined disposition of that issue regardless of her proof. Thus, before he had heard any evidence, he stated that a husband and wife who were separated without possibility of reconciliation should be divorced, that if plaintiff would seek a divorce defendant would not contest the action and she would be awarded substantially all of the property and reasonable alimony, that he had not heard the evidence and that his decision might be in favor of defendant. And after she

had made her proof, he stated her case entitled her to a divorce if she would ask for one; if she would change her prayer there would be no need for further testimony and she would get the utmost to which she was entitled; and if she insisted on separate maintenance he would hear the testimony of defendant, and that testimony might convince him that defendant, and not plaintiff, was entitled to relief. The dominating factor in deciding the case seems to have been the trial judge's bias and prejudice against an action for separate maintenance. On the cold record, plaintiff established a strong case for separate maintenance; defendant, a weak case for divorce. Whether there was any corroboration of defendant's testimony is a doubtful question. It would appear from what the judge said after plaintiff had made her proof, which he said entitled her to a divorce, that he had made up his mind not to award her separate maintenance. Plaintiff had to proceed under the handicap of a preconceived and declared disinclination of the judge to award her the only relief which she sought. Such conduct on the part of a trial judge indicating his unsympathetic attitude toward the litigation does not accord with recognized principles of judicial behavior consistent with the presentation of a case in an atmosphere of fairness and impartiality, and it cannot be condoned.

[13, 14] Whether the error complained of has produced substantial injury to the appellant is always a proper question for consideration on review. Webber v. Webber, 33 Cal.2d 153, 155, 199 P.2d 934. While a judgment should not be reversed unless after an examination of the entire record it appears that the alleged error "has resulted in a miscarriage of justice", Const. art. VI, § 4½, such is the situation here, as evidenced by the declared attitude of the trial judge.

In view of our conclusion, it is unnecessary to discuss other grounds for reversal urged by plaintiff.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 228

Claude F. CASIDA, Plaintiff, Respondent and Cross-Appellant

v.

Hollis B. ROBERTS, Defendant, Appellant and Cross-Respondent.

Civ. 4935.

District Court of Appeal, Fourth District, California.

April 11, 1955.
Rehearing Denied May 5, 1955.
Hearing Denied June 8, 1955.

Action for dissolution of mining partnership between plaintiff and defendant, for accounting therein, and for damages. The Superior Court of Kern County, Robert B. Lambert, J., entered a judgment from which both parties appealed. The District Court of Appeal, Mussell, J., held that evidence supported trial court's findings as to existence of partnership, but that trial court was in error in refusing to allow defendant the reasonable rental value for certain machinery owned by him and used in partnership operations.

Judgment as to the existence of partnership affirmed, judgment on accounting reversed.

1. Appeal and Error ⇐1010(1)

Findings supported by substantial evidence may not be disturbed on appeal.

2. Mines and Minerals ⇐97

In action for dissolution of alleged mining partnership to which defendant had contributed entire capital, and for accounting therein, evidence supported jury's special verdict that plaintiff and defendant had become partners to mine, extract and sell gypsum and to share profits equally.

3. Mines and Minerals ⇐100

In action for dissolution of mining partnership and for accounting therein, evidence on issue of whether partnership had terminated before period for which accounting was sought supported finding for plaintiff.

4. Mines and Minerals ⇐100

In action for dissolution of mining partnership, and for accounting therein,

evidence supported trial court's findings that defendant had operated mine to his own use and benefit to the wrongful exclusion of the plaintiff and that plaintiff was entitled to accounting and settlement of partnership affairs.

5. Mines and Minerals ⇐97

In action for dissolution of mining partnership between plaintiff and defendant, evidence on defendant's contention that a third person was member of partnership supported finding for plaintiff.

6. Mines and Minerals ⇐100

Where one partner owned machinery which was used by mining partnership in its operation, he was entitled to reasonable rental thereof from partnership, in dissolution proceedings.

Morris B. Chain and William E. Swiney, Bakersfield, for plaintiff, respondent and cross-appellant.

Baker, Palmer & Wall, Bakersfield, for defendant, appellant and cross-respondent.

MUSSELL, Justice.

This is an action for dissolution of a partnership, an accounting, and for damages. A jury returned a special verdict that "Hollis B. Roberts and Claude F. Casida became partners to mine, extract and sell gypsum and share the profits equally." It was stipulated by the parties "That the intention of the said verdict was to refer solely to the extraction, mining and selling of gypsum from deposits situated on Section 13, Township 26, Range 20 East, M.D.B. & M., Kern County, California." Judgment was entered in accordance with the verdict of the jury and counsel for the respective parties stipulated that the accounting features of the case be heard at a later date by the court. After the trial of the accounting issues by the same judge who presided at the jury trial, judgment was rendered on May 19, 1954, in favor of plaintiff and against the defendant for $21,004.55, plus interest and costs.

Defendant appeals from the judgment entered on the verdict of October 19, 1953, and also from the judgment entered on May 19, 1954, on the trial of the accounting issues. Plaintiff appeals from the May 19, 1954, judgment only.

At the jury trial plaintiff Casida testified that he had been connected with gypsum mining operations for several years; that he had known defendant Roberts for about fifteen years and that Roberts was engaged in the business of farming; that early in February, 1952, he, Casida, heard of a government lease that might be available in the Lost Hills area in respect to gypsum deposits; that on February 6, 1952, he talked to Roberts about this lease and told him that it would be necessary to put up a $2,000 deposit on the bid for a government lease on land in Section 33, Township 25 South, Range 20 East, M.D.B. & M., Kern County; that on said date he and Roberts discussed the Associated Oil property situated on Section 13 in Township 26 South, Range 20 East, M.D.B. & M., and Roberts agreed "to go in as partners with me on a fifty-fifty basis" if they could get the Associated Oil property; that he told Roberts he could get $1,000 from a Mr. Vrba and Roberts said "You know the work, and you have been in the business, and we will put up the money, and you do the work;" that he obtained $1,000 from Vrba and a like amount from Roberts and went to Sacramento with a cashier's check for $2,000 where he put in a bid for a lease on the government property in said section 33; that the bid was not accepted; that he and Roberts discussed the matter of obtaining a lease on section 13 with a Mr. Sanders, manager of real estate and right of way for the Tide Water Associated Oil Company; that Sanders told them he was sure that they could get a lease; that equipment was delivered to the mine on section 13 on February 15, 1952, and he, Casida, directed the operation of removing the "overburden" of earth over the gypsum deposit; that under his direction the mining operations on section 13 commenced on February 15, 1952, and continued twenty-four hours a day until February 20, 1952, when Roberts came out to the mine and told him that "he was all finished" and to get off

the property; that he then left the property and conducted no further operations thereon.

Casida further testified that the application to the State Agricultural Department or state licenses to ship and sell gypsum were first signed by Roberts and Casida as partners but that Roberts had these licenses canceled and others issued in his name only; that Roberts also obtained the lease of the property in section 13 in his own name and that the lease was dated February 12, 1952, and was for a period of one year.

Roberts testified that he had no conversation with Casida concerning the formation of a partnership on a fifty-fifty basis, or otherwise; that he discussed the operation of a mine on section 13 with Casida; that he made a deal with him to pay him $300 per month "and if we make a net profit, he was to get five per cent" and that that was the understanding under which Casida worked for him from February 15, 1952, until February 20, 1952.

[1–4] There was a conflict in the evidence as to the existence of a partnership between plaintiff and defendant and the jury in a special verdict found that "Hollis B. Roberts and Claude F. Casida became partners to mine, extract and sell gypsum and share the profits equally." This finding is supported by substantial evidence and cannot be here disturbed. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Defendant Roberts in his appeal from the judgment based on this verdict contends that the jury was not permitted to find what period was involved in the partnership, and whether the parties became partners to mine, extract and sell gypsum from property other than said section 13. The evidence is that no time limit was established by the parties as to the partnership existence. The trial court found that defendant from and after February 20, 1952, operated the entire partnership business as his own and mined, extracted, sold and used the gypsum taken from the property of the partnership; "that plaintiff is entitled to an accounting and settlement of the partnership affairs; that the partnership was dissolved by the wrongful exclusion of plaintiff on February 20, 1952, from the business; and that the partnership was not terminated nor its affairs wound up or settled as between the parties at any time after February 20, 1952, or to and including the date of trial." These findings are substantially supported by the evidence.

It was stipulated by the parties that the jury found as a fact that the parties became partners to mine, extract and sell gypsum and share the profits equally and that the intention of said verdict was to refer solely to the extraction, mining and selling of gypsum from deposits situated on said section 13.

[5] Roberts further contends that there is substantial evidence that Vrba was a partner and that the jury should have been instructed as to his status. However, the lease in which Vrba was interested and in connection with which he advanced the sum of $1,000 was never executed. The bid was not accepted and Vrba never claimed an interest in the partnership. The evidence would not support a finding that he was interested in or a party to the mining and extraction of gypsum from section 13. We conclude that the judgment on the verdict dated October 19, 1953, is supported by the record and we find no prejudicial error in the instructions given to the jury.

Both parties appeal from the judgment dated May 19, 1954, and rendered by the court in the accounting proceedings. Appellant Casida contends that the court erred in allowing defendant Roberts $10,000 as depreciation on his machinery and equipment used in the mining operations conducted on section 13 and further contends that the profits of all sections leased for gypsum by defendant Roberts should have been included in the profits of the partnership because all sections were operated as one business, using the same machines, labor, books and management. Appellant Roberts contends that the trial court erred in substituting the $10,000 as depreciation allowance for the reasonable rental value of his machinery and equip-

ment; that the said reasonable rental value amounted to the sum of $58,993.50; that if said sum had been allowed, the partnership would have shown a loss rather than a profit.

The record shows that after Roberts excluded plaintiff from section 13 on February 20, 1952, the mining operations thereon were conducted exclusively by Roberts and his employees and the machinery and equipment used in these operations were owned and maintained by Roberts. The record further shows that Roberts, as an individual and not on behalf of the partnership, during 1952 and 1953 leased from the Tide Water Associated Oil Company portions of other sections near said section 13 and conducted gypsum mining operations thereon. The court found that an auditor's report dated August 12, 1952, prepared by an auditor employed by Roberts, shows that a net profit from the operation of all of these gypsum properties to July 31, 1953, amounted to the sum of $88,480.48. The court further found that the report failed to charge defendant for gypsum taken by him for his own use and that the sum of $88,480.48 should be charged to defendant for such gypsum; that the true profit from all operations by defendant was the sum of $168,599.88; that dividing this profit by 212,809.46 tons produced resulted in a net profit of 78¢ per ton; that the total tons mined, sold, taken and removed from section 13 was 68,601.42 tons; that the net profit attributable to section 13 was therefore 68,601.42 x 78¢ or $53,509.10. The court then found that all machinery and equipment used in the mining operations, other than that for which rent was paid directly to commercial lessors, was the sole property of the defendant and not the property or asset of the partnership; that defendant is entitled to an allowance for use of such machinery and equipment; that the value of defendant's machinery and equipment used in the mining operations was $200,000; that an additional charge of five per cent thereof, or $10,000, should be allowed as a deduction from the net profit attributable to section 13; that adjusted accordingly, the final net profit attributable to section 13 is $53,509.10, less a $10,000 depreciation, or a final profit attributable to section 13 of $43,509.10; that plaintiff's share thereof was $21,754.55.

[6] Evidence was introduced showing that the reasonable rental value of the machinery and equipment used in mining gypsum on section 13 to and including April 24, 1952, was the sum of $58,993.50. While the court found that defendant was entitled to an allowance for the use of his machinery and equipment, it failed to determine the reasonable rental value thereof and the amount to be allowed therefor. This we conclude was error. If Roberts had rented other equipment to conduct the mining operation it seems quite clear he would have been allowed this expense and since he furnished his own equipment, the reasonable rental value thereof should have been ascertained by the court and allowed as an expense to the defendant. Moreover, it does not appear from the record that definite evidence could not be produced with respect to the production and expense in connection with the operations on section 13, segregated from the other operations, which would more accurately disclose the factual situation with respect to the partnership. The entire accounting issue with respect to section 13 should be retried.

The judgment dated October 19, 1953, and entered on the verdict of the jury is affirmed and the judgment dated May 19, 1954, in the trial of the accounting issue is reversed. Each party to bear his own costs.

BARNARD, P. J., and GRIFFIN, J., concur.

132 Cal.App.2d 250

Fred PODESTA and Adeline Podesta, his wife, Plaintiffs, Respondents and Cross-Appellants,

v.

LINDEN IRRIGATION DISTRICT, a public corporation, The Stockton and East San Joaquin Water Conservation District, Defendants, The Stockton and East San Joaquin Water Conservation District, a public corporation, Appellant.

Linden Irrigation District, a public corporation, Cross-Respondent.

Civ. 8788.

District Court of Appeal, Third District, California.

April 14, 1955.

Landowners brought action against irrigation district and water conservation district for an injunction. The trial court, San Joaquin County, George F. Buck, J., granted an injunction, and the water conservation district appealed to the District Court of Appeal and requested the District Court of Appeal to issue a writ of supersedeas operative pending appeal. The District Court of Appeal, Van Dyke, P. J., held that where water conservation district entered on land of landowners, excavated dry channel of slough, and used channel for water for consumers, injunction providing that until acquisition of right of way by district over dry channel, district should be enjoined from introducing water into the channel, was a "mandatory injunction" rather than a "prohibitory injunction" and was automatically stayed by appeal by district, and therefore, in theory, no supersedeas was required to be granted because statutory supersedeas was operative, but District Court of Appeal would, in order to set matter at rest, grant writ of supersedeas.

Writ of supersedeas issued.

1. Appeal and Error ⇐460(2)

If injunction is mandatory in character, it is automatically stayed by appeal.

2. Appeal and Error ⇐460(2)

On mistaken attempt of trial court to enforce injunction mandatory in character, though it has been automatically stayed by appeal, appellant is entitled as matter of right to issuance of writ of supersedeas.

3. Appeal and Error ⇐460(2)

If injunction is prohibitory, it is self-executing, and its operation is not stayed by appeal.

4. Appeal and Error ⇐460(2), 478

Where water conservation district entered on land of landowners, excavated dry channel of slough, and used channel for water for consumers, injunction providing that, until acquisition of right of way by district over dry channel, district should be enjoined from introducing water into the channel, was a "mandatory injunction" rather than a "prohibitory injunction" and was automatically stayed by appeal by district, and therefore, in theory, no supersedeas was required to be granted because statutory supersedeas was operative, but District Court of Appeal would, in order to set matter at rest, grant writ of supersedeas. Gen.Laws, Act 9127c, as amended.

See publication Words and Phrases, for other judicial constructions and definitions of "Mandatory Injunction" and "Prohibitory Injunction".

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for appellant.

Jones, Lane, Weaver & Daley, Stockton, for respondents and cross-appellants.

VAN DYKE, Presiding Justice.

Petitioner, The Stockton and East San Joaquin Water Conservation District, has appealed from a judgment which in part restrains it from using a watercourse through respondents' land to flow water stored in an upstream reservoir. This Court is asked to issue its writ of supersedeas with respect to that injunction order.

Petitioner is a public corporaton organized under the laws of the State of California and its included lands are located in San Joaquin County. It is organized under Deering's General Laws, Act 9127c, as amended, and is given the right of eminent domain. It has powers to conserve

and store water by acquiring dam sites, reservoirs, canals, ditches, etc.

Plaintiffs, respondents here, are the owners of some 600 acres of highly developed orchard land through which there is now, or was formerly a channel of the Calaveras River. The watershed drained by the Calaveras River has a maximum elevation of 4,000 feet and the flow of the river consists almost entirely of rainwater falling on the upper elevations of the shed. Plaintiffs' lands lie east of Linden and west of the foothills. The Calaveras River leaves the mountains and enters the plains near Bellota. Shortly before it reaches the lands of the plaintiffs it divides into Mormon Slough and North Slough, which latter slough is the one that goes through the lands of respondents. It appears without conflict that this separation of the channels has a long history; and that by natural processes the North Slough, which at one time was the main river channel, has silted up near its mouth, the process extending downstream in diminishing extent until past the plaintiffs' lands. By this natural process the bed of North Slough had by the turn of the century reached an elevation about ten feet above that of the bed of Mormon Slough, with the result that the only waters which were flowing down North Slough were the crests of floods, the body of which proceeded down Mormon Slough. Owing to the flash nature of the stream, such flood waters entered North Slough at rare intervals in a year.

Prior to 1934 respondents had been able to cross the dry bed of North Slough at many places as it went through their lands, with their farm equipment of various kinds, including trucks, heavy tractors and the like. Shortly before that time, however, defendant Linden Irrigation District was formed, embracing a part of the same land now contained within the boundaries of the appellant conservation district, and it proceeded to implement a plan for the use of waters from the Calaveras River to irrigate the lands within that district, which included the lands of respondents. In 1930 the City of Stockton had completed a regulating dam on the Calaveras River known as Hogan Dam located about 30 miles up the Calaveras River east of respondents' lands. The purpose of this dam was to regulate the flood flows in the river and for that purpose it was pierced with various openings calculated to allow only so much water down the channel of the river as could be accommodated by Mormon Slough. The channel of this latter stream had as a part of the same plans of the city been rectified and charted around the city limits to prevent its waters at flood from entering the city. The Linden District's plans envisioned the use of Hogan Dam for storage purposes and it obtained contractually the consent of the city to use the dam. A fundamental part of this plan, however, was to take water out of Mormon Slough and put it into North Slough and thence carry it to the lands within the Linden district so that, by direct pumping onto the lands and by percolation, the lands could be irrigated and the water table raised. This table had been steadily falling due to excessive pumping. Linden district obtained orally the consent or license of respondents to use North Slough through respondents' lands for this purpose. The district, starting at the junction of North Slough and Mormon Slough, excavated the bed of North Slough at grade down to the point where at the junction it equaled the elevation of the bed of Mormon Slough; thence continuing within the banks of North Slough until, at a point approximately at the west line of respondents' lands, no further excavation was needed because from that point on the bed of North Slough was not above the grade to which the easterly part of the channel had been excavated.

As a condition of entering upon respondents' lands, the district orally agreed that it would construct two bridges across the channel within respondents' land, and a third bridge across what is called the Lewis property lying to the west of respondents' boundaries as then existing, in order that the channel could be conveniently crossed for all farming purposes. On the Lewis property one bridge already existed and this bridge the district reconstructed and brought into good condition. There was an old bridge on respondents' lands also

which received the same treatment and one completely new bridge was built. The Linden project was not wholly successful, the amount of water being short of the needed supply and subject to such pumping by farmers and stockmen whose lands lay between the district and the Hogan Dam as to seriously deplete the available water. About 1936, therefore, the Linden District ceased to use the channel and for 13 years made no effort to send water down it. By that time, by natural processes again, that portion of North Slough which lay between the westerly line of respondents' lands (they having in the meantime purchased the Lewis property) and the point where the river separated into Mormon Slough and North Slough was refilled with silt, so that again, at the junction, the bed of North Slough was raised so far above that of Mormon Slough that only the crests of the floods could enter. In fact, there is considerable evidence that due, in part, to the lowering of the flood crests by the operation of Hogan Dam the water in the river entered North Slough only a few days in a year and for periods of about 48 hours. Respondents resumed the use of the dry channel for crossing back and forth between the north and south parts of their lands for all farming purposes.

In 1948 appellant conservation district was organized and it included much more territory than had been included within the Linden district. The City of Stockton was within the new district and had not been included in the Linden district. Appellant district made arrangements with the City of Stockton for the augmented use of Hogan Dam as a storage dam. It expended considerable sums in placing control gates in the openings that had been left in Hogan Dam so that more accurate control of floods could be exercised, with the result that many thousands of acre feet of water could during the course of a season be stored beyond the flood period and thereafter used much as the Linden district had attempted to use the water. Appellant made no contract with respondents and, without obtaining any consent, cleaned out the channel as it had been dredged by Linden district. By that time the bridges were in bad condition and appellant made no effort to repair them. Respondents served notice upon appellant that unless it repaired and undertook in writing to keep in repair the bridges across North Slough the leave or license under which Linden district had built and maintained the bridges would be revoked, it being the position of respondents that the acts of appellant in entering upon respondents' lands to dredge out North Slough and its acts in bringing water down from the dam were without right and unlawful. Appellant ignored this notice and continued with its acts and from that time until the present has each year stored water behind Hogan Dam and has brought it down to the lands within its boundaries through North Slough. As an aid in doing this it constructed a weir across Mormon Slough downstream from its junction with North Slough, thus elevating the water in Mormon Slough to aid in causing it to flow down the channel. It began flowing water down the channel of North Slough in fruition of this general plan of conservation in 1950 and has continued to do so ever since. It was shown in evidence that many farmers were pumping water from the channel, thus lessening the drain on the underground water; and that by depositing this water from the channel directly upon the lands, and by percolation of water from the channel, the water table was being steadily raised. The foregoing is sufficient to show the situation which existed when the judgment appealed from was rendered.

By their complaint respondents alleged the foregoing in substance, asserting that appellant's acts had been without rights, and further alleged that due directly to the acts of appellant in diverting water in excess of the natural flow through North Slough their lands had been severed into two parcels and that the value of their holdings had been reduced in the sum of $77,000. They prayed for a judgment in that sum and also asked that "defendants be enjoined from introducing foreign water into said watercourse in excess of its natural flow as it existed prior to 1933."

By its findings the trial court found generally the facts above recited, and spe-

cifically further found the following: That the deepening of the channel of North Slough across the lands of plaintiffs was an integral part of the district's general project to increase the flow in North Slough for public use; that said project would not be effective without the deepening and excavation of the channel on respondents' land; that the effect of the operation of the entire project since 1949 had been to cause the water to flow from the main channel of Calaveras River into North Slough for public use almost continuously throughout the year; that said water had continued to so flow until the trial of the action; that since the first of January, 1949 the appellant "has furnished irrigation water from the North Slough without cost to numerous landowners within its boundaries whose lands adjoin the North Slough; * * * that since the 31st day of May, 1953, the direct effect of said continuous flow of water through the excavated channel on plaintiffs' lands has been to sever the lands of the plaintiffs into two separate parcels [this date of May 31, 1953 refers to a finding that the date marks the time when the existing bridges became incapable of safe use]; that said lands have continued to be so severed until the trial of this action"; that the value of respondents' lands in an unsevered condition was and since May 1, 1949 had been $840,000, and that the severance had reduced the value by $77,000.

Among the conclusions of law we find the court declaring that the appellant had no right to sever the lands of respondents by diverting water through the excavated channel of North Slough and through their lands; that any consent for such diversion was terminated by May 1, 1949 and "that the continued diversion by the defendant, Stockton and East San Joaquin Water Conservation District, since the first day of May, 1949, and the severance of plaintiffs' lands since May 31, 1953, constitutes a taking and damaging of private property for public use without just compensation having first been made to the owners." By the judgment appealed from it is decreed that the respondents have judgment against appellant in the sum of $77,000, with interest thereon at 7% from May 31, 1953; that said sum be paid within 30 days after final judgment in the cause. The judgment contained further provisions that if bonds had to be issued by appellant the payment date would be extended. It was further decreed that upon the payment of $77,000 respondents would have to execute a grant of an easement to appellant for the doing of the same things it had been doing. It was then provided that "until the acquisition of a right of way" through North Slough by the appellant where North Slough passes through respondents' lands the appellant be enjoined from introducing water into the slough in the excavated channel through respondents' lands in excess of the natural flow as it had existed since 1900, and the judgment declared that this natural flow consisted "of freshets or flood water flowing in said channel for four days a year." It is clear from what has been said that this injunctive decree, if enforced, and so long as enforced, would completely stop appellant's entire project of water conservation according to its existing and implemented plans. However, said the court, if appellant wanted to continue to use the excavated channel through the respondents' lands pending any appeal, and if it should during such appeal comply with the provisions of Section 1254 of the Code of Civil Procedure the injunctive order would be suspended during the time of such compliance. The judgment further provided that the appellant could, by filing with the court its written election to abandon its project of taking water through the excavated channel over the lands of respondents, have the money judgment reduced to an amount representing interest at 7% per annum upon the $77,000 award, from May 31, 1953 to the date of the filing of said election.

Appellant asks this Court to issue a writ of supersedeas operative pending appeal, whereby the injunctive features of the judgment shall be suspended, with the result, of course, if this be done, that the district will continue with its project of sending water across the respondents' lands through the excavated channel of North Slough.

[1–3] At the outset we have to consider the nature of the injunctive order as to its being mandatory or prohibitive, for it is well settled that: "If the injunction is mandatory in character, it is automatically stayed by the appeal, and upon a mistaken attempt of the trial court to enforce it, the appellant is entitled as a matter of right to issuance of the writ of supersedeas. If on the other hand the injunction is prohibitory, it is self-executing and its operation is not stayed by the appeal." Food & Grocery Bureau of Southern California v. Garfield, 18 Cal.2d 174, 176–177, 114 P.2d 579, 580. However, "The question of whether a decree is of the one character or the other is sometimes a difficult one, as an order which is entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect * * *." Food & Grocery Bureau v. Garfield, supra, 18 Cal. 2d at page 177, 114 P.2d at page 580, citing Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580, Ohaver v. Fenech, 206 Cal. 118, 273 P. 555, Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640, and Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896.

Discussing now the question of what sort of injunction we have in the case before us, we find a line of cases which we think decisive.

In Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 363, there was presented the following set of facts: A corporation running a hotel sued out a temporary injunction against the defendant who claimed to be the treasurer of the corporation and the manager of the hotel. By the decree he was ordered to cease collecting money or disbursing the same, to cease representing himself as manager and treasurer and to cease interfering with, directing or attempting to direct, or controlling, the employees of the corporation. Said the Supreme Court: "It is thoroughly settled that, while an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal, * * * a mandatory injunction—i. e., one which compels affirmative action by the defendant—cannot be enforced pending a duly perfected appeal * * *. If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ. It may be likened to an execution, and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below." The court declared the decree before it to be mandatory. It reasoned that if Clute was in the actual possession of the hotel and the personal property in it an order punishing him for preventing another person from entering and taking charge could have no other effect than to compel him to turn over his possession to that other or at least to surrender his theretofore exclusive possession. Said the court: "Clute, claiming to hold on behalf of the corporation, was resisting a right of entry claimed by persons who, as he asserted, had no authority from the corporation to take possession. An order turning over the control of the property from him to the other claimants would certainly, if executed, operate to change that status. * * * For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory."

We next refer to Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706, 708. There the plaintiff in the action was asserting a violation by the defendant of riparian rights in a stream, the waters of which it had diverted above plaintiff's land and carried to a point where the water was returned to the stream below plaintiff's land. The trial court had granted a preliminary injunction against defendant, restraining it from so interfering with the waters of the stream, and the defendant corporation appealed. Said the court on the nature of the injunction: "This brings

us to the consideration of the vital phase of the present controversy, viz. the nature of the injunctive order. If it be mandatory in character, it is conceded that it is automatically stayed by the appeal therefrom. * * * we are persuaded that the injunctive order issued herein has the essential characteristics of a mandatory injunction. The defendants are and always have been lawfully in possession of their property. In that possession they are engaging in a lawful use thereof. They are not trespassing upon any of the rights of the plaintiff. * * * The effect of the order, if enforced, would be to disturb a lawful use of property lawfully in possession, and to dispossess the defendants of the use of any of the waters of the stream." The court then declared that the decree was automatically stayed as a matter of law by the appeal.

We refer next to Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640, 641. There a woman employee of a corporation had gotten into a dispute with her union which had a contract with the employer. Under that contract the corporation was not to employ anyone not in good standing with the union. That was the woman's status and the union obtained a preliminary injunction restraining the employer from employing her. It refused to heed the injunction after taking an appeal and the trial court punished its officers for contempt. In a review of that order the Supreme Court said it was satisfied the injunction was mandatory because, since the woman had the status of an employee at the time the injunction was pronounced, its inevitable effect was as "an order compelling affirmative action on the part of the defendants." Said the court further: "Inasmuch as Amelia Greenwood at the time of the issuance of the order was already in the employ of the defendants, and the very controversy arose out of the *continuance* in employment of said Amelia Greenwood, it is apparent that the result intended to be accomplished by the issuance of said order was the compulsory release of said Amelia Greenwood from employment by the defendants. In short, the order directed and commanded the defendants to discharge said employee."

We next refer to Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896, 897. San Francisco had built two dams on the Hetch Hetchy. A lower riparian owner had sought to quiet title to certain riparian rights and asked injunctive relief to protect those rights. The trial court declared the extent of the rights of the city and enjoined it from storing water in excess of its storage rights as so declared. An appeal was taken and pending the appeal the city raised the height of one dam above what it had been, with the result that the total storage was increased by over 100,000 acre feet. The trial court proceeded to adjudge the public utilities commission of the city to be guilty of contempt. Said the Supreme Court: "Whether an injunction is prohibitory or mandatory in character is not always easy of determination. What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory. The authorities indicate that an injunctive decree that compels the surrender of the lawful possession of real property amounts to the granting of affirmative relief and is mandatory in character. * * * The reasoning therein [referring to cited cases] compels the conclusion that the injunction involved herein was mandatory in character and stayed by the appeal therefrom. Throughout the trial of the main action, and up to the present moment, the city has contended that in addition to the prescriptive right recognized in and awarded to it under the decree of the respondent court, it was the owner and possessor of certain appropriative rights in and to the waters of the Tuolumne river. The effect of the injunctive decree was to compel the city to restrict its storage solely to the amount of water to which it was entitled under its prescriptive right and to subordinate certain of the city's appropriate claims to that of the plaintiff in the action and, in effect to deprive the city of the full possession and privilege of exercising such appropriative rights. * * We are of the view, therefore, that in so

far as the injunctive decree of the respondent court undertook to and did preclude the exercise by the city of its appropriative rights in and to the excess waters of the Tuolumne river it was affirmative or mandatory in character, within the meaning of the authorities, and was therefore automatically stayed by the appeal".

Before applying the foregoing rules for determining the character of the injunctive decree before us, we return to the facts found by the trial court. It found that the appellant is a public corporation possessing the power of eminent domain and that for the purpose of the public use, of which it was in charge, it had, a number of years before respondents filed their action, entered upon their property, excavated the channel of North Slough and begun the service of water to consumers, which water it was storing behind Hogan Dam; that all it did was for the benefit of the persons within its boundaries entitled to its services; that the acts of which respondents complain had been going on continuously up to the time of trial and that whatever it had done upon respondents' property was done in the service of a public use. The court found further that its acts in entering upon respondents' property, in excavating the channel of North Slough, and in turning down the slough quantities of water through the greater part of each year, amounted to a taking. Just what was taken the court did not by its findings specifically describe, but it is apparent from the record that it could only have meant that through adapting the channel of North Slough to its purposes and uses for the transportation of water it had assumed an easement or right of way across respondents' lands for that purpose. This analysis is reinforced by those parts of the judgment describing with great particularity the location of the easement which, according to the trial court, the respondents must purport, at least, to grant appellant if and when it pays to them the damages which the court finds has resulted from the acts of appellant. The court found that the total damage for taking and for severance was the sum for which it gave judgment. It appears from the record, therefore, that appellant was in actual possession and exercise of a claimed easement over respondents' property and that in this litigation it was steadily asserting ownership rights of an easement to convey water across respondents' lands. It was engaged steadily in the business of promoting the public use of which it was in charge through the delivery of such water in that manner. It is apparent from the record that if this injunction were enforced appellant would be compelled to give over the possession it is holding under claim of right, and to give up its status established for so many years. Thus it seems that by a decree couched in prohibitory language it is mandated to surrender all of that for which it is contending in the cause.

[4] We conclude that this injunction is mandatory and is automatically stayed by the appeal. In theory therefore no supersedeas need be granted since the statutory supersedeas is operative. However, we think it appropriate that, to set the matter at rest, we should grant the writ asked for.

Let a writ of supersedeas issue.

SCHOTTKY and PEEK, JJ., concur.

132 Cal.App.2d 262

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Dempsey CAMPBELL and Joseph Teller, Defendants and Appellants.

Cr. 2588.

District Court of Appeal.
Third District. California.
April 14, 1955.
Rehearing Denied April 26, 1955.

Prosecution for burglary and for conspiracy to commit burglary. One defendant pleaded guilty, and the other two were convicted in Superior Court, Sonoma County, Donald Geary, J., and appealed. The District Court of Appeal, Schottky, J., held that evidence sustained the convictions.

Affirmed.

1. Criminal Law ⇐1144(13)

Upon appeal in criminal case, appellate tribunal must assume in favor of verdict the existence of every fact which jury would reasonably have deduced from evidence and then determine whether guilt of defendant is deducible therefrom.

2. Burglary ⇐41(1)

Evidence sustained conviction of each defendant for burglary. Pen.Code, § 459.

3. Conspiracy ⇐23

To sustain conviction for conspiracy, it is necessary to prove unlawful agreement to commit a crime, accompanied by an overt act in furtherance of such agreement. Pen. Code, § 182.

4. Conspiracy ⇐47

Conspiracy may be established solely by circumstantial evidence, and it is not necessary to prove that parties actually came together and reached formal agreement. Pen.Code, § 182.

5. Conspiracy ⇐47

Evidence sustained conviction of each defendant for conspiracy to commit burglary. Pen.Code, § 182.

6. Criminal Law ⇐200(6)

Defendants were not placed in double jeopardy by being charged with and convicted of crime of burglary and crime of conspiracy to commit burglary. Pen.Code, §§ 182, 459.

7. Conspiracy ⇐28

Conspiracy is distinct offense from actual commission of offense forming object of conspiracy and guilty parties may be legally convicted of both offenses. Pen. Code, §§ 182, 459.

8. Burglary ⇐46(1)

Criminal Law ⇐768(2), 785(16)

In prosecution for burglary and for conspiracy to commit burglary, instructions that defendants were entitled to each juror's separate, individual opinion as such, and that witness found to be willfully false in one part of his testimony is to be distrusted in other parts of such testimony, and that degree of burglary, if any, was second degree, were fair and free from error. Pen.Code, §§ 182, 459.

Dempsey Gene Campbell, in pro. per.

Joe Teller, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and F. G. Girard, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellants above named and one Joseph McKay were charged with a violation of Penal Code section 459, burglary, and a violation of section 182, conspiracy to commit burglary. Each appellant was also charged with a prior felony conviction. Appellants entered pleas of not guilty to both counts, and admitted the prior convictions. Thereafter a jury trial was had, during the course of which defendant Joseph McKay entered a plea of guilty, and at the conclusion of which both appellants were found guilty on both counts. This appeal is from the judgments of conviction entered on said verdicts.

Appellants have filed a lengthy brief in propria persona and their principal contentions appear to be (1) that the evidence is insufficient to sustain the conviction, (2) that they were placed in double jeopardy because they were charged with and

convicted of the crime of burglary and the crime of conspiracy to commit burglary, (3) that there was error in the instructions, and (4) that they did not receive a fair trial and were not adequately represented by counsel.

Before discussing these contentions we shall give a brief summary of the evidence as disclosed by the record.

On April 16, 1954, at approximately 11:00 p. m., a Santa Rosa police officer was walking along Third Street of that city, making a routine check of the downtown business establishments. As he checked the Western Stores he noticed that a service (garage) door was slightly ajar. The door swings up and it was about three inches from being all the way down. The officer then heard what he described as "metallic noises * * * steel on steel or iron on iron" coming from within the building. At this point another city police officer arrived in a police vehicle. A radio call to the Santa Rosa city police station resulted in the arrival of police reinforcements within a matter of minutes. The reflection of a flashlight from within the store was observed.

Officer Carl Meister climbed a fire ladder on an adjacent building and from this vantage point he had an unobstructed view of practically the entire roof of the Western Stores. As he climbed the last section of the ladder he observed a man going along the top of the roof. The man then proceeded to the roof's edge and peered down towards the street. Meister described this man as being approximately of his own age and size, wearing matching light shirt and pants. Meister could not positively identify the person he saw on the roof and did not positively identify appellant Campbell as the man on the roof, but Meister testified that when Campbell was arrested a couple of days after the burglary he was wearing matching pants and shirt, tan in color. Meister stated that he thought Campbell was shorter and younger than he was, but of approximately the same size and age. When the man on the roof had approximately returned to the place where Meister had first seen him, Meister called out for him to hold it, turned his flashlight on and pointed it at the person. The individual then moved fast, disappearing from Meister's view, and shortly thereafter Meister heard a sound of glass breaking. It was ascertained that the man had descended through a skylight to the interior of Western Stores.

Another officer looked down the skylight into the building and yelled down to the burglars, identifying himself as a police officer, advising them that they were surrounded and telling them to come out with their hands raised. Within a couple of minutes the roar of an automobile engine was heard from within the service area of the Western Stores and then a car with at least two occupants crashed out of the building, splintering the wooden service door, and proceeded to flee from the scene. An officer fired four shots into the fleeing vehicle. It was established that the vehicle was a dark 1940 or 1941 Buick.

An examination of the Western Stores showed that an 800 to 1000 pound safe had been moved approximately 70 feet from its place in the office to the service area of the store. Prior to the burglary this safe's location was on top of another safe in the office. The bottom of the safe had been peeled off in an unsuccessful attempt to open it. A shotgun, two hydraulic jacks, a pair of tin snips, and a set of socket wrenches had been removed from the retail counters and taken to the service area. A mattress had been taken from the service area and placed on the floor of the office.

At approximately 11:00 a. m. on April 16, 1954, Campbell, Teller and McKay were observed in a tavern in Santa Rosa; they ordered two beers, conversed among themselves for about ten minutes and then left. Upon leaving the bar, Campbell got into a Kaiser automobile and drove toward downtown Santa Rosa, followed by Teller and McKay in a dirty "Buick or Pontiac." Later that day, at approximately 9:00 p. m., Campbell and Teller were observed together at a Santa Rosa service station. Campbell was in the closed area of the station purchasing some points for a 1941 Buick, Teller was just outside the station office, within the service station area. In response to a question by an employee as to whether

he could be of assistance, Teller replied, "Hell no." Teller nodded to Campbell and they both got in a 1941 Buick. Another man was in the car, but, due to insufficient lighting, it was not possible to positively identify him. The car then left the service station in the general direction of Western Stores.

On the morning following the burglary, at approximately 8:30 o'clock, Campbell and Teller were observed in Campbell's Kaiser, which was parked on a county road directly behind the 1940 or 1941 Buick which had shattered the service door of the Western Stores in the successful escape. The Buick was partially off to the side of the road and McKay was standing by it, apparently wiping a flashlight with a cloth. Approximately an hour later these same parties were observed entering Campbell's apartment.

Teller did not testify in his own behalf. However, his wife testified to the effect that on all relevant periods in question he was in San Francisco. A bartender also testified that Teller was in his establishment in San Francisco from approximately 12:30 p. m. until 3:00 p. m. on April 16, 1954. In a statement given to the authorities by Teller shortly after his arrest, he admitted knowing McKay, denied having been in Santa Rosa during the past few years and stated that he was at his home in San Francisco during the time in question.

Campbell took the stand in his own defense and testified that on the night of April 16, 1954, he had had several beers in various taverns in Santa Rosa and had walked home at approximately 10:30 p. m. He denied having been in the presence of Teller and McKay at the tavern earlier that day, and denied having been in the service station with Teller. As to the identification of him in the parked Kaiser near the escape vehicle, he testified that McKay had contacted him early in the morning of April 17, 1954, and had informed him that he would need assistance in getting his car started. Campbell stated that he agreed to assist McKay and that he, McKay, and an unidentified friend of McKay, called Tom, drove to the place where the Buick was stalled. He said that he got out, observed the bullet holes in the car, and chastened McKay for subjecting him to the risk of becoming involved in something which he was unaware of and didn't want to know about. He then drove off, leaving McKay and his friend near the Buick. He testified that Teller was not with him at the time, nor had they been together at any time during the relevant periods. In a statement given to the authorities at the time of his arrest, Campbell informed them that he had done a little drinking on the night of the 16th, that he had arisen on the morning of April 17, 1954, about 7:30 or 8:00, had fooled around for a little while and then had gone to San Francisco. In response to a question by the officers as to where he had got the money to buy his Kaiser, he replied: "I won it at the races; I had a lucky day * * * you don't think I am crazy to use my own car on a job, do you?" It was shown that Campbell had previously resided in a hotel which was adjacent to the store that was burglarized.

[1, 2] Upon an appeal in a criminal case the appellate tribunal must assume in favor of the verdict the existence of every fact which the jury would reasonably have deduced from the evidence and then determine whether the guilt of a defendant is deducible therefrom. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. Bearing this familiar rule in mind we are convinced that the evidence is sufficient to sustain the conviction of appellants on both counts.

As to the burglary count, appellants were seen at a Santa Rosa service station two hours before the burglary was discovered. The physical evidence of the burglary clearly showed that it was not accomplished within a matter of minutes. Records and files in the office had been disrupted; a mattress had been taken from the service area of the store and placed on the floor of the office. An 800 to 1000 pound safe, which rested on the top of another safe, had been removed from its place in the store office to the service area of the store, a distance of approximately 70 feet; the bottom of the safe had been peeled off; tools were taken from the retail shelves to the service area and were probably used

in the unsuccessful attempt to open the safe. A lookout was observed on the roof of the store; positive identification was not possible, but the man appeared to be of the approximate age and size of appellant Campbell; also, he was dressed in clothes which were somewhat similar to the ones worn by Campbell at the time of his arrest a couple of days later. Apparently the Buick car which appellants were observed getting into at the service station around 9:00 p. m. was the same Buick car that was driven from within the service area of the Western Stores into and through the service door in the successful escape. At least two men were in the car, crouched as low as possible, at the time it splintered the service door. No positive identification was made. But at 8:30 the following morning appellants and McKay were observed at the scene where the Buick was abandoned, following its successful flight from the burglary. About an hour later appellants and McKay were observed together, entering Campbell's apartment. While appellant Teller did not testify in his own behalf, he had informed officers that he was not in Santa Rosa during the relevant periods. Appellant Campbell's testimony merely conflicted with that given by prosecution witnesses. Also, his response to the question by the officers as to the condition of his car was given *prior* to any mention of a vehicle being used in the burglary. The incriminating circumstances of this statement could be considered by the jury.

[3–5] As to the conspiracy counts, in order to sustain a conviction it is necessary to prove an unlawful agreement to commit a crime, accompanied by an overt act in furtherance of such agreement. People v. Daener, 96 Cal.App.2d 827, 216 P.2d 511; People v. Benenato, 77 Cal.App.2d 350, 175 P.2d 296. The crime may be established solely by circumstantial evidence, People v. Sica, 112 Cal.App.2d 574, 247 P.2d 72, and it is not necessary to prove that the parties actually came together and reached a formal agreement. People v. Griffin, 98 Cal.App.2d 1, 42–43, 219 P.2d 519; People v. Steccone, 36 Cal.2d 234, 223 P.2d 17. In the light of the above rules it is apparent that the jury's finding of an agreement was warranted by the following facts. Teller and McKay arrived in Santa Rosa from San Francisco; on the morning of the burglary, Campbell, Teller and McKay were observed in a Santa Rosa tavern engaged in conversation; and when they left this tavern they headed in the direction of the Western Stores, Campbell in his Kaiser, followed by Teller and McKay in a Buick or Pontiac. Appellants and an unidentified man were observed together in a service station about two hours before the crime's discovery; their manner could be classed as suspicious; and when they left the service station they headed in the direction of the Western Stores in the Buick which played such a vital part in the crime. From the nature of the crime it is apparent that it was a deliberated, planned affair and not a spontaneous act. On the morning following the burglary, appellants and McKay were observed at the scene where the escape vehicle had been abandoned; McKay was holding a rag, apparently wiping a flashlight, appellants were sitting in Campbell's Kaiser; and about one hour later all three were observed entering Campbell's apartment in Santa Rosa. As to the establishment of the overt act, the evidence would support a conclusion that appellant Teller and McKay arrived in Santa Rosa from San Francisco and contacted appellant Campbell for the purpose of planning and/or committing the crime. Moreover, the evidence shows that in furtherance of the conspiracy, appellants had provided a plan of escape which apparently included abandonment of the escape car and return to Santa Rosa in a car (Campbell's Kaiser) which was not involved in the crime. This was carried out as planned.

We are satisfied that the record shows substantial evidence of the conspiracy and of the overt act in furtherance thereof.

[6, 7] There is no merit in appellants' contention that, because they were charged with and convicted of the crime of burglary and the crime of conspiracy to commit burglary, they were placed in double jeopardy. It has long been settled that a conspiracy is a distinct offense from the actual commission of the offense forming

the object of the conspiracy and that guilty parties may be legally convicted of both offenses. People v. Keene, 128 Cal.App.2d 520, 275 P.2d 804; People v. Hoyt, 20 Cal. 2d 306, 316–317, 125 P.2d 29.

[8] Appellants contend also that the court committed error in giving certain instructions to the jury. They complain that they were prejudiced by the court's instructing the jury that the defendants were entitled to each juror's separate, individual opinion as such; and that a witness found to be wilfully false in one part of his testimony is to be distrusted in other parts of such testimony; and also that the degree of burglary, if any, was second degree. Appellants have set out in their brief all of the instructions given by the court and a reading of them convinces us that the jury was fully and correctly instructed. In fact, the instructions appear to be extremely fair to appellants and singularly free from error.

With reference to appellants' final contention that they did not receive a fair trial and were not adequately represented by counsel, it is apparent from the record that these contentions are entirely without merit. Because of the fact that appellants have made these contentions and have filed their brief in propria persona we have made a careful study of the record and it is clear that appellants were represented at the trial by able counsel who were vigorous in their cross-examination of the witnesses for the People and who apparently endeavored to present evidence favorable to defendants. It should be stated also that the trial judge was eminently fair in his rulings, and that the rights of appellants were protected by the court and counsel in so far as it was possible to protect them.

In view of the foregoing we conclude that the evidence adequately supports the verdicts and that no prejudicial error was committed.

The judgments are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d Supp. 881

Byron J. BULLOCK, Plaintiff and Respondent,

v.

Andrew E. SIMON et al., Defendants and Appellants.

C. A. 8648.

Appellate Department, Superior Court, Los Angeles County, California.

March 25, 1955.

Action on a note. From adverse judgment of the Municipal Court of Inglewood Judicial District, the debtors appealed. The Appellate Department of the Superior Court, Patrosso, J., held that where payee of note never unconditionally agreed to give debtor, his employee, any credit upon note dated October, 1947, for vacation pay, and debtor was never advised that payee had given her such credits upon the note, and last payment made by debtor on note was November, 1947, credits thereafter given by payee on note did not constitute payment on account of principal or interest due on note made by party to be charged and action commenced in August 1953 was barred by statute of limitations.

Judgment reversed.

1. Limitation of Actions ⇐160

Where payee of note never unconditionally agreed to give debtor, his employee, any credit upon note dated October, 1947, for vacation pay, and debtor was never advised that payee had given her such credits upon the note, and last payment made by debtor on note was November, 1947, credits thereafter given by payee did not constitute payment on account of principal or interest due on a promissory note, and action commenced in August 1953 was barred by statute of limitations. West's Ann. Code Civ.Proc. § 360.

2. Limitation of Actions ⇐159

Extension of credit by creditor, in order to constitute a payment by debtor and operate to toll statute of limitations, must have been authorized by debtor or someone legally competent to act for him.

Philip H. Simon, Jr., Los Angeles, for appellants.

Robert E. Austin & John N. Helmick, Los Angeles, for respondent.

PATROSSO, Judge.

Action upon a lost promissory note, resulting in judgment for plaintiff from which defendants appeal.

[1] As alleged in the complaint and testified to upon the trial by plaintiff, the note was dated October 10, 1947, payable in installments of $30 per month, but with the provision that "default in the payment of any installment when due shall cause the whole note, principal and interest, to become immediately due and payable." The action was filed August 17, 1953 and as admittedly the last payment made by the defendant was November 15, 1947, it was barred by the statute of limitations, which was pleaded by the defendants, unless the "credits" hereinafter mentioned constituted payments thereon which operated to toll the statute.

From the statement on appeal, it appears that the defendant, A. Virginia Simon, at the time of the execution of the note and for several years thereafter was an employee of plaintiff; that defendant "had frequently complained about not being given vacation pay, and he (plaintiff) agreed to allow her vacation pay as a credit on her note, if she would submit to him a statement of the amounts of vacation pay to which she felt she was entitled; that she never furnished such a statement to him. That in June, 1953, when plaintiff filled in the copy of the note [the original having been lost] from his memory, he computed what Mrs. Simon's pay would be, based on her average weekly earnings, and entered such credits on the back of the note." There is no evidence that plaintiff ever unconditionally agreed to or gave any credit upon the note for vacation pay prior to June, 1953, although when he then purported to endorse such credits upon the copy of the note, he antedated them as of August 19, 1948, August 15, 1950, August 25, 1951, and August 25, 1952. Neither is there any proof that defendant was ever advised that she had been given such credits upon the note. Thus the question is presented as to whether such purported credits constitute *"payment* on account of principal or interest due on a promissory note *made by the party to be charged"*, within the meaning of this language as used in section 360, Code of Civil Procedure.

Prior to 1947 a mere payment unaccompanied by a written promise was insufficient to toll the statute of limitations, and insofar as we have been able to ascertain none of the appellate courts of this State have had occasion to construe the language of the amendment. In other jurisdictions, however, the rule has long obtained that the statute may effectively be tolled by a payment on account, but the decisions are not in entire harmony as to what constitutes a payment by the debtor. See Annotation, 124 A.L.R. 234. The greater weight of authority, however, appears to support the view that the mere entry of a credit by the creditor without the consent of the debtor is without effect upon the statute of limitations and likewise the fact that the debtor knows of the unauthorized entry of credit on his debt and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute.

In Brooklyn Bank v. Barnaby, 1910, 197 N.Y. 210, 90 N.E. 834, 27 L.R.A.,N.S., 843, where a bank, as it had the right to do, sold collateral securing a promissory note held by it, notifying the maker thereof who made no objection thereto, it was held that the crediting of the amount of the proceeds upon the note did not constitute payment by the maker so as to toll the statute, the court saying, 90 N.E. at page 839, 27 L.R.A.,N.S., at page 851:

"In view of the repeated and unequivocal declarations of this court that a part payment, whether made before or after a debt is barred by the statute, does not revive the contract unless made by the debtor himself or by some one having authority to make a new promise for the residue, I deem it unnecessary to refer to the cases in other states, for that could not be satisfactorily done without extending this discussion be-

yond reasonable limits. It is sufficient to say that the great weight of authority in other states supports the rule adopted by this court.

"A further point relied upon by the plaintiff remains to be noticed. It is urged that the defendant ratified the act of the plaintiff in applying upon the note but the proceeds of the stock and bonds sold, and that this is the equivalent of a new promise by the defendant. That claim is based upon the letter mailed by the plaintiff to the defendant, notifying the latter that the securities had been sold, and upon the defendant's neglect or failure to object to that procedure. If the conclusion is well founded that the written authority accompanying the note gave to the plaintiff no greater right than it had under the law, except as to the details of sale, it is obvious that the defendant was not called upon to protest or object. His creditor was simply doing what it had the right to do, and that was to sell the securities to satisfy the debt. This was a right which could not be affected by, nor affect, the statute of limitations. Hulbert v. Clark, 128 N.Y. 295, 28 N.E. 638, 14 L.R.A. 59; House v. Carr, 185 N.Y. 453, 78 N.E. 171, 6 L.R.A.,N.S., 510, 113 Am.St.Rep. 936, 7 Ann.Cas. 185. The defendant's silence in these circumstances, far from being evidence of ratification, is quite consistent with his determination to stand upon his legal rights."

In Pessemier v. Zeller, 1936, 144 Kan. 726, 62 P.2d 882, 107 A.L.R. 1523, the question presented was whether the application by the receiver of a bank of the deposit of the maker of a promissory note held by the bank and the crediting thereof against the note constituted a payment thereon so as to toll the statute. In holding that it did not, the court said in 62 P.2d at page 884: "Defendant admits the receiver had a right to appropriate the deposit but denies that the receiver's appropriation and application of the deposit as a credit on the note constituted a payment by him as debtor and thus tolled the statute. R.S. 60–312 provides for the tolling of the statute of limitations by payment or acknowledgment of liability, debt, or claim, or by promise to pay the same. The acknowledgment or promise under the statute must be in writing. No such writing is pleaded. Was the application of the credit by the receiver a payment by defendant? We know of no statute or decision and none is cited by plaintiff, to the effect that a receiver of an insolvent bank is the authorized agent of a depositor for the purpose of acknowledging a depositor's existing liability on a note of the bank. Were this the law then a creditor could apply a credit and thereby *a* make a promise to himself that the debtor would pay the new obligation. The reason payment tolls the statute is that payment is an acknowledgment of an existing debt and an implied promise to pay the remainder. In Good v. Ehrlich, 67 Kan. 94, 72 P. 545, it was held: 'A part payment, in order to be efficient to toll the statute of limitations or remove the bar, must have been made as part payment of the obligation in question by the obligor, or by some one at his direction, and under such circumstances as to amount to an acknowledgment of an existing liability on such obligation.' Syl. 1."

[2] While it may not be denied that plaintiff here had the right to offset any debt due him by the defendant, the exercise of this right did not constitute a payment on the note by the defendant so as to toll the statute. As pointed out by the authorities cited above, the plaintiff was merely doing that which he was legally entitled to do, and as defendant would not have had the right to protest against the same even if she was advised of the fact [of which there is no proof here], her failure to object thereto may not be deemed a consent thereto or ratification thereof. As said in 54 C.J.S., Limitations of Actions, § 325, p. 430, the extension of credit by the creditor in order to constitute a payment by the debtor and operate to toll the statute must have been "authorized by defendant or some one legally competent to act for him". Therefore, it is of no significance that the plaintiff may, as he testified, have stated to defendant that "her vacation credits were not sufficient to pay the interest on the note."

The conclusion reached renders unnecessary a consideration of the other contentions advanced by defendant.

The judgment is reversed.

BISHOP, Acting P. J., and SWAIN, J., concur.

132 Cal.App.2d Supp. 885

Dave BEHAR and Nathan Kaplan, partners, etc., Plaintiffs and Respondents.

v.

Harry RUBINSTEIN, Defendant and Appellant.

C. A. 8618.

Appellate Department, Superior Court, Los Angeles County, California.

March 30, 1955.

Action by lessors against lessee on complaint alleging in two counts, (1) money due under oral contract whereby lessee agreed to reimburse lessors for expenditures in remodeling leased premises, (2) a common count for money loaned by lessors to lessee in the same amount. The Municipal Court of Los Angeles Judicial District entered judgment in favor of lessors on finding that allegations of both counts were true and lessee appealed. The Appellate Department of Superior Court, County of Los Angeles, Patrosso, J., held that evidence disclosing that lessors paid debt contracted by lessee to contractor for work which lessee ordered contractor to perform during remodeling did not establish oral contract that lessors order and pay for improvements reasonably necessary to remodel premises and make them suitable as meat market and that lessee would reimburse lessors for expenditures; and that evidence did not support finding that money was loaned to lessees.

Judgment reversed.

1. Landlord and Tenant ⇐152(1)

In action by lessors against lessee to recover money due under alleged oral contract wherein lessee agreed to reimburse lessors for expenditures incurred in remodeling leased premises, evidence disclosing that lessors paid debt contracted by lessee to contractor for work which lessee ordered contractor to perform during remodeling, did not establish oral contract that lessors order and pay for improvements reasonably necessary to remodel premises and make them suitable as meat market and that lessee would reimburse lessors for expenditures.

2. Money Lent ⇐7(3)

In action by lessors against lessee to recover money due under alleged agreement whereby lessee was to reimburse lessors for expenditures incurred in remodeling leased premises for purposes of meat market, trial court's finding that lessors loaned money to lessee was without support, where there was no evidence of money loaned to lessee.

Leon Turret, Los Angeles, for appellant.

Jerome Weber, Los Angeles, for respondents.

PATROSSO, Judge.

The complaint in this action is in three counts, but as the second was dismissed by plaintiffs upon the trial, it may be disregarded. The first count alleges: "That on or about the 26th day of Feb. 1952, the plaintiffs and the defendant entered into an oral contract in the City of Los Angeles, County of Los Angeles, State of California, whereby it was agreed that plaintiffs order and pay for certain plumbing, electrical, concrete and miscellaneous construction work to those certain premises in the City and County of Los Angeles, State of California, more particularly described as the part of the building located at 327-329 South Broadway, it being agreed that such work as was reasonably necessary to remodel said premises and make them fit and suitable as a meat market was to be done, said work being subject to approval

of both parties prior to its performance, it being further agreed that defendant reimburse plaintiffs for all expenditures made by plaintiffs for said work"; that plaintiffs have fully performed all obligations under the contract; but that defendant has failed and refused "to perform the said contract on his side"; by reason whereof plaintiffs have been damaged in the sum of $2,901.11. The third count is in the form of a common count for money loaned by plaintiffs to defendant in the same amount. Defendant answered, denying the allegations contained in both counts, and upon the conclusion of the trial the court made findings to the effect that the allegations of both counts were true, and entered judgment in favor of plaintiffs, from which defendant appeals.

The defendant contends that the evidence does not support the findings upon either count. We agree, and accordingly are reversing the judgment.

The testimony is not only conflicting, but highly confusing. However, viewed in the light most favorable to plaintiffs, it discloses the following: Plaintiffs are the owners of the Broadway Public Market, various portions of which are leased by them to tenants who operate the different departments or concessions therein. During February, 1952 plaintiffs decided to improve and remodel the entire market, and to lease the various concessions to new tenants. To this end the market was largely closed down from about February 19 to June 19, during which the work of remodeling was in progress. Early in February, and before the market was closed, negotiations were opened between plaintiffs and defendant looking to the leasing of the meat department to the defendant, which culminated in the execution of a ten-year lease, dated March 12, 1952. The lease is silent as to any improvements to be made by either the lessors or lessee other than the customary provisions that the lessors shall not be required to make any improvement or alterations and that the lessee shall not make any alterations or improvements without the consent of lessors. However, the testimony adduced upon behalf of plaintiffs is to the effect that in the negotiations preceding the execution of the lease plaintiffs stated to defendant that they would bear the expense of remodeling the market premises generally, that is, the floor, walls, ceiling, painting and general lighting, "everything except the individual stands themselves," as well as bringing the electrical wiring "up to the floor" of the portion of the premises to be occupied by defendant, and that defendant would have to bear the cost of "any changes in plumbing, electrical work or anything he (defendant) had to do in order to change the stands (fixtures) around," as defendant "had contracted for new stands." At the same time it was suggested by plaintiffs that, inasmuch as plaintiffs had awarded a general contract for the work of remodeling which they were doing, the defendant would find it to his advantage to employ the same contractor to do such work as the defendant would require and for which he would have to bear the cost. Pursuant to this suggestion, the defendant engaged the general contractor to remodel a walk-in refrigerator which he had purchased from plaintiffs, converting it from an ammonia operation to electricity. This work was completed and paid for by defendant to the contractor and is not in controversy. In addition, the contractor performed other electrical, plumbing, concrete and carpenter work related to the meat market department. Plaintiffs' testimony is that all this work was ordered by and performed by the contractor under the direction of defendant, and that plaintiffs had no part therein. When, however, during the course of the work, the contractor submitted bills therefor to the defendant, the latter refused to pay the same, assigning as a reason for his refusal that the charges were excessive and included work which the plaintiffs were obligated to perform and pay for. Thereupon the contractor stopped the work, and resumed and completed the same only at the direction and upon the promise of plaintiffs to pay therefor—this because, as plaintiffs testified, they were desirous that all concessions be ready and in operation on the occasion of the opening of the market on June 17. Thereafter plaintiff paid the contractor for this work, and it is for the sum so paid that plaintiffs sought and were granted recovery.

[1] The foregoing recital of the evidence makes clear, we believe, that it falls far short of establishing the contract pleaded in the first count of the complaint, namely, that the parties agreed "that *plaintiffs order and pay for* certain plumbing, electrical, concrete and miscellaneous construction * * * as was reasonably necessary to remodel said premises and make them fit and suitable as a meat market * * *" and that it was *"agreed that defendant reimburse plaintiffs for all expenditures made by plaintiffs for* said work." As noted, the proof is to the effect that defendant—not plaintiffs—ordered the contractor to do certain work; that during the course thereof a dispute arose between the defendant and the contractor as to the charges made by the latter, as the result of which he stopped the work, and only proceeded therewith upon the order of the plaintiffs who promised to pay therefor. In short, that plaintiff paid a debt contracted by the defendant to the contractor for work which defendant ordered the contractor to perform.

[2] It may well be that, under the evidence, plaintiffs might be entitled to maintain an action against defendant under the doctrine of subrogation, in that, in order to protect an interest of their own, they discharged a debt of the defendant which in equity and good conscience should have been paid by him. See Fresno Inv. Co. v. Brandon, 1926, 79 Cal.App. 387, 389, 249 P. 548, 549; Stein v. Simpson, 1951, 37 Cal.2d 79, 84, 230 P.2d 816, 819–820. However, no such case is presented by the pleadings, and, despite the fact that defendant when making a motion for a nonsuit pointed out the absence of any evidence establishing a contract as alleged, plaintiffs made no request for leave to amend their complaint. The judgment, resting as it does upon a finding of the existence of the express contract pleaded, which finding is unsupported by the evidence, cannot stand. Likewise, without support is the finding with respect to the third count to the effect that plaintiffs loaned to defendant the sum of $2,901.11, for there is not a scintilla of evidence to be found in the record that plaintiffs loaned any money to defendant. Upon a retrial, the parties should be permitted to amend their pleadings, if so advised.

The judgment is reversed

BISHOP, Acting Presiding Judge.

I concur in the judgment and in the opinion. In order that the plaintiffs may recover on the theory of their complaint, they must prove in addition to the alleged agreement with the defendant, a supplementary one with the general contractor. Plaintiff Kaplan undertook to do this by stating, as a witness, the conversation that he had had with the general contractor. The trial court interposed its own objection, declaring that the evidence would be hearsay, unless the defendant were present. This ruling was erroneous, and prejudicial. As stated in Jones Commentaries on Evidence, Second ed., Vol. 3, p. 2014: "It is hardly necessary to cite authorities to the obvious proposition that when proof is to be made of a parol contract, or when for other reasons the statements of a person are relevant, such statements may be proved by third persons who were present as well as by the one who used the language. In such case the statements are not hearsay, but substantive evidence."

132 Cal.App.2d Supp. 889

Helen R. BARTHOLOMEW, Plaintiff and Respondent,

v.

HEYMAN PROPERTIES, Inc., a corporation, Defendant and Appellant.

Civ. A. 138.

Appellate Department, Superior Court, Alameda County, California.

April 4, 1955.

Action against employer by plaintiff, who was employed as manager, janitor and parking lot attendant of an apartment house, to recover wages for overtime work. From adverse judgment of the Municipal Court for the Oakland Piedmont Judicial

District, Charles W. Fisher, J., the employer appealed. The Superior Court, Appellate Department, Ledwich, J., held that evidence was sufficient to support implied finding that plaintiff worked a sufficient number of hours in excess of the maximum 48 hours per week to warrant the amount of the judgment.

Judgment affirmed.

1. Appeal and Error
⇐994(3), 1011(1), 1012(1)

If there is any substantial evidence to support the judgment, reviewing court will not weigh evidence or pass on credibility of witnesses or conflicts in the evidence.

2. Labor Relations ⇐1531

In action against employer to recover wages for overtime work performed by plaintiff, who was employed as manager, janitor and parking lot attendant of apartment house, evidence supported implied finding that plaintiff worked sufficient number of hours in excess of maximum 48 hours per week to warrant amount of judgment in her favor. Labor Code, §§ 1171–1204.

3. Labor Relations ⇐1531

In action against employer to recover wages for overtime work performed by employee as manager, janitor, and parking lot attendant of apartment house, evidence justified finding that nature of various duties that employer required employee to perform required her to be on the job 84 hours or more a week. Labor Code, §§ 1171–1204, 1194, 1198.

4. Labor Relations ⇐1471

Where it was a misdemeanor for an employer to require a female employee to work more than 8 hours a day or 48 hours a week and for an employer to fail to keep payroll records required by statute, but no penalty was attached to employee for working more than 8 hours a day or 48 hours a week, rule of in pari delicto would not be applied against employee in action commenced by her to recover wages for overtime work. Labor Code, §§ 1174, 1175(d), 1198, 1199, 1350, 1354; West's Ann.Const. art. 20, § 17½.

Wagener & Brailsford, Oakland, for defendant and appellant.

Harpham & Holt, Albany, for plaintiff and respondent.

LEDWICH, Judge.

Plaintiff, a woman over 18 years of age, alleges in her complaint that she was employed by defendant as manager, janitor and parking lot attendant of said apartment house from March 17, 1953, to about November 17, 1953, and that during that period she rendered services to the defendant at its special instance and request for at least 86 hours per week as such employee. She alleged she was entitled to be paid at the minimum wage of 75 cents per hour for the first 48 hours' work each week, and at time and a half, or $1.12½ per hour, for 38 hours' overtime work each week. After allowing credit to defendant at the rate of $75 per month paid her, and for the use of an apartment provided for her as part of her compensation, plaintiff sued for a balance of $1,796.80. Judgment was entered in her favor for $1,106.25.

Appellant makes three contentions for reversal of the judgment, namely:

(1) That there is no substantial evidence that appellant required or compelled respondent to work in excess of the maximum hours provided by law for women workers of 48 hours per week.

(2) That under Section 1194 of the Labor Code plaintiff was only entitled to recover an amount equal to the minimum wage of 75 cents per hour for all time worked, including overtime.

(3) That Section 1198 of the Labor Code provides that "The employment of any woman * * * for longer hours than those fixed by the order * * * (Industrial Welfare Commission Order No. 5–52) is unlawful". Therefore, argues appellant, plaintiff cannot recover for time worked in excess of eight hours per day, or 48 hour per week.

[1, 2] No findings were requested or made. As an Appellate Court, this Court is bound by the well-settled rule regarding the evidence that if there is any substantial evidence to support the judgment, this

Court will not weigh the evidence or pass upon the credibility of the witnesses, or conflicts in the evidence. We have carefully read the entire transcript of the testimony before the trial Court and are satisfied that it amply supports the finding, implicit in the judgment, that plaintiff worked a sufficient number of hours in excess of the maximum of 48 hours per week to warrant the amount of the judgment.

Plaintiff's evidence shows that she worked daily from approximately seven o'clock a. m. until nine, ten or eleven o'clock at night, with practically no time off, except for meals, and that she also worked Sundays and holidays the same hours. Her duties as manager of this 40-room apartment house and parking lot with 21 stalls or garages were numerous. She collected, kept track of, and deposited all of the rents from the apartment house and parking lot, showed and rented the apartments, and exercised supervision over all of the activities at the apartment house. There was no regularly employed janitor, and plaintiff also did janitorial work of various kinds. She handled complaints of tenants and disturbances at night at the apartment house. Plaintiff was told by the president and general manager of defendant, who hired her, that her hours would be "long and confining hours", and that she was to be on the premises whenever there were vacant apartments, and on Sundays and holidays.

Plaintiff further testified that there were 11 vacant apartments when she took the job and that at all times while she managed the apartment house there were vacant apartments to rent, that there was a running ad in the paper at all times, with the telephone number, she handled complaints and disturbances, and that she was required to phone defendant's manager whenever she rented an apartment, day or night; that tenants moved in and out frequently; that she had numerous telephone calls, and numerous persons came to see the apartments respecting the renting thereof, day and night. Plaintiff further testified that she was required to look after the garbage cans early in the morning, the washing and drying machines sometimes as late as 10 o'clock at night; that she was required to look after the water in the furnace, and performed numerous other duties of a janitorial nature.

Plaintiff's testimony that she was required by the defendant to be on the premises at all times when there were vacant apartments was corroborated by an agent of the Division of Industrial Welfare, who testified that the president of defendant so stated to her. The foregoing resume of plaintiff's duties is sufficient to show that the trial Court was justified in finding that plaintiff worked daily, including Sundays and holidays, from approximately seven o'clock a. m. until nine or ten o'clock at night, and that the nature of her duties required her to devote that much time to the job of manager.

The evidence is also amply sufficient to show that the defendant's president, who was frequently on the premises, knew that plaintiff was performing these numerous duties and that they required the plaintiff to be on the job for approximately the above hours daily and weekly. The requirement of defendant that plaintiff be on the premises at all times when there were vacancies in the apartment house itself is strongly corroborative of plaintiff's testimony as to the hours that she worked and was required to work. We find no merit in appellant's argument regarding the insufficiency of the evidence to sustain the implied finding that plaintiff worked long hours overtime daily and weekly. The evidence is ample to sustain a finding that plaintiff worked at least four hours overtime daily, in addition to Sundays and holidays, or a total of 84 hours a week.

Appellant's second argument is that under Section 1194 of the Labor Code plaintiff was only entitled to recover an amount equal to the minimum wage of 75 cents per hour for all hours worked, and that the amount awarded her exceeds such sum.

Section 1194 of the Labor Code reads as follows:

> "*Recovery of unpaid balance of full amount of minimum wage.* Any woman or minor receiving less than the legal minimum wage applicable to such

woman or minor is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage, together with costs of suit, notwithstanding any agreement to work for a lesser wage."

Section 4–(b) of Order No. 5–52 of the Commission is as follows:

"Every employer shall pay to each employee, on the established pay day for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise."

Section 2–(h) of said Order No. 5–52 reads as follows:

"'Hours Worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

Section 10 of said Order No. 5–52 provides that when "lodging", or living accommodations are provided by the employer as part of the compensation, "they may not be evaluated in excess of the following: Apartment—Two-thirds (2/3) of the ordinary rental value * * *."

Appellant makes no attack on the validity of the above Orders of the Commission, but bases its argument solely upon Section 1194 of the Labor Code. Appellant states in its closing brief how the Court arrived at the amount of its judgment, but there is nothing in the record before us to support such statement. Since there are no findings, this Court does not know how many hours the trial Court found that plaintiff worked per day or week. Under the evidence, it could have found that she worked 86 hours a week, as she alleged.

If appellant desired a review of the process by which the trial Court arrived at the amount awarded plaintiff, it should have requested findings of fact showing the total number of hours the Court determined that plaintiff actually worked and the rate per hour of compensation awarded her. In the absence of any such findings, if the amount of the judgment, computed at the minimum wage "for all hours worked" is supported by the evidence, we need not concern ourselves with how the trial Court arrived at the amount.

As above pointed out, there was sufficient evidence before the trial Court for it to find that she did work 86 hours per week during the period from March 17, 1953 to November 7, 1953, or 33.5 weeks. If the trial Court concluded that she worked 12 hours a day, or 84 hours a week, for the above period, at the minimum wage of 75 cents per hour, she would be entitled to $2,110.50 "for all hours worked". Her agreed compensation was $75 per month and an apartment, the rental value of which was $75 per month. She was actually paid $581.25 in cash, and evaluating the apartment at two-thirds of its rental value, (as provided by Section 10 of Order No. 5–52) she also received $400 for eight months' use of the apartment, making a total of $981.25 paid to plaintiff. The balance unpaid (computed at 75 cents per hour) would be $1,129.25, slightly in excess of the judgment of $1,106.25. The result is that the judgment is supported by the evidence under the interpretation of Section 1194 which appellant argues it should receive.

The gist of appellant's third argument is that plaintiff should be denied recovery because she is *in pari delicto* with the defendant. In support of this argument defendant cites and relies upon Lewis v. Ferrari, 34 Cal.App.Supp.2d 767, 90 P.2d 384, decided by the Appellate Department of the Superior Court of San Diego County in 1939. Appellant argues that plaintiff did not work overtime because of coercion or compulsion, but voluntarily, and she should be denied recovery because she was involved in an unlawful act. There are several answers to this argument.

[3] 1—The evidence fully justifies a finding that the nature of the various duties that defendant required plaintiff to perform as manager, both day and night, and holidays, required her to be on the job 84 hours, or more, a week. During all of such time, she was subject to the control of defendant, as her employer. Order No. 5–52,

Subdivision 2–(h), (above quoted), defines hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Plaintiff was not free to pick up and leave the job when she had worked eight hours a day, or 48 hours a week, but had to devote whatever time was required to perform her duties as manager. To this extent her overtime was not voluntary, nor merely permitted by defendant, but was required by it.

[4] 2—The Labor Code does not forbid the employee working more than eight hours a day or 48 hours a week, or attach any penalty to the employee for doing so. It does, however, forbid an employer employing or permitting any female to work more than the above maximum hours in an apartment house and makes the employer who does so guilty of a misdemeanor, Labor Code Sections 1350, 1354; also Sections 1198 and 1199. Section 1174 requires every employer to keep payroll records at the place of employment "showing the hours worked daily by, and the wages paid to, women * * *." Section 1175(d) makes the failure to keep such records a misdemeanor by the employer. The evidence shows, without dispute, that the appellant violated this provision of law and Section 1353, for it kept no records as the law requires. The evidence shows two misdemeanors, under the Labor Code, committed by appellant, and no violation of law by plaintiff. In the eyes of the law, appellant was culpable, plaintiff was not. Under such circumstances, the California courts have refused to apply the rule of *in pari delicto* against the innocent or less culpable party, as appears from the cases hereinafter cited.

3—The conclusive answer against applying *in pari delicto* in this case is the fact that the legislature in enacting the Labor Code, pursuant to Section 17½ of Article XX of the State Constitution, incorporated therein Section 1194 (above quoted), permitting civil suits by the employee. This section is a declaration by the legislature of the public policy of this State that an employee who is paid less than a minimum wage shall not be considered *in pari delicto* with the employer who has violated the Statute, one of the primary purposes of which was the general welfare and protection of female employees in their employment. In view of this declaration of public policy by the legislature, which is a reasonable exercise of its power, there is no room for the courts to apply the doctrine of *in pari delicto* in a case such as this.

There is no language in Section 1194 of the Labor Code that the employee may recover wages for only 48 hours' work. The language of the Section is that the employee may recover in a civil action "the unpaid balance of the full amount of such minimum wage". Order No. 5–52, Section 4–(b) provides that the employer shall pay the employee "not less than the applicable minimum wage for all hours worked in the payroll period". Considering that one of the primary purposes of the legislation was the protection of the employee, the only reasonable interpretation of Section 1194 of the Labor Code is that in said Order No. 5–52, Paragraph 4–(b), that the employee shall be paid at least the minimum wage "for all hours worked". Any other interpretation would defeat one of the main purposes of the Statute, and the Constitution of California, Article XX, Section 17½, since the employer would be unjustly enriched by the employee's overtime labor.

Lewis v. Ferrari, supra, relied on by appellant, is readily and completely distinguishable from this case upon its facts. That was an appeal upon the judgment roll and the trial Court found that the employee engaged in a conspiracy with the employer to keep false records of the hours worked so as to show that the employee had not worked more than the maximum hours permitted by law. The employee actually kept such false records, pursuant to said conspiracy, and then sued for overtime contrary to the records. A judgment denying recovery was affirmed on the *pari delicto* rule. What is said in the opinion with reference to this rule must be considered as said with reference to the facts of the case before the Court. It should be noted that Section 1194 of the Labor Code is nowhere

referred to in the opinion. We consider that the foregoing adequately disposes of any application of the *pari delicto* rule to the facts in this case. Our conclusion in this respect is fully supported by several California cases, including the following: Smith v. Bach, 183 Cal. 259, 263–264, 191 P. 14; McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Carter v. Seaboard Finance Co., 33 Cal.2d 564, 574, 203 P.2d 758; Miller v. California Roofing Co., 55 Cal.App.2d 136, 143–144, 130 P.2d 740; Norwood v. Judd, 93 Cal. App.2d 276, 289, 209 P.2d 24.

While none of the above cited cases involved a violation of the Labor Code, the *pari delicto* rule as announced in them clearly shows that such rule should not be applied to the facts in this case. In Smith v. Bach, the Court states [183 Cal. 259, 191 P. 15]:

> "By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not *in pari delicto*, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumtances of the case may require."

In McAllister v. Drapeau, 14 Cal.2d at page 112, 92 P.2d at page 916, the rule is stated as follows:

> "It is, of course, true that where parties are *in pari delicto* neither can secure affirmative relief at law or equity. But it is equally true that where one party is involved to some extent in the illegality, but where the second party is grievously at fault and the first party only slightly at fault, the court will allow recovery of moneys paid by the first party under the executory contract. Smith v. Bach, 183 Cal. 259, 191 P. 14".

In Carter v. Seaboard Finance Co., 33 Cal.2d at page 574, 203 P.2d at page, 765, the Court states:

> "A member of the class for whose protection the statute was enacted is ordinarily not considered *in pari delicto* with those who violate the statute. McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911; 125 A.L.R. 800; Miller v. California Roofing Co., 55 Cal. App.2d 136, 143, 130 P.2d 740".

In Miller v. California Roofing Co., 55 Cal.App. at page 143, 130 P.2d at page 745, the Court announces the rule in this language:

> "Where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men—the one from their station and condition being liable to be imposed upon by the other—in the furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. (Citing cases.) This is true even though both parties are to some extent involved in the illegality. In such event, since the policy of the law designed to discourage illegal agreements comes in conflict with that policy which demands the effective enforcement of the Corporate Securities Act, the law differentiates the guilt of the parties, because refusal of relief to the less culpable would involve harmful effects wholly out of proportion to the requirements of individual punishment or the discouragement of illegal contracts. (Citations.)"

In Norwood v. Judd, 93 Cal.App.2d at page 289, 209 P.2d at page 31, the Court uses the following language, which aptly fits this case:

> "It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase *'in pari delicto'* that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind,

and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied."

The only cases cited by appellant, other than Lewis v. Ferrari, supra, are four cases from other jurisdictions. None of them involved a statute which contained a provision similar to Section 1194 of the Labor Code. They are also distinguishable for other reasons apparent from a reading thereof. In any event, they have no application under the *in pari delicto* rule as that rule is established in this State by the California authorities above cited and others in accord therewith.

The judgment of the Municipal Court is amply supported by the evidence and the law applicable thereto, and is affirmed. Respondent to recover costs on appeal.

WAGLER, P. J., and HOYT, J., concur.

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44 Cal.2d 289

Ella C. BABBITT, Respondent,

v.

Douglas B. BABBITT et al., Defendants; Agnes M. McGowan, Appellant.

L. A. 22931.

Supreme Court of California, in Bank.

April 15, 1955.

Divorce proceeding by wife wherein she made another woman a party defendant. From adverse judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., the other woman appealed. The Supreme Court, Shenk, J., held that evidence sustained finding that real property purchased in name of other woman while husband was residing with her was purchased with community funds and earnings of husband and wife and that the property was entirely community property.

Judgment affirmed.

Schauer and Carter, JJ., dissented.

Opinion, 268 P.2d 834, vacated.

1. Husband and Wife ⇐264

In action by wife for divorce wherein she joined as a party defendant another woman in whose name title to property had been taken while husband was living with her, evidence sustained finding that property was purchased solely from community funds and earnings of husband and wife, that no part of purchase price was furnished by other woman, and that property was entirely community property.

2. Judgment ⇐707

In action by wife for divorce wherein wife joined as party defendant another woman in whose name property had been purchased while husband was living with her, ejectment action by other woman against husband, who admittedly purchased property in other woman's name to keep wife from getting it, resulting in stipulated judgment was not binding on wife, who was not a party to the action. West's Ann.Civ.Code, §§ 172, 172a.

3. Judgment ⇐707

A judgment obtained in fraud of the interests of a third party is not binding upon him.

4. Gifts ⇐49(4)

In action by wife for divorce wherein wife joined as party defendant another woman in whose name property had been purchased while husband was living with her, record refuted claim that husband had made a gift of one-half of the property to other woman.

5. Husband and Wife ⇐265

A wife during existence of marriage may set aside a gift of community property by husband to a third party without her consent.

6. Judgment ⇐252(1)

In action by wife for divorce and for general relief wherein wife joined as party defendant another woman in whose name property had been purchased while husband was living with her, judgment quieting title to property in wife did not exceed the prayer and give relief upon a different theory from that presented by the pleadings. West's Ann.Code Civ.Proc. § 580.

7. Pleading ⇐72

Where plaintiff prays for general relief and facts upon which relief is based are alleged in complaint and action is contested, prayer does not limit relief which may be

granted provided such relief is consistent with case made by complaint and embraced within the issues. West's Ann.Code Civ. Proc. § 580.

8. Fixtures ⇐7

Generally, gas stoves or ranges when installed in a dwelling are not fixtures and electrical appliances such as refrigerators and stoves are personal property and do not become a part of realty where they are movable and can be disconnected by pulling a plug or unscrewing a gas connection.

9. Liens ⇐4

In action by wife for divorce wherein wife joined as party defendant another woman in whose name property had been purchased while husband was living with her, other woman was not entitled to a lien upon real property merely because ice box and stove belonging to her were upon the property.

10. Divorce 253

In action by wife for divorce wherein wife joined as party defendant another woman in whose name property had been purchased while husband was living with her, right of other woman to ice box and stove, which were in home, was not in issue when not pleaded and trial court properly refrained from deciding that question.

Benjamin D. Brown, A. James Ayers, Los Angeles, for appellant.

Ernest Best, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment in which the plaintiff was granted an interlocutory decree of divorce and awarded a parcel of community real property. Her title to that property was quieted as against a third party who was joined as a defendant in the action.

[1] Douglas and Ella Babbitt were husband and wife. In 1949, Douglas, while still married to Ella, commenced to live with Agnes McGowan, also known as Agnes Hansen. While Douglas and Agnes lived together, Agnes contributed from her earnings toward their common livelihood. During 1949 a parcel of improved real property in Los Angeles County was purchased. Title was taken in the name of Agnes McGowan. Both lived on the property. In September of 1951 Agnes brought an action of ejectment against Douglas, claiming full title to the property. Douglas filed a cross-complaint in which he claimed to be the owner of the property and alleged that Agnes was holding it in trust for him. While the ejectment action was pending in the superior court Douglas and Agnes, as parties thereto, stipulated that a judgment be entered by which each party should take a one-half interest in the property and Agnes be awarded a $500 lien against the property. The plaintiff, Ella Babbitt, was not a party to the ejectment action.

The plaintiff commenced this action for divorce against Douglas alleging adultery and cruelty. She joined Agnes as a party defendant alleging that Agnes held the half interest in the real property in trust for the community. The prayer of the plaintiff's complaint sought a divorce, support, all of the community property, and a decree that Agnes "holds said real property as trustee, to be distributed as community property of the married parties; and such other relief as to the court may seem just."

Douglas defaulted in the divorce action although he appeared as a witness at the trial. Agnes answered and denied that she held the interest in the real property in trust for the community. The court found the allegations of the complaint as against Douglas to be true and ordered the interlocutory decree of divorce. The court found that although Agnes contributed her earnings to the livelihood of herself and Douglas, the moneys used to purchase the real property were community funds; that title to the property was taken in Agnes' name to prevent the plaintiff from discovering the transaction; that the plaintiff was not bound by the stipulated judgment in the ejectment action; that Agnes has no right, title or interest in the property, and that it be awarded to the plaintiff along with the remainder of the community property. Judgment was entered accordingly.

Agnes first contends that the evidence is insufficient to support the finding that the

property was entirely community property. Evidence was introduced upon this subject. Agnes testified that some of her money went into the purchase of the property, and Douglas testified that Agnes made no payments whatsoever from her money on the purchase price of the property and that the entire purchase money came from his earnings. There is substantial evidence to sustain the trial court's finding "That the entire purchase price of said real property was furnished by defendant Douglas B. Babbitt from the community funds and earnings of himself and plaintiff, and that no part thereof was furnished by defendant Agnes M. Hansen."

In addition the court found, and there is substantial evidence to support the finding, "That the two defendants, while living together in open and notorious adultery, conceived the idea and purpose of using said community earnings to purchase an improved parcel of real property and to have title thereto taken in the name of Agnes M. Hansen, the then name of defendant Agnes M. McGowan, for the sole purpose of cheating, deceiving and defrauding the plaintiff; and that pursuant to said design and purpose, and upon the oral promise of the said Agnes M. Hansen to convey legal title to the improved real property to defendant Douglas B. Babbitt, upon his demand * * * Douglas * * * purchased [the] Lot * * *."

It is contended by Agnes that the judgment in the ejectment action is binding on the plaintiff on the theory that the husband has the management and control of the community property, Civ.Code, §§ 172, 172a, and that the judgment in that action was the result of a bona fide compromise between herself and Douglas concerning their respective rights to the property involved.

[2, 3] The plaintiff, as stated, was not a party to the ejectment suit. The judgment in that action was brought into this case by Agnes as defensive matter. It was proper for the plaintiff in the present action to attack that judgment on any and all legal grounds. Feig v. Bank of Italy, 218 Cal. 54, 57, 21 P.2d 421; Manuel v. Kiser, 94 Cal.App.2d 540, 546, 210 P.2d 918; Stevens v. Kelley, 57 Cal.App.2d 318, 134 P.2d 56. She interposed the objection that it was not binding on her because of the fraud of Agnes and Douglas and the trial court so found and concluded. This conclusion was justified under the evidence on the theory that the stipulated judgment in the ejectment action could not be disentangled from the fraudulent relationship of the parties thereto, and that it was but another step in the conspiracy between Douglas and Agnes to deprive the plaintiff of her property rights. It was properly held that such an agreed judgment was in effect merely a compromise among wrongdoers in a controversy between themselves as to a division of the spoils. On no principle of right or justice should that judgment be deemed binding on the plaintiff. It is the general rule that a judgment obtained in fraud of the interests of a third person is not binding upon him. (Restatement of Judgments, § 91, § 115, comment (d); see Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Anderson v. Bank of Lassen Co., 140 Cal. 695, 74 P. 287; Harada v. Fitzpatrick, 33 Cal.App.2d 453, 91 P.2d 941. The fraud was abundantly established. Douglas testified: "* * * if I bought the property in my name, I was afraid that my wife would take it away from me perhaps through the court at a later date and that is why I bought it in her [Agnes'] name." The evidence also shows that at all times here involved Agnes knew that Douglas was married to the plaintiff and of the community character of the property. It thus appears that the ejectment action was but a continuation of the fraudulent scheme employed by Agnes and Douglas in their endeavor to defeat the rights of the plaintiff to the property.

[4, 5] Agnes may not prevail on the theory of gift. The record refutes any such claim. Moreover, a wife during the existence of the marriage may set aside a gift of community property by the husband to a third party without her consent. Odone v. Marzocchi, 34 Cal.2d 431, 438, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109; Britton v. Hammell, 4 Cal.2d 690, 692, 52 P.2d 221.

[6, 7] Agnes further contends that the judgment, insofar as it quieted title to the property in the plaintiff, exceeded the prayer and gave relief upon a theory different from that presented by the pleadings. The plaintiff prayed for general relief and the facts upon which relief was based were alleged in the complaint. The action was contested. In such a case the prayer does not limit the relief which may be granted provided such relief is "consistent with the case made by the complaint and embraced within the issue." Code Civ.Proc. § 580; see Woods Central Irrigating Ditch Co. v. Porter Slough Ditch Co., 173 Cal. 149, 153, 159 P.2d 427; Johnson v. Polhemus, 99 Cal. 240, 244, 33 P. 908. The result in this case is within that rule.

Finally, Agnes complains that the trial court failed to recognize a $500 lien against the property awarded her in the ejectment action. As previously pointed out, that judgment is not binding upon the plaintiff. However, at the trial the plaintiff's attorney stipulated that Agnes provided the money from her own funds for the purchase of an icebox and a stove, which were left in the house and that the purpose of the $500 lien was to secure to her a reimbursement for that expenditure.

[8–10] It is the rule generally that gas stoves or ranges when installed in a dwelling are not fixtures and that electrical appliances such as refrigerators and stoves are personal property and do not become a part of the realty where, as here, they are movable and can be disconnected by pulling a plug or unscrewing a gas connection. Daniger v. Hunter, 114 Cal.App.2d 796, 798, 251 P.2d 353. There seems to be nothing in the law of this state which would confer upon Agnes a lien upon the real property merely because personal property belonging to her is upon it. The right to the personal property which she claims was not asserted by any of the pleadings. It was therefore not an issue in the case and the trial court properly refrained from deciding that question.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. The record supports the finding that Douglas and Agnes conspired in the original purchase of the property in question and in the taking of title to it in the name of Agnes in order to defeat a possible claim of plaintiff to a community interest but it does not establish a ground for setting aside or avoiding the effect of the judgment in the ejectment action. To the contrary, the record establishes that Douglas and Agnes had come to a parting of the ways and were asserting directly conflicting claims to the property at the time the ejectment action was filed.

The parties to that action were Agnes as plaintiff and Douglas as defendant and cross-complainant. The property he was claiming adversely to Agnes was the property here at issue and, if it be community property at all, he necessarily, or at least prima facie on the record as it is presented to us, was representing the community in that action. On the record as it now exists, the plaintiff wife here was in privity with her husband there and is bound by that judgment. (Cutting v. Bryan (1929), 206 Cal. 254, 258, 274 P. 326; Yearout v. American Pipe & Steel Corp. (1946), 74 Cal. App.2d 139, 142–144, 168 P.2d 174; Secondo v. Superior Court (1930), 105 Cal.App. 179, 182, 286 P. 1089; see also Rest., Judgments, § 85, p. 409.)

It is a general rule that a party to a case, or a privy to a party, may, after a judgment has become final, attack it only directly and only upon a showing of extrinsic fraud in procuring it. (Campbell-Kawannanakoa v. Campbell (1907), 152 Cal. 201, 208–210, 92 P. 184; Anderson v. Bank of Lassen Co. (1903), 140 Cal. 695, 698, 74 P. 287; Harada v. Fitzpatrick (1939), 33 Cal. App.2d 453, 459, 91 P.2d 941. See also 15 Cal.Jur., Judgments, § 123, p. 15 et seq., and § 139, p. 47, and cases there cited; Neblett v. Pacific Mutual Life Ins. Co. (1943), 22 Cal.2d 393, 397, 139 P.2d 934; Caldwell v. Taylor (1933), 218 Cal. 471, 475–476, 479–480, 23 P.2d 758, 88 A.L.R. 1194; McGuinness v. Superior Court (1925), 196 Cal. 222, 227–230, 237 P. 42, 40 A.L.R. 1110; Associated Oil Co. v. Mullin

(1930), 110 Cal.App. 385, 389–390, 294 P. 421; Feig v. Bank of Italy, etc., Ass'n (1933), 218 Cal. 54, 56–57, 21 P.2d 421.)

There is no suggestion that the judgment in the ejectment action is void on its face and there is no finding of extrinsic fraud in its procurement. In this state of the record the majority opinion, to support its holding that the ejectment judgment is not binding on the plaintiff, declares its own conclusion that "It thus appears that the ejectment action was but a continuation of the fraudulent scheme employed by Agnes and Douglas in their endeavor to defeat the rights of the plaintiff to the property." But there was no finding to such effect. Instead, the court found as follows:

"6

"That subsequent to the taking of legal title to said real property in the name of Agnes M. Hansen, and about the time that the final payment was made on the purchase price thereof, the two defendants herein separated from each other; the defendant Douglas B. Babbitt demanded of Agnes M. Hansen legal title to said real property, which conveyance was refused; and the defendant Agnes M. Hansen claimed said real property to be her own.

"7

"That on or about September 11, 1951, in the Compton branch of this Court, the said Agnes M. Hansen commenced an action against the said Douglas B. Babbitt, having for its object and purpose to eject the said Douglas B. Babbitt from said real property; that the said Douglas B. Babbitt contested said action and filed his cross complaint therein claiming legal title to said real property by reason of his aforesaid payments of money and trust agreement and on to wit June 4th, 1952, in said proceedings number COC 313, files [sic] in said Branch Court, a stipulated judgment was entered into, upon the consent of said parties, giving each of said parties an undivided one-half interest in and to said real property, and adjudging that the same be sold and the net proceeds be divided between them according to the tenor of said judgment."

It appears to me that the above quoted findings not only fail to determine that the ejectment judgment was a product of continuing collusion, obtained in fraud of the rights of the plaintiff here, but, to the contrary, conclusively establish (so far as this appeal is concerned) that the earlier action was a bona fide adversary litigation in which plaintiff's husband (her privy) "contested said action and * * * [obtained for himself and plaintiff as against the adverse claim of Agnes] an undivided one-half interest in and to said real property."

Whether Douglas (plaintiff's husband) did or did not make a wise compromise of the conflicting claims of Agnes and himself is beside the point. The fact as found is that Douglas "demanded of Agnes M. Hansen legal title to said real property, which conveyance was refused; and the defendant Agnes M. Hansen claimed said real property to be her own." These findings negative collusion.

At no point in either the pleadings or the court's findings and conclusions is it stated or suggested that the judgment in the ejectment action was procured in any wise other than as a bona fide compromise and settlement of an actual and active dispute between defendants (husband and Agnes) as to their respective rights in the property. Nor does the judgment roll in the ejectment action suggest or reveal fraud of any nature. Agnes' complaint in that action alleges that she owns the property in fee and is entitled to possession of it; the husband's answer denies her ownership and his cross-complaint alleges that he "agreed to purchase" the property and put it in her name, in reliance upon her statements that she would reconvey to him upon his request; that he paid for the property but she intended to defraud him of it. Agnes' answer to the cross-complaint alleges that part of the purchase price was paid from her earnings and separate property and that an accounting would be needed to determine the respective interests of the parties in the property, and that title

had been taken in her name to prevent the wife from learning of the husband's interest in the property and from asserting any interest therein. The judgment in the ejectment action recites that the parties had "stipulated in open court that the court may make the judgment and decree set forth hereafter"; it is then adjudged that the parties each own an undivided one-half interest in the property, that the husband's one-half interest therein is vested in him by virtue of the decree, that Agnes has "an equitable charge and lien against" the property in the sum of $500 and the husband has a similar "charge and lien" in the sum of $850.

The fact that originally Douglas paid for the property and had it placed in Agnes' name for the purpose of defeating the plaintiff's claims is only indirectly relevant to the controlling issue. That issue is not how was the property originally obtained but, rather, how was the judgment obtained. Unless the judgment was collusively obtained in fraud of plaintiff's rights it is conclusive as between her and Agnes as well as between Douglas and Agnes.

Without going into further detail here, I submit that it is plain from the record that the trial court in the present (divorce) suit did not find fraud in the procurement of the ejectment action judgment and that the court's conclusion that such judgment is not res judicata or binding as to plaintiff is utterly without support. (See e. g., Cutting v. Bryan (1929), supra, 206 Cal. 254, 258, 274 P. 326; Yearout v. American Pipe & Steel Corp. (1946), supra, 74 Cal.App.2d 139, 142–144, 168 P.2d 174; Secondo v. Superior Court (1930), supra, 105 Cal.App. 179, 182, 286 P. 1089; see also Rest., Judgments, § 85, p. 409.)

If in truth there was collusion between Douglas and Agnes in the procurement of the judgment in the ejectment action, then plaintiff, as a person in privity with her husband in that action but claiming by reason of the fraud to be not bound by it could (either in a direct action brought for the purpose, or, probably, upon proper proof and sufficient findings here) establish the fact of actual fraudulent collusion in the obtaining of the judgment and so avoid the prima facie and otherwise conclusive bar of that judgment. (See 15 Cal.Jur., Judgments, § 139, p. 47, and cases there cited; Caldwell v. Taylor (1933), supra, 218 Cal. 471, 475, 237 P.2d 42, 40 A.L.R. 1110; Associated Oil Co. v. Mullin (1930), supra, 110 Cal.App. 385, 389–390, 294 P. 421; Rest., Judgments, § 115, p. 556, and § 122, p. 594.) It is declared at page 556 of Restatement of Judgments that "Where an action is brought by or against a fiduciary for the benefit of another, and a judgment is rendered therein, the beneficiary is bound by the rules of res judicata. * * * Hence the beneficiary is entitled to equitable relief under the same circumstances as if he were a party to the judgment. He may be entitled to equitable relief even though the fiduciary is not so entitled, as where the judgment is the result of collusion between the other party and the representative * * *" It would appear that this latter exception to the general rule would be applicable to plaintiff-wife here, *if* she proves and the court finds facts in support of such theory.

For the reasons above stated, there is shown in the record now before us no tenable basis for sustaining the holding of the trial court that the entire property is community and awarding it to plaintiff. The portion of the judgment so decreeing, insofar as it is in derogation of the earlier judgment, should be reversed and the judgment modified or the cause remanded for a new trial on the res judicata issue.

CARTER, J., concurs.

44 Cal.2d 325

Roy C. JENSEN, Neoma Jensen, and Carolyn Jensen, a minor, by and through Roy C. Jensen, her Guardian ad litem, Plaintiffs and Appellants,

v.

Floyd MINARD, Defendant and Respondent.

Sac. 6531.

Supreme Court of California.

April 19, 1955.

Rehearing Denied May 18, 1955.

Action for death of child who was struck by bullet from defendant's rifle. The Superior Court, Stanislaus County, Sherrill Halbert, J., entered judgment upon verdict for defendant and plaintiffs appealed therefrom, and from order denying motion for new trial. The Supreme Court, Traynor, J., held that instruction that mere fact that accident happened does not support an inference of negligence and instruction on unavoidable accident could have led jury to believe that prima facie the accident was unavoidable and was not owing to defendant's negligence, and therefore instructions were erroneous.

Judgment reversed.

Opinion, 271 P.2d 635, vacated.

1. Appeal and Error ⇐110

Order denying motion for new trial is not appealable.

2. Negligence ⇐4, 121(1)

In ordinary negligence cases, standard of care is ordinary care under circumstances and burden of proof is on the plaintiff.

3. Weapons ⇐18(1)

Rules of law governing actions for injuries caused by discharge of firearms are not different from rules governing actions for injuries claimed to have been inflicted by negligence of defendant.

4. Weapons ⇐18(2)

In action for death of child who was struck by bullet from defendant's rifle, requested instruction purporting to place burden of proof of freedom from fault on defendant was erroneous and was properly refused.

5. Weapons ⇐18(2)

In action for death of child, who was struck by bullet from defendant's rifle, instructions that mere fact that an accident happened, considered alone, did not support an inference of negligence and instruction on unavoidable or inevitable accident were erroneous in that they could easily lead jury to believe that prima facie the accident was unavoidable and was not owing to defendant's negligence.

Vernon F. Gant, Modesto, for appellants.

David F. Bush and Bush, Ackley & Milich, Oakdale, for respondent.

TRAYNOR, Justice.

[1] Judgment was entered on a verdict for defendant in an action for wrongful death. Plaintiffs appeal from the judgment and the order denying their motion for a new trial. Since the latter order is not appealable, the appeal therefrom is dismissed.

On May 21, 1951, Bonnie, 12, and her sister Carolyn, 8, got off the school bus at the intersection of Wren and Sierra roads in Stanislaus County at about 4:10 p.m. and started homeward along Wren Road. Defendant's home is located near and just to the west of the intersection of Wren and Sierra roads, which bound his farm land on the east and north. He testified that he was acquainted with the Jensen children and had frequently seen them get off the bus at Wren and Sierra roads. He saw them get off on the day in question while he was sitting with a friend on the patio of his home and watched them proceed along Wren Road until they were lost from view. At about this time he stood up and fired a .22 caliber rifle at a sparrow in his strawberry patch approximately 60 or 65 feet away. He looked up and down Wren Road and into the field beyond before firing and the children were not in sight. Shortly after firing the rifle, he heard a child scream, and he ran toward Wren Road and found Bonnie lying on the road approximately 180 feet south of his line of fire and approximately 200 yards from the point of firing. She had been struck in the

head by a bullet from his gun and died later that day. To support their theory that defendant must have fired in the direction of the children, plaintiffs introduced expert testimony indicating that the bullet had not ricocheted. Defendant introduced expert testimony indicating that it had. To prove that he was not negligent in failing to foresee the possibility of harm from a ricochet, he presented expert testimony that the chance of the accident's happening as a result of a ricochet was only one in ten million.

[2, 3] Plaintiffs contend that the trial court erred in failing to instruct the jury that "One who causes injury to another by discharging a firearm must, in order to excuse himself from liability, show that he was absolutely without fault." This instruction, taken from the opinion of the court in Rudd v. Byrnes, 156 Cal. 636, 640, 105 P. 957, 26 L.R.A.,N.S., 134, not only requires that the defendant be absolutely without fault but places the burden of proof of this issue on him. In ordinary negligence cases, however, the standard of care is ordinary care under the circumstances and the burden of proof is on the plaintiff. The question is presented, therefore, whether the court in the Rudd case meant to establish a special rule to govern injuries caused by firearms. When the language is read in context, it is clear that the court did not establish such a rule, but was merely emphasizing the proposition that owing to the dangerous character of the instrumentality, ordinary care in the use of firearms requires a very high degree of caution. "In short, the rules of law governing actions for injuries caused by the discharge of firearms are not different from the rules governing actions for any injuries claimed to have been inflicted by the negligence of the defendant. By reason of the dangerous nature of such weapons, a person handling them is held to a high degree of care. If he has not used the degree of care appropriate to the circumstances, and injury results, he will be liable to the person injured * * *." Rudd v. Byrnes, 156 Cal. 636, 641, 105 P. 957, 959, 26 L.R.A., N.S., 134; see also, Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 75, 265 P.2d 513; Lasater v. Oakland Scavenger Co., 71 Cal. App.2d 217, 221, 162 P.2d 486.

In the present case the jury was properly instructed on this theory. Negligence was defined as the failure to use ordinary care. The court then pointed out that "inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended * * *. What ordinary care is in any particular case depends upon what the circumstances are. Here the defendant was firing a gun which is an extremely dangerous activity. Ordinary care while firing a gun demands that the person firing the gun must exercise extreme caution while so doing. If you find that the defendant did not use extreme caution, then you must find that he was negligent."

[4] This case is not one in which the purpose of the shooting was unlawful, see, Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869, 871, or in which a statute or ordinance prohibits the use of any firearms. It is therefore unnecessary to decide whether defendant might be liable despite the exercise of extreme caution if the shooting were otherwise wrongful. Under the circumstances of this case there is no material difference between defining ordinary care in the use of firearms in terms of extreme caution or in terms of being absolutely without fault. Thus, to the extent that the requested instruction related to the standard of care, it was adequately covered by the instructions that were given, and to the extent that it purported to place the burden of proof on defendant, it was erroneous. Accordingly, the trial court did not err in refusing to give it.

[5] The trial court committed prejudicial error, however, in giving certain instructions requested by defendant. The jury were instructed that "The mere fact

that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." Since it was conceded that the fatal bullet was fired by defendant, this instruction in effect told the jury that the fact that Bonnie was killed by a bullet from defendant's gun afforded no evidence of negligence. Ordinarily, however, accidents of this sort do not occur if those using firearms use due care. Even though instructions on the doctrine of res ipsa loquitur were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent. See, Rose v. Melody Lane, 39 Cal.2d 481, 488, 247 P.2d 335. Moreover, this error was aggravated by the instruction given on unavoidable accidents, which stated: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it." Considering these instructions together, the jury could easily be led to believe that prima facie the accident was unavoidable and was not owing to defendant's negligence. It must also be noted that the instruction defined unavoidable accidents as including those that could have been avoided by the "exercise of exceptional foresight, skill or caution" thus creating a clear conflict with the correct instruction that ordinary care requires that one using firearms must use extreme caution.

Although defendant's own expert testified that ricochets from the ground at the angle at which defendant was shooting were not unlikely, he also testified that it was highly improbable that they would deviate sufficiently from the line of fire to endanger Bonnie and that the chance of the accident's having been caused by a ricochet bullet was only one in ten million. Under these circumstances we cannot agree with plaintiffs' contention that as a matter of law the evidence does not support the verdict. The possibility of a ricochet, however, coupled with the fact that the children had just passed beyond defendant's field of view would clearly justify a finding that defendant did not use extreme caution. Accordingly, we have concluded that the giving of the erroneous instructions resulted in a miscarriage of justice.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal but I do not agree with the reasoning of the majority upon which its conclusion is based.

It is my considered opinion that the standard of care required of one who discharges firearms is so high that a person can only be excused from liability for injuries caused to others by a showing that he was absolutely without fault, and it was prejudicial error for the trial judge to refuse to instruct the jury accordingly.

In discussing the standard of care required in firearm cases under common law it is stated in Pollock's Law of Torts, 15th Ed. (1951), p. 386, that "The risk incident to dealing with fire, fire-arms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." This standard which would appear to border upon the doctrine of strict liability has been interpreted by our American courts in different ways. As summed up in American Jurisprudence (Vol. 56, p. 1006), "The degree of care to be exercised in the use or handling of a firearm is determined by

the application of general rules relating to the care which must be exercised by one using dangerous agencies or instrumentalities. It is often said that a very high degree of care is required from all persons using firearms in the immediate vicinity of others regardless of how lawful or innocent such use may be, or that more than ordinary care to prevent injury to others is required. Some courts refer to the degree of care required as a high degree of care; others say that the utmost or highest degree of care must be used to the end that harm may not come to others. More often, the requisite degree of care is defined as such care as is commensurate with the dangerous nature of the firearm. The same degree of care is, no doubt, expressed by saying that the care which persons using firearms are bound to take in order to avoid injury to others is a care proportionate to the probability of injury to others, or by saying that one who has in his possession or under his control an instrumentality exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury thereby." On pages 1004–1005 of this same volume it is stated that "Some courts have been inclined to hold a person to very strict rules of accountability for injuries resulting from the discharge of a firearm. It has been held that one is liable civilly for damages for injuries inflicted by an unintentional discharge of a firearm unless he shows that the injury was unavoidable. In several cases it is said that the test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from all blame. According to the theory of these cases, it is no defense that the act occurred by misadventure, and without the wrongdoer's intending it. The defendant must show such circumstances as would make it appear to the court that the injury done to the plaintiff was inevitable, and the defendant was not chargeable with any negligence. This view warrants the imposition of liability on a person who, voluntarily aiming his gun at a particular person or animal, accidentally shoots another person or animal. Perhaps in these cases the court intended merely to emphasize the care required in the use of such a dangerous instrumentality as a firearm; clearly, the modern tendency of the court is to apply the general rule of negligence where injury or death has been inflicted by missiles from a firearm, and to permit the defendant in an action for damages to show in defense his freedom from negligence in causing the injury complained of. But even with respect to such an action it may be said that one who is in possession of a loaded gun is bound to use care proportionate to the dangerous nature of the instrument."

While the courts of this country have approached the problem in different ways they have generally required a great deal of care from one using firearms. A reading of the cases in other jurisdictions illustrates the extremely high standard of care which has been imposed. In Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869, 871, the court stated that "Even where a gun is accidentally discharged, the one handling it is liable for the injuries caused, unless he shows that he was entirely free from blame." In Judd v. Ballard, 66 Vt. 668, 30 A. 96, 97, the court said "The test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame." In the case of Atchison v. Procise, Mo.App., 24 S.W.2d 187, 190, the court stated that "In such situation, all that plaintiff was required to show was that defendant fired the shot and that plaintiff was hit. The burden of justification then shifted to defendant, and he was required to show that the injury was inevitable and utterly without fault on his part." For other cases expressing similar views see Harrison v. Allen, 179 Ill.App., 520; White v. Bunn, 346 Mo. 1112, 145 S.W.2d 138; Annear v. Swartz, 46 Okl. 98, 148 P. 706, L.R.A. 1915E, 267; Hawksley v. Peace, 38 R.I. 544, 96 A. 856, L.R.A. 1916D, 1179; Manning v. Jones, 95 Ark. 359, 129 S.W. 791; Morgan v. Cox, 22 Mo. 373.

In California the extremely high standard to which the user of firearms must be held was recognized in the case of Rudd v. Byrnes, 156 Cal. 636, 640, 105 P. 957, 959, 26 L.R.A.,N.S., 134, where this court

stated that "'As firearms are extraordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for a want of such care.' 12 Am. & Eng.Ency. of Law (2d Ed.) 518; Bahel v. Manning, 112 Mich. 24, 70 N.W. 327, 36 L.R.A. 523, [67 Am.St. Rep. 381]; Judd v. Ballard, 66 Vt. 688, 30 A. 96; Moebus v. Becker, 46 N.J.L. 41; Morgan v. Cox, 22 Mo. 373, 66 Am.Dec. 623. *One who causes injury to another by discharging a firearm must, in order to excuse himself from liability, show that he was absolutely without fault.* 12 Am. & Eng.Ency. of Law (2d Ed.) 519; Bahel v. Manning [112 Mich. 24, 70 N.W. 327, 36 L.R.A. 523, 67 Am.St.Rep. 381]; Morgan v. Cox [22 Mo. 373, 66 Am.Dec. 623]; Tally v. Ayres, [35 Tenn. 677] 3 Sneed 677; Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496." (Emphasis added.)

In the case of Frazzini v. Cable, 114 Cal. App. 444, 456, 300 P. 121, 126, the court quoted the rule as stated in Rudd v. Byrnes, supra, 156 Cal. 636, 640, 105 P. 957, and concluded that the Rudd case disposed "of appellant's claim that ordinary care was all that was required."

It thus becomes apparent that almost all jurisdictions impose a very high standard of care upon the users of firearms and that in California this high standard has been interpreted as meaning that a person who injures another in discharging a firearm can only escape liability by showing "that he was absolutely without fault."

As stated in the majority opinion, the evidence discloses that the defendant was sitting on the patio of his home firing at birds with a .22 caliber rifle; that his home was near the junction of two public roads; that the area was a populated farm area; that defendant knew that children were in the area of Wren Road; that Wren Road was less than 180 yards beyond the strawberry patch into which defendant was firing; and that the body of Bonnie Ann Jensen was found on Wren Road approximately 200 yards from the point of firing. The only evidence offered by defendant as an excuse for the shooting consisted of his testimony that he had used care in the handling of the gun; that he had looked up and down Wren Road before shooting and found it to be clear; that he had aimed into the strawberry patch; and that even if extended beyond the strawberry patch his line of fire would have been somewhat to the north of where the body of the victim was found. There was conflicting expert testimony as to whether or not the bullet might have ricocheted. Looking at the evidence as a whole it is difficult to say that there was any evidence upon which a jury could find that the defendant was entirely free from blame or that he was "absolutely without fault." Neither the fact that defendant looked both ways before shooting nor the fact that he was not aiming at the children is sufficient to exonerate him from liability in a case of this type particularly since he had seen the children get off the bus and knew they were in the area. Likewise the mere fact that a bullet may have ricocheted cannot of itself exonerate one injuring another with a firearm since it is a well known fact that bullets frequently glance off objects and travel in other than the exact direction of fire. Defendant admitted that he fired in the direction of the road on which he had previously seen the children walking. It is true that the evidence shows that the defendant did exercise some care and that he did not intend to harm the victim but it is extremely doubtful that such evidence can support a finding that the defendant was "absolutely without fault." A verdict for the defendant based upon evidence of this character indicates that the jury was not sufficiently apprised as to the standard of care required of the defendant in order to relieve him from liability. Had such an instruction been given a different verdict might have been returned. Hence, it is my opinion that the trial court committed prejudicial error in refusing to give the jury the instruction offered by plaintiffs to the effect that "One who causes injury to another by discharging a firearm must, in order to excuse himself from liability show that he was absolutely without fault." The language of this instruction was taken verbatim from the opinion of this court in Rudd v. Byrnes,

supra, 156 Cal. 636, 105 P. 957. Such is and should be the law of California, and an instruction of this type was necessary to fully apprise the jury of the extremely high standard of care required of the users of firearms. The mere fact that other instructions were given, indicating that defendant was required to use extreme caution and extraordinary care, is not sufficient. As pointed out in the foregoing discussion the standard of care for users of firearms has been stated in different language by various courts in other jurisdictions. Some require great care, some extraordinary care and in still others the standard is so high that a person injuring another by firing a gun can only escape liability by showing that he was entirely free of blame. California has adopted the latter view as expressed in Rudd v. Byrnes, supra, 156 Cal. 636, 105 P. 957, and an instruction expressly setting out such a standard should have been given, and was necessary, to fully apprise the jury of the standard of care required of the defendant in this case.

44 Cal.2d 310

Thomas WARNER, Jr., Plaintiff and Appellant,

v.

SANTA CATALINA ISLAND COMPANY; Olin Industries, Inc., also known as Western Cartridge Company, et al., Defendants,

Olin Industries, Inc., also known as Western Cartridge Company, Respondent.

No. L. A. 23502.

Supreme Court of California.
In Bank.
April 19, 1955.

Action against cartridge manufacturer for loss of eyesight resulting when particle of metal from cartridge rebounded from shooting gallery backstop. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment of nonsuit in favor of the defendant, and the plaintiff appealed. The Supreme Court, Carter, J., held that evidence was sufficient to take to jury question as to whether defendant had been guilty of negligence in manufacturing and inspecting product dangerous to human life by deviating from great degree of care required of one manufacturing an explosive article.

Reversed.

Opinion, 274 P.2d 426, vacated.

1. Trial ⇐139(1)

A motion for nonsuit may properly be granted when, and only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, result is determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

2. Trial ⇐142

Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from evidence, and that any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it upon appeal, or trial court to set it aside as a matter of law, trial court is not justified in taking case from jury.

3. Negligence ⇐4

All persons are required to use ordinary care to prevent others being injured as result of their acts; "ordinary care" being that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under circumstances.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

4. Negligence ⇐10

Care which must be exercised by every person to prevent others from being injured is proportionate to danger to be avoided and consequences that might reasonably be anticipated.

5. Explosives ⇐7
Negligence ⇐19, 21
Weapons ⇐18(1)

The standard of care required of reasonable person when dealing with such dangerous articles as fire, firearms, explosives or highly inflammable matters, and corrosive or otherwise dangerous or noxious fluids, is so great that slight deviation therefrom will constitute negligence.

6. Negligence ⇐1, 136(14)

Defendant's conduct must always be gauged in relation to all other material circumstances surrounding it, and if such other circumstances admit of reasonable doubt as to whether such questioned conduct falls within or without bounds of ordinary care, then such doubt must be resolved as a matter of fact rather than of law.

7. Weapons ⇐18(2)

In action against cartridge manufacturer for loss of eyesight resulting when particle of metal from cartridge rebounded from shooting gallery backstop, evidence was sufficient to take to jury question as to whether defendant had been guilty of negligence in manufacturing and inspecting product dangerous to human life by deviating from great degree of care required of one manufacturing an explosive article.

8. Negligence ⇐62(3)

Fact that intervening act of third person is negligent in itself or is done in negligent manner does not make it superseding cause of harm to another which actor's negligent conduct is substantial factor in bringing about if actor, at time of his negligent conduct, should have realized that third person might so act.

9. Negligence ⇐136(25)

Issue of proximate cause is essentially one of fact.

10. Weapons ⇐18(2)

In action against cartridge manufacturer for loss of eyesight resulting when particle of metal from cartridge rebounded from shooting gallery backstop, evidence on proximate cause issue was sufficient to take to jury question as to whether manufacturer should reasonably have anticipated that operators of shooting gallery might continue to operate gallery knowing of pitted condition of backstop and of dangerous propensities of manufacturer's cartridges.

11. Appeal and Error ⇐927(3)

On appeal from judgment of nonsuit, reviewing court must accept plaintiff's evidence and every legitimate inference to be drawn therefrom in an endeavor to determine whether it is so lacking in evidentiary support that court would be bound to set aside verdict for plaintiff had one been reached by trier of fact.

Manuel Ruiz, Jr., Los Angeles, for appellant.

Crider, Tilson & Ruppé, Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, Thomas Warner, Jr., appeals from a judgment of nonsuit in an action for damages for personal injuries. Plaintiff originally brought suit against Olin Industries, Inc., a corporation (aka Western Cartridge Company), and G. W. Rushmore, Amory P. Eckley, Thomas Browne, Gene Nordlund and Edward Nagle. Prior to trial, defendants Rushmore and Eckley paid plaintiff the sum of $22,000 in consideration of which plaintiff executed a covenant not to sue defendants Rushmore, Eckley and Browne. Rushmore and Eckley filed a cross-complaint against Olin Industries, Inc., for the amount expended for the covenant not to sue. Olin Industries answered, and at the beginning of the trial, moved for judgment on the pleadings as to Rushmore and Eckley. The motion was granted, no appeal was filed and that matter is now final. The cause went to trial only against defendant Olin Industries, and it is now respondent on this appeal.

Plaintiff, on July 18, 1947, was at a shooting gallery watching one of his party shoot at a target when a particle of a bullet ricocheted and entered his eye causing him to lose the sight therein. The shooting gallery was owned and operated by Rushmore and Eckley; Nordlund, as their employee, was the actual operator of the concession. Cartridges containing bullets known as

"Kant-Splash," used in the guns from which customers fired at various targets in the gallery, were manufactured by defendant Olin Industries.

Plaintiff alleged that Olin represented to the purchasers and users of its "Kant-Splash" bullets that they were designed for use in short range shooting galleries and to disintegrate upon striking a metal target or backstop; that Olin was negligent in the manufacture, testing and inspection of the bullets, as a result of which he was injured.

The record shows that there was a metal backstop the width of the gallery at the back thereof, which extended from the floor to the ceiling; that from the ceiling were suspended four metal baffles between the counter and the backstop; the sides of the gallery from the backstop to the counter were metal lined; the counter was approximately 37 feet from the backstop. Targets consisted of metal owls, metal rabbits on a revolving wheel, paper bullseyes; metal cylinders and other metal bell-type objects. The backstop was pitted, rather than smooth. Small particles of metal were found imbedded in wooden portions of the shooting bench, or counter, and some were found near the counter; the metal sides of the gallery were marked or scraped; the baffles were dented. Plaintiff was approximately 40 feet from the backstop at the time he received his injury.

The particle which entered plaintiff's eye has never been removed because to do so was considered extremely hazardous. Defendant contends, but not seriously, that it might have been a portion of one of the metal targets which entered plaintiff's eye. So far as this appeal from a judgment of nonsuit is concerned, the contention appears without merit. The operator of the concession testified that by the sound he could tell whether the marksman had hit a target and there is, apparently, no evidence that the person shooting, at the time plaintiff was injured, hit any one of the objects in the gallery. Plaintiff alleged that a portion of the Kant-Splash bullet caused his injury and there is no evidence to the contrary.

Plaintiff's evidence showed that defendant had been manufacturing Kant-Splash cartridges for use in shooting galleries since 1944; that underneath the name Kant-Splash on the package of cartridges appeared the following words: "These cartridges have special synthetic greased bullets designed to disintegrate upon striking a metal target or backstop"; that the bullets were advertised to the trade as those which would disintegrate into small particles with "splash-backs" reduced to an absolute minimum.

Mr. Doughan, the manager in charge of sales and distribution of the ammunition manufactured by defendant, testified (by deposition) that he was aware of the fact that when customers ordered shooting gallery cartridges, "particularly Kant-Splash" they were ordered so that they would disintegrate into powder or dust. He qualified the statement with the provision that the "backstop [must be] in good condition"; that by "good condition" was meant a "smooth finish" ordinary sheet steel background. He testified that he was aware that the ordinary shooting gallery had various targets; that these targets were between the customer and the backstop. His testimony showed that he knew of no material in writing wherein "any reference [was] made to the fact that the backstop ought to be smooth when Spatterpruf and Kant-Splash bullets [were] used in galleries"; that he knew of no warning issued by the defendant that the Kant-Splash bullets might splash back and injure a customer, or bystander.

Mr. Bellmore, the superintendent of the inspection division for defendant, testified (by deposition) that he was responsible for the quality of the products that were being manufactured during the time of manufacture; that during the years 1946–1947 he was assistant ballistic engineer and that his duties then were to perform tests on ammunition during the course of manufacture; that he had been "associated" with the tests on Kant-Splash bullets since that time; that the tests were indirectly under his supervision; that he usually observed the results of the tests. Mr. Bellmore tes-

tified that the material used in Kant-Splash bullets was designed to disintegrate into small particles upon hitting a hard object such as iron, steel or stone; that although he had conducted tests for the disintegration qualities of the bullets he had never segregated the particles of a disintegrated bullet to ascertain the size of the particles; that no one in the organization had done so as far as he knew; that he did not know how small the particles were; that he was not acquainted with the standard measurements used to compute the size of such particles; that defendant had no such instruments or measures; that whether Kant-Splash bullets disintegrated upon being shot at a steel, or similar hard wall, depended upon the condition of the steel backstop against which it was fired; that by "good condition" he meant a backstop which was not pitted, and by "not pitted" he meant no pits visible to the naked eye; that if there was any visible pitting, the particles might spatter; that he had never made any examination of actual shooting gallery backstops. Mr. Bellmore testified that even with a *"smooth, unpitted steel background, small particles will come back approximately 30 feet"*; that no tests had been made of the velocity of those particles. He testified that no tests had been made on lead targets, or on warped plates, although warping would affect the amount of spatter or splash in that there would be more ricocheting and less spattering; that tests had been conducted at a distance of 40 feet from the backstop and that particles had been found to extend approximately 40 feet from the backstop *even though the backstop was a smooth, unpitted one.*

Mr. Frost, the manager of the Products Service Division for the defendant, testified (by deposition) that the only way of testing a bullet was after its manufacture; that out of 10,000 bullets "probably 24" would be tested; that 200,000 Kant-Splash bullets were made per day; that testing took place once a week; that the bullets tested were not "lotted" but were selected at random from the production; that the spatter-back tests were on approximately 100 bullets per week; that they were not able to ascertain from what machine any particular bullet came; that even if a bullet showed a great amount of spatter-back, there was no way of telling what machine it came from; that no spatter-back tests had been made on a pitted plate; that the plates used in the spatter-back tests eventually became pitted; that every time a spatter-back test was made, the plate was examined for pits and when pits were found, the plate was replaced.

Mr. Franz, assistant Works Manager for defendant, testified (by deposition) that his duties consisted of the "Inspection Division, Explosives, and Technical Control Division and the Cartridge Division." He testified as to the results of spatter-back tests made in 1947. The tests were made each time of 100 26-grain bullets. The result of one entire test made in that year, showed 75.8 grains at a distance from 10 to 20 feet; 14.5 grains at a distance of 20 to 30 feet, and 9.5 grains "mostly unburned" at a distance of 30 to 40 feet. A test made a month later showed 77.8 grains at 10 to 20 feet; 21.0 grains at from 20 to 30 feet; one 6-grain piece at 20 feet and 5 grains at from 30 to 40 feet. The evidence shows that all the tests were made by the tester shooting always at a 90° angle at a distance of 40 feet; that shooting galleries average from 25 feet in length to 40 feet. A summary of the results of the available tests made in 1947 for the approximate distance from the backstop at which plaintiff was injured, shows (February 3) a spatter-back of 9.5 grains "mostly unburned" at a distance of 30 to 40 feet; another test (March 3rd) shows 21.0 grains at from 20 to 30 feet with one particle found at 20 feet weighing 6 grains, and 5 grains at from 30 to 40 feet; another test (April 7th) shows 88.4 grains at from 10 to 20 feet, 14.1 grains at from 20 to 30 feet, 6.5 grains at from 30 to 40 feet; another test (May 5th) shows 7.2 grains at from 30 to 40 feet; another test (May 19th) shows 6.5 grains "mostly unburned" at from 30 to 40 feet; another test (May 26th) shows 6.5 grains "mostly unburned" at from 30 to 40 feet; another test (June 3rd) shows 7.3 grains "mostly unburned" at from 30 to 40 feet; another test (June 16th) shows 5.3 grains at from 30 to 40 feet; another test

(June 24th) shows 3.7 grains "unburned powder" at from 30 to 40 feet. It was the witness' best judgment that from 60 to 70% of the shells manufactured in 1947 had been manufactured during the first six months of the year.

Mr. Bellmore testified that Kant-Splash bullets were manufactured of approximately 90% lead, approximately 9% zinc, and approximately 1% oil; that these substances were compressed by squeezing them in a hydraulic press, but that he did not know the poundage used; that the bullet was lubricated with a lubricant whose composition he did not know. He testified that some tests had been made by shooting through a piece of paper at 50 feet and that particles did not come back from the backstop through the paper.

The trial court granted defendant's motion for a nonsuit because it was of the opinion that defendant was not guilty of any negligence in either the manufacture or inspection of its Kant-Splash cartridges; that no duty existed on defendant's part to warn the gallery operators of any inherent dangers in the cartridges; that even if such a duty existed, the defendant could not be expected to "reasonably anticipate the action of the gallery operators in continuing to operate that gallery as they did with full knowledge that these bullets did splash back or ricochet, and that they were inherently dangerous in the manner they were used in that particular gallery." It was concluded that the failure of defendant to give notice to the gallery operators "if there was any inherent danger in them" was not a proximate cause of the plaintiff's injuries.

[1, 2] "A motion for nonsuit may properly be granted '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191, see, also, Blumberg v. M. & T., Inc., 34 Cal.2d 226, 229, 209 P.2d 1; Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665. 'Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, 769, see, also, Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574." Palmquist v. Mercer, 43 Cal.2d 91, 95, 272 P.2d 26, 28.

A summary of plaintiff's evidence shows that defendant's Kant-Splash bullets were designed for, and sold for use in short range shooting galleries; that all testing of the bullets was done under ideal conditions in that a smooth, unpitted backstop was used; that at no time were any tests made under actual shooting gallery conditions with targets between the person doing the shooting and the backstop; that the test shooting was always done at a 90° angle; that no measurement was made of the size of the particles which spattered back or ricocheted from the metal backstop; that there was no way of ascertaining from which machine a bullet came; that even when tests were made under the above stated ideal conditions, each test showed a spatter-back which extended 30 to 40 feet from the backstop. Plaintiff's evidence showed that defendant sold its cartridges on the theory that when the bullets hit a metal surface, the bullets would disintegrate into powder or dust.

[3–5] All persons are required to use ordinary care to prevent others being injured as the result of their acts; ordinary care has been defined as that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances of a given case. In other words, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated, Crowe v. McBride, 25 Cal.2d 318, 321, 153 P.2d 727; Hatzakorzian v.

Rucker-Fuller Desk Co., 197 Cal. 82, 98, 239 P. 709, 41 A.L.R. 1027; 19 Cal.Jur. 579. The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence. Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L.R.A.,N.S., 134; Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 75, 265 P.2d 513; Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 221, 162 P.2d 486.

[6, 7] There can be no doubt but that ammunition used in guns has propensities dangerous to human life. Plaintiff's evidence also established that defendant knew its ammunition was to be used in shooting galleries, that those galleries were usually found in crowded places; that the shooting was done in close proximity to other persons; that defendant's cartridges spattered back even though the testing was done under ideal conditions unlike those prevalent in most shooting galleries; that defendant's tests showed that its cartridges did not disintegrate into powder or dust, but into particles which ricocheted as far as 40 feet, the longest length of any shooting gallery. From this evidence and other evidence found in the record, the jury could have legitimately inferred that defendant was guilty of negligence in manufacturing and inspecting a product dangerous to human life in that it had deviated from the great degree of care required of one manufacturing an explosive article. Defendant's conduct must always be gauged in relation to all the other material circumstances surrounding it, and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law. Mosley v. Arden Farms Co., 26 Cal.2d 213, 217, 157 P.2d 372, 158 A.L.R. 872; Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848; Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574; Palmquist v. Mercer, supra, 43 Cal.2d 91, 95, 272 P.2d 26.

Defendant argues that the negligence of the operators of the shooting gallery in permitting the use of a pitted backstop and their knowledge, or the knowledge that they should reasonably have had, that the cartridges did not disintegrate into powder or dust but did spatter and ricochet is such superseding, intervening negligence as to relieve it of liability. In other words, defendant contends that its negligence, if any, was not the proximate cause of plaintiff's injury. To show knowledge of the ricocheting qualities of defendant's product, defendant points to the testimony of John Smith who operated a game concession fifteen feet back of the counter from which the shooting gallery customers shot at targets. Approximately two or three weeks prior to plaintiff's accident, while Smith was sitting at his concession, he felt a sharp pain in his back (which was turned toward the gallery) and found that a sliver of some sort of metal was stuck therein. He testified that he told the operator of the gallery about it, but could not remember which one of the three persons interested therein he had told. He also testified that he had heard "pinging" noises prior thereto which sounded like someone "engaged in horseplay" at the pinball machines which were interposed between his concession and the shooting gallery. Defendant also places emphasis on the fact that plaintiff's evidence showed particles of metal imbedded in the counter and other portions of the gallery as well as the pitted condition of the metal backstop. Plaintiff's witness, Browne, who supervised the shooting gallery testified that he had not noticed the particles or the pitted condition prior to the time plaintiff's expert made his examination after the accident occurred. There was no evidence concerning the times at which the particles had become imbedded in the wooden portions of the gallery although the expert witness testified that it had occurred over a period of time.

[8–10] Assuming that the evidence was sufficient to show that the operators of the gallery knew of the pitted condition of the backstop and the imbedded particles

of metal in the wooden portions thereof, and continued to operate the gallery knowing of the dangerous propensities of defendant's cartridges, it must be determined whether such negligent conduct on the part of the operators should have been reasonably anticipated by the defendant. Section 447 of the Restatement of Torts, sets forth the rule as follows: "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act * * *." It has been held that this rule is applicable in California, Stasulat v. Pacific Gas and Elec. Co., 8 Cal.2d 631, 67 P.2d 678; Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544. The issue of proximate cause is essentially one of fact, Fennessey v. Pac. Gas & Elec. Co., 20 Cal.2d 141, 124 P.2d 51; Mosely v. Arden Farms Co., supra, 26 Cal.2d 213, 219, 157 P.2d 372; Crowe v. McBride, supra, 25 Cal.2d 318, 321, 153 P.2d 727. From the evidence, the trier of fact could have inferred that defendant knew of the dangerous propensities of its cartridges; that it knew that its product did not disintegrate into powder or dust upon striking even a smooth metal surface; that it knew the dangerous character of the cartridges became intensified when a pitted surface was present in the metal backstop; that defendant knew, or could in the exercise of reasonable care have known, that shooting gallery conditions were different than the ideal conditions under which its tests were conducted. The trier of fact could reasonably have concluded that defendant, at the time it made its tests of Kant-Splash cartridges realized, or should have realized, that operators of shooting galleries might not take the utmost precautions in the use of the cartridges. In other words, the negligence of the operators of the shooting gallery could have been found by the trier of fact to have been reasonably foreseeable by the defendant and hence not a supervening, independent cause of plaintiff's injury. Gall v. Union Ice Company, 108 Cal.App.2d 303, 313, 239 P.2d 48; Northwestern, etc., Ins. Co. v. Rogers, etc., Foundry, 73 Cal.App.2d 442, 166 P.2d 401. The danger of spattering, or ricocheting particles was precisely the danger defendant sought to minimize with its specially designed Kant-Splash bullets and any conduct tending to increase that danger should have been, in the exercise of reasonable care, foreseeable by defendant and the jury could have concluded that its tests should have been conducted with the end to be achieved in view.

[11] Defendant contends that plaintiff has not shown how it was negligent in the manufacture or testing of its product or in what better and safer way the manufacture or testing could have been accomplished. It is argued that it was incumbent upon plaintiff to introduce expert testimony as to the proper tests, inspections, and processes of manufacturing and that the tests and methods of manufacture used by defendant did not meet "this standard." This is an appeal from a judgment of nonsuit and we must accept plaintiff's evidence and every legitimate inference to be drawn therefrom in an endeavor to determine whether it is so lacking in evidentiary support that we would be bound to set aside a verdict for the plaintiff had one been reached by the trier of fact. Palmquist v. Mercer, supra, 43 Cal.2d 91, 95, 272 P.2d 26. In so doing it appears as heretofore set forth that plaintiff has made out a case for defendant's negligence as the proximate cause of his injury and that defendant's argument would be a matter of defense on the trial of the issues of negligence and proximate cause.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 371

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Grady C. TERRY and Lloyd Fred Rossi, Defendants,

Lloyd Fred Rossi, Defendant and Appellant.

Cr. 5697.

Supreme Court of California, In Bank.

April 22, 1955.

Rehearing Denied May 18, 1955.

Defendants were convicted of giving and promising to give a bribe to influence testimony of prospective witnesses. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., entered judgment of conviction and an order denying motion for new trial, and one of the defendants appealed. The Supreme Court, Spence, J., held that the evidence was sufficient to support implied findings that criminal intent originated with defendants and that appellant had not been entrapped and that there was an agreement or understanding that witness's testimony would be influenced by bribe.

Judgment and order affirmed.

Opinion, 278 P.2d 49, vacated.

Schauer and Carter, JJ., dissented.

1. Criminal Law ⇐37

"Entrapment" is a positive defense, imposing upon accused the burden of showing that he was induced to commit the act for which he is on trial.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

2. Criminal Law ⇐569

Entrapment as a matter of law is not established where there is any substantial evidence from which it may be inferred that criminal intent to commit the particular offense originated in the mind of accused.

3. Criminal Law ⇐569

In prosecution for giving and promising to give a bribe to influence testimony of prospective witness, evidence was sufficient to support implied finding that criminal intent to commit offense originated with defendants and that they had not been entrapped into offering bribe. Pen.Code, § 137.

4. Perjury ⇐13

An essential requirement of statute relating to bribery of prospective witness is an understanding or agreement that testimony of such witness shall be thereby influenced. Pen.Code, § 137.

5. Perjury ⇐33(9)

In prosecution for giving and promising to give a bribe to influence testimony of prospective witness in prosecution for violation of Alcoholic Beverage Control Act, evidence was sufficient to support implied finding that there was an agreement or understanding between accused and arresting officer that officer's testimony would be thereby favorably influenced. Pen.Code, § 137; West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 25602.

6. Bribery ⇐11

Direct evidence concerning precise details of a corrupt agreement as to purpose for which a bribe is given or promised is seldom available and reliance must often be placed on inferences concerning such details. Pen.Code, § 137.

7. Perjury ⇐13

While requirement that there must be an understanding or agreement that testimony of prospective witness will be influenced by bribe given or promised implies a meeting of minds, such meeting of minds need not exist as to every detail, and it is sufficient if, under all the circumstances, the parties understand that the testimony will be influenced in some manner by the giving of the bribe. Pen.Code, § 137.

William H. Rosenthal, Marshall Gumbiner and Joseph Ostrow, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant Rossi appeals from a judgment of conviction for violating section 137

of the Penal Code and from an order denying his motion for a new trial.

Defendants Terry and Rossi were accused of violating said section in that they gave and promised to give a bribe to Norman Moore and John Mallick, persons who were about to be called as witnesses, upon the understanding and agreement that their testimony would thereby be influenced. The trial court, sitting without a jury, convicted the defendants. Proceedings were suspended and each defendant was granted three years' probation and was fined $400. Defendants' motion for a new trial was denied. The appeal is taken only by defendant Rossi. He contends: (1) that the evidence shows as a matter of law that he was entrapped; and (2) that the evidence is insufficient to support the verdict.

[1–3] As to the first contention, "entrapment 'is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial.' People v. Schwartz, supra, 109 Cal.App.2d [450] at page 455, 240 P.2d [1024] at page 1027; People v. Grijalva, 48 Cal.App.2d 690, 694, 121 P.2d 32; People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003." People v. Braddock, 41 Cal.2d 794, 803, 264 P.2d 521, 526. Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused. People v. Braddock, supra, 41 Cal.2d 794, 802, 264 P.2d 521. A review of the record here shows that there is ample evidence to support the trial court's implied finding that the criminal intent originated with the defendants.

Defendant Rossi's bartender was arrested on July 8, 1953, for an alleged violation of section 62 of the Alcoholic Beverage Control Act, Business and Professions Code, § 25602 (furnishing alcoholic beverage to an obviously intoxicated person). He was arrested by Officers Moore and De Madelena. Rossi and Terry owned bars approximately six blocks apart and had known each other for two or three years. Officer Moore first met defendant Terry approximately six years prior to the trial, and he first met defendant Rossi at his bar at approximately 11:50 p. m. on July 24, 1953.

Officer Sillings, who was present when Rossi was questioned at the police station, testified that Rossi admitted that he was aware that an ABC (Alcoholic Beverage Control Act) arrest had been made in his establishment. Rossi also stated that Terry first discussed the arrest with him on July 23, 1953. At that time Rossi mentioned that he thought one of the arresting officers was Officer Moore. Terry said that he had known Officer Moore for five or six years. Sillings then testified that Rossi said that the substance of his conversation with Terry had been to the effect that "through the influence of Mr. Terry, Officer Moore could do Mr. Rossi some good on his ABC pinch. And Mr. Rossi said 'So, naturally I wanted to meet the officer and talk it over with him.' And a meeting was arranged for the following night, Saturday night."

Rossi was asked, "Just what did you expect this officer to do?" Rossi answered, "Well, it is kind of a friendship deal between Terry and I. We are both bar owners in the vicinity and I thought maybe the officer could kind of go easy on the evidence; and if I were found not guilty, then I wouldn't have to go to the State Board."

This conversation between defendants Terry and Rossi took place at Rossi's bar on the 23rd of July, 1953, the day before Terry first talked to Officer Moore about the bartender. From that testimony the trial court could infer that on the day before Terry first talked to Moore about the bartender's case, Rossi had formed the idea that Moore could do "some good" in the bartender's case; could be influenced to "go easy on the evidence" therein, and he, Rossi, "naturally" wanted to meet the officer and "talk it over with him."

Officer Moore testified that he and his partner, Officer Mallick, saw Terry in front of his bar at approximately 2:00 p. m. on the 24th of July, 1953. Terry asked them to come into the bar and inquired whether they had made the ABC arrest in Rossi's bar. Moore answered that he was one of the arresting officers. Terry then said that

Rossi had just received his whiskey license and didn't want it suspended; and inasmuch as Rossi was his friend, he asked if Moore would be able to do something about the arrest. Terry "said that if we could do something for him, it would be the price of a couple boxes of cigars." Moore asked Terry what he could do. Terry "suggested that [Moore] fall down on the steps breaking the evidence." Moore stated that he did not know about that, and he started to leave. As Moore passed by the door, Terry tapped him on the shoulder and held up two fingers and "whispered, two hundred. And then stated that he would like to see [them] that night."

At approximately 10:50 p. m. that same night, Officer Moore again met Terry and asked him "what the deal was." Terry stated, "This guy I was telling you about will be worth $200 if you can do something for him." Terry stated he would like to see Moore do something for him because he would face a 15-day suspension if he was convicted. Moore said he might be able to do something along that line, but that he would have to have something to go on. Terry asked him how much, and he stated that it would take at least $50 to get started. Terry then stated that he would have to see Rossi in regard to the thing and then left, walking in the direction of Rossi's bar.

Officer Moore was asked if, during the second conversation with Terry at 10:50 p. m., on July 24, 1953, any mention was made of the conversation had between himself and Terry four months previously outside of Division 7 in the Hall of Justice. He answered in the affirmative and stated: "I directed Terry to the conversation that we had outside Division 7. * * * I asked him what the deal was on making these ABC pinches. Mr. Terry stated that the only thing I would have to do is make ABC pinches and that he would go to the bar the next day and just happen to be in there. [Terry] said, 'Of course the owner will tell me about receiving a pinch and I will tell him that I might be able to do something for him.' [Terry] says, 'The only thing you have to do is when you make the arrest is to substitute the drink that you take with a non-alcoholic beverage or change your testimony in some way.' [Terry] said, 'It will be worth $500 or $1,000 or whatever we can get on the thing.'" This conversation occurred on July 24, 1953, and was not the conversation which had taken place four months previously. Later, in cross-examination, Moore was asked whether Terry at any time had offered him $500. Moore answered affirmatively, stating that this had occurred outside of Division 7. There is no evidence as to what was said at that time.

Resolving all conflicts and indulging in all reasonable inferences in support of the judgment, it is clear that the evidence does not show, as a matter of law, that the criminal design originated with Officer Moore. On the contrary, there was ample evidence to show that Rossi formulated the idea that Officer Moore could be influenced to go easy on the evidence prior to the talks between Terry and Moore concerning Rossi's bartender; and that Terry did not talk to Moore about Rossi's bartender prior to July 24, 1953, the day after Terry's and Rossi's conversation at Rossi's bar.

It was for the trial court to determine as a matter of fact whether Rossi had a preexisting intent to commit the particular offense with which he was charged. The trial court could infer from Officer Sillings' testimony that Rossi and Terry had the idea of influencing Moore's testimony, and that such idea was formulated on July 23, 1953; and there is no evidence in the record from which it may be inferred that Moore prevailed upon Terry in any way prior to July 23, 1953, to induce Rossi to commit the offense with which he is charged. We therefore conclude that there was ample evidence to sustain the implied finding that there was no entrapment.

[4] Defendant Rossi's second contention is that the evidence is insufficient to support a finding that there was an "understanding" or "agreement" between himself and Officer Moore to influence the latter's testimony. An essential requirement of section 137 of the Penal Code is that there must be an "understanding or agreement that the testimony of such witness shall be thereby influenced". Defendant

relies on the case of In re Jang, 25 Cal. App.2d 529, 78 P.2d 250. The court there held that an essential requirement of an agreement or understanding is a meeting of minds.

[5] It is clear that the evidence in the present case supports the implied finding that there was an agreement or understanding between defendant Rossi and Officer Moore that the latter's testimony would be influenced. In In re Jang, supra, 25 Cal. App.2d 529, 78 P.2d 250, there was no evidence of an agreement to influence any testimony, whereas the evidence set out below leaves no doubt concerning the existence of an agreement to influence Officer Moore's testimony.

Pertinent testimony as to the agreement can be found in the conversation between Terry and Rossi on July 23rd, the conversation between Terry, Rossi and Officer Moore on July 24th, and the conversation between Rossi and Officer Sillings on July 24th, at the police station. As to the conversation of the 23rd, Officer Sillings testified that Rossi said he was aware that an arrest had been made in his establishment for a violation of the Alcoholic Beverage Control Act. Rossi further said that Terry had visited him on the 23rd, and that the substance of the conversation was that through the influence of Terry, Officer Moore could do Rossi some good on his ABC arrest, and that Rossi "naturally * * * wanted to meet the officer and talk it over with him." A meeting was arranged for the following night. In answer to the question of what he thought Moore could do for him, Rossi said, "I thought maybe the officer could kind of go easy on the evidence; and if I were found not guilty, then I wouldn't have to go to the State Board."

Officer Moore testified that in the conversation of July 24th between himself, Rossi and Terry, Moore was introduced to Rossi as the officer who had made the arrest. Rossi was then told that Moore was in a hurry, and Rossi replied, "All right; what is the deal?" Moore said, "Didn't Terry give you the details on this thing?" Rossi answered, "Yes, he said it was $500 bucks; but I got taken for $1,500 once, so I would like to put the thing in escrow or work something along those lines." Moore replied that he couldn't do that, and Terry told Rossi "we needed $50 now and the rest could come after the pinch was taken care of," and if "we didn't do something for him he would get the $50 back." Terry then told Rossi that if he welshed on the deal, he would get pinched every day. Rossi replied that "I am not trying to welsh on this thing, I just want to have all the facts straight." Rossi then asked if Moore wanted the $50 now, and he was told by Moore that he would have to see Terry on that, as Terry handled the details. Terry and Rossi then walked into Rossi's bar and when Terry returned, Terry handed $50 to Moore.

From the foregoing testimony the trial court could infer that Officer Moore, Terry and Rossi met on July 24th to consummate a "deal" by which Moore's testimony would be favorably influenced, and that the deal would cost Rossi a certain sum of money. Terry's usage of "we" in the presence of Moore and Rossi, in the absence of any denial by Moore, further indicates acquiescence in the deal by Moore. It could also be inferred that the deal concerned the arrest which was made at Rossi's bar for violation of the Alcoholic Beverage Control Act, in which Moore participated and for which case he was subpenaed as a witness.

[6,7] Direct evidence concerning the precise details of a corrupt agreement is seldom available and reliance must often be placed on inferences concerning such details. This was recognized in People v. Graves, 137 Cal.App. 1, 29 P.2d 807, 30 P.2d 508, which affirmed a conviction of receiving and agreeing to receive a bribe upon the agreement and understanding that the defendant's vote would be influenced. The court commented that "It is, of course, true that there is no direct testimony of the alleged fact that appellant corruptly agreed to vote and did corruptly vote for the compromise * * * but there are circumstances present in this case * * * that baffle any other explanation * * *." 137 Cal.App. at page 13, 29 P.2d at page 813. The agreement to influence Officer

Moore's testimony can reasonably be inferred in the present case. An agreement implies a meeting of minds, but it would be an absurdity to insist that such meeting of minds must exist as to every detail. It is sufficient if, under all of the circumstances, the parties understand that the testimony will be influenced in some manner by the giving of the bribe.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the opinion prepared for the District Court of Appeal by Presiding Justice Shinn and concurred in by Justice Vallée (reported in (Cal.App.) 278 P.2d 49), adequately discusses and correctly resolves the questions presented on this appeal. For the reasons therein stated I would reverse the judgment and the order denying appellant's motion for a new trial.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

44 Cal.2d 343

Harvey LEMING, Plaintiff-Respondent,

v.

OILFIELDS TRUCKING COMPANY, a corporation, and Phoenix Construction Company, a corporation, Defendants-Appellants.

L. A. 23272.

Supreme Court of California.

April 22, 1955.

Rehearing Denied May 18, 1955.

Action brought against corporations, which allegedly employed driver of tractor-trailer, to recover for injuries caused by negligent operation of tractor-trailer. The Superior Court, Kern County, William L. Bradshaw, J., entered judgment adverse to the corporations, and they appealed. The Supreme Court, Schauer, J., held that award of $215,460.22 to 47 year old man, who had life expectancy of 23.08 years and monthly earnings of $410.41 after deductions, whose injuries consisted of loss of right leg, which required three major surgeries on stump after amputation, and permanent injury to left leg causing it to be shorter and permanently stiff, and who would probably suffer phantom pains for remainder of his life and a ringing in his ears as result of large quantity of drugs administered during his sickness, and who would require medical attention for remainder of his life, was not excessive.

Judgment affirmed.

Opinion, 271 P.2d 101, vacated.

1. Appeal and Error ⇐930(1)

Evidence must be viewed in light most favorable to respondent when sufficiency of evidence to support jury's findings is challenged.

2. Automobiles ⇐244(26)

In action against corporations, which were allegedly employers of driver of tractor-trailer, to recover for injuries caused by negligent operation of tractor-trailer, evidence was sufficient to support implied finding that driver was acting within scope of his employment at time of accident and with at least implied permission of his employers in undertaking to return cement spreading equipment mounted on trailer to job site so it would be ready for use following morning.

3. Appeal and Error ⇐1002

Finding of jury based on conflicting evidence will not be disturbed by reviewing court.

4. Automobiles ⇐244(22)

In action against corporations for injuries caused by negligent operation of tractor-trailer which was owned by one corporation and driven by driver employed by that corporation but on which was mounted cement spreader which was owned by other corporation but operated by driver under supervision of superintendent of corporation which owned cement spreader, evidence was sufficient to support a judgment

against corporation owning cement spreader as a joint adventurer on construction project.

5. Joint Adventures ⇐7

Relationship of joint venturers is that of a mutual agency, akin to a limited partnership, and negligence of one joint venturer or of his employes acting in connection with joint venture is imputed to other joint venturers.

6. Trial ⇐203(1)

It is duty of court to instruct on every theory of case finding support in the evidence.

7. Trial ⇐260(7)

Denial of requested instruction that if jury believed taking of tractor-trailer by driver was without permission of owner verdict should be in favor of owner was not prejudicial when point was covered by other instructions.

8. Automobiles ⇐246(60)

In action against corporations for injuries caused by negligent operation of tractor-trailer, which was owned by one of corporations and driven by employee of that corporation, who was returning tractor-trailer in late evening from corporations' yards to job site so it would be ready for work following morning, instruction that if jury found from evidence that at time of accident driver was employee of owner of tractor-trailer then jury could infer that driver was acting as agent and within scope of his authority but that they were not compelled to draw that inference, was not erroneous.

9. Damages ⇐127

Whether amount of damages awarded is excessive is an issue which is primarily factual in nature and which therefore cannot be decided upon basis of awards made in other cases.

10. Appeal and Error ⇐757(3)

Appellant asserting that award of damages is excessive is required to set forth in brief all material evidence on point, and unless this is done contention is deemed to have been waived.

11. Appeal and Error ⇐907(2)

Reviewing court starts with presumption that record contains evidence to sustain every finding of fact, and it is not the province of such a court to search record in order to ascertain whether it contains evidence which will support a contention made by either party to an appeal.

12. Damages ⇐132(10)

Award of $215,460.22 to 47 year old man who had monthly earnings of $410.41 after deductions, whose injuries consisted of loss of right leg, which required three major surgeries on stump after amputation, and permanent injury to left leg causing it to be shorter and permanently stiff, and who would probably suffer phantom pains for remainder of his life and a ringing in his ears as result of large quantity of drugs administered during his sickness, and who would require medical attention for remainder of his life, was not excessive.

Baker, Palmer & Wall, Claude F. Baker and Jack W. Bradley, Bakersfield, for appellants.

Oscar F. Catalano and A. V. Falcone, Bakersfield, for respondent.

SCHAUER, Justice.

Defendants-appellants herein are Oilfields Trucking Company and Phoenix Construction Company, two corporations, hereinafter called, respectively, Oilfields and Phoenix. They appeal from a judgment in plaintiff's favor, entered on a jury verdict, in his action to recover for personal injuries suffered in a trucking accident. The judgment now on appeal was rendered on a second trial of the action. The driver of the tractor and trailer which caused the injuries, one Mason, was also named as a defendant, and on the first trial judgment was recovered against him as well as against Oilfields and Phoenix. That judgment became final against Mason, but on motion of Oilfields and Phoenix a new trial was granted as to them and they are therefore the sole defendants involved in the present appeal from the judgment which followed

the new trial. We have concluded that, contrary to defendants' contentions, the evidence is sufficient to support the verdict, no error prejudicial to defendants occurred in instructing the jury, the verdict is not as a matter of law excessive, and the judgment should be affirmed.

At a late evening hour on Tuesday, July 10, 1951, as plaintiff, a truck driver, was standing between two trucks which were parked, one in front of the other, along the curbing of a street in Bakersfield, a tractor and trailer driven by Mason along the same street struck the rear one of the parked trucks, causing it to strike and injure plaintiff. Plaintiff's action against the two defendant corporations is predicated upon the allegation that at the time of the accident Mason was operating the tractor and trailer "as agent and employee and within the scope of authority and agency of his employers, Phoenix * * * and Oilfields. * * * As grounds for reversal defendants urge (1) insufficiency of the evidence to support the jury's implied finding that at the time the accident occurred Mason was acting within the scope of either an employment or agency relationship, (2) error in instructing the jury, and (3) excessive damages awarded under the influence of passion or prejudice.

Sufficiency of Evidence

[1] Viewing the evidence in the light most favorable to plaintiff-respondent, as is required when sufficiency of the evidence to support the findings is challenged (Richter v. Walker (1951), 36 Cal.2d 634, 640, 226 P.2d 593; In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689), it appears that the two defendant corporations are enterprises of the Phoenix brothers, of Bakersfield. Harry Phoenix was president of Oilfields and vice president of Phoenix. Percy Phoenix was president of Phoenix and vice president of Oilfields. The business of Oilfields was trucking or hauling for hire, and that of Phoenix was construction. The corporations conducted their operations from a base comprising an area of 8 to 9 acres mutually occupied by them some 2 or 3 miles south of Bakersfield, on which they maintained in common their respective offices, shops, yards, garages, warehouses, storerooms, equipment and appliances.

Prior to May 21, 1951, the two corporations entered into a written contract with the Division of Highways of the State of California by which they agreed to do certain road resurfacing referred to as the Haypress Canyon or Bena job and located some 18 to 30 miles east of Bakersfield. This contract was made by the corporations as joint venturers, they were so designated therein, and an officer of each corporation confirmed that "that was a joint venture between" Oilfields and Phoenix. The two corporations "together as joint venturers" posted a performance bond with the State for this job. They had previously engaged as joint venturers on highway jobs, and the purpose of the joint ventures was to enable them "to pool the resources of the two corporations" in order to qualify to bid for construction jobs in higher amounts. Oilfields owned some 170 trucking units and employed about 90 truck drivers. Early in June, 1951, Butler, its personnel superintendent, hired Mason, a former employe, as a truck driver. He assigned Mason to the Haypress Canyon job for the duration thereof as driver of tractor No. 382 combined with a trailer on which was mounted a cement spreader required for the work. Both the tractor and the trailer were owned by Oilfields, and the cement spreader was owned by Phoenix.

Defendants' yards, located on the west side of Highway 99, south of Bakersfield, were operated on a 24-hour schedule with dispatchers on duty day and night for dispatching drivers and trucking equipment. The evidence was not specific as to whether or not Mason was subject to the usual dispatching routine, which included written dispatch orders and a daily master "truck movement sheet" on which were listed the name of truck and of driver, number of the truck, and purpose or destination of the trip. Mason operated the cement spreader which accompanied tractor No. 382, to which he had been assigned, at the Haypress Canyon job from Monday through

Friday of each week, working an average of 10 hours a day. He was the sole and exclusive driver and operator of this piece of equipment while he was on that job. Trucks bringing bulk cement to the job would arrive from 3 o'clock in the morning on, and Mason's work included having the cement spreader ready at that time and assisting in unloading the trucks and loading the spreader. He slept at the job site in a convertible bed in his own automobile. He was the only employe of defendants who remained at the job site overnight. Two foremen and a superintendent of defendant Phoenix, who were in charge at the job site, knew of this practice. Each Friday night Mason would drive tractor No. 382 and the spreader equipment from the job site back to defendants' yards for servicing, and would pick it up again about 4 o'clock Monday morning and return to the job.

On Friday night, July 6, 1951, Mason drove the equipment to the Bakersfield yards as usual, and returned it to the job in the early morning of Monday, July 9. Because a breakdown of the pug mill at the job had interrupted cement spreading work, Mason took the equipment back to defendants' yards in the afternoon of the same day (Monday). About 5 p. m. of the following day (Tuesday, July 10) the job superintendent notified the dispatcher at the yards to get Mason and the spreader equipment back on the job. The dispatcher was unable to locate Mason, and requested Oilfields' personnel superintendent, Butler, to do so. Butler located Mason at a cafe about 6 p. m., and in Mason's words "told me to be at the Haypress Canyon job the following morning * * * about 5:00 o'clock * * * [and] to have the truck out there in the morning, ready to go to work with the cement mixer, spreader." Butler testified that he did not "take any memorandum of any kind to Mason * * * [but] went to give him verbal orders." Mason left the cafe and drove around for a time in his own car, with one Smith and two girl friends; he had one drink of vodka mixed with orangeade during this time. About 9:30 p. m. Mason and his three companions arrived at defendants' yards. Mason went to the Oilfields area and took tractor 382, which he had been using, and moved it to the Phoenix area, where he hooked up the trailer and cement spreader. He also arranged for Smith to drive Mason's car to the job site and meet Mason there. He then drove the spreader equipment out on the highway without notifying the dispatcher of his intended departure. He was going to take it to the job site so it would be there the following morning when the bulk truck arrived. As he proceeded on his customary route from yards to job site, he drove into the rear end of the parked truck, injuring plaintiff.

With respect to the extent of supervision exercised over Mason in his work, Butler, the personnel superintendent who assigned Mason to the Haypress Canyon job, testified as follows:

"Q. Assuming the truck was out there [at the job site] all week, would Mason have to come in to find out what his dispatch orders were? A. He received those orders out there, what he was to do, after he was dispatched to the job." Mason stated that "I was my own boss there," and also testified as follows:

"Q. And when you picked the truck up on * * * Monday morning did you have to see anyone to pick up that truck? A. I never did, I knew where I was going.

"Q. You just went in and got in the truck and drove out to the job, is that right? A. That is right, checked my tires and whatnot.

"Q. That same routine continued while you were working on the Haypress job, is that right, sir? A. Yes."

Esponda, who was shop foreman for Oilfields and was on duty in the yards at the time Mason took the equipment out just before the accident, testified that although he saw Mason leaving and tried to stop him, "the only reason * * * [I was] trying to stop this truck was because no clearance lights were burning on the trailer, * * * It wasn't because he didn't have any business with that equipment" and that the witness did not see Mason hook the cement

trailer onto the tractor although Mason "probably did because that is where it is usually parked. He took up on his own, he kind of more or less worked on his own." The witness further stated that he knew Mason "belonged to that equipment" and was assigned to it, and that he had never seen "any dispatch orders on Mason."

[2, 3] The above recited evidence is manifestly sufficient to support the implied finding of the jury that Mason was acting within the scope of his employment and with at least the implied permission of his employer in undertaking to return the cement spreading equipment to the job site in order to have it available for use there the following morning. Other evidence, relied upon by defendants, merely creates a conflict which was resolved by the jury in plaintiff's favor and will not be considered on appeal. (Richter v. Walker (1951), supra, 36 Cal.2d 634, 640, 226 P.2d 593 and cases there cited.)

[4, 5] Phoenix contends, nevertheless, that Mason was an employe of Oilfields alone, and not of Phoenix, and that "The evidence is insufficient to support a judgment against * * * Phoenix * * * as a joint adventurer of * * * Oilfields * * *, since appellant [Phoenix] exerted no control over Mason." Phoenix expressly concedes, however, and the evidence indicates, that after Mason "got on the job with the equipment, the job superintendent of Phoenix * * * directed him in the spreading of the cement." It was the same superintendent and employe of Phoenix, one Flem, who requested the yard dispatcher on the day of the accident to get Mason and the spreader equipment back on the job, and the cement spreader which was mounted on the trailer and was at Flem's request being returned to the job site was owned by Phoenix. Not only does the above evidence show that Phoenix actually did exercise control over Mason, but it appears to be the general principle that "The relationship of joint venturers is that of a mutual agency, akin to a limited partnership" (Campagna v. Market St. Ry. Co. (1944), 24 Cal.2d 304, 308, 149 P.2d 281), and that the negligence of one joint venturer or of his employes acting in connection with the joint venture is imputed to the other joint venturers. (See Shook v. Beals (1950), 96 Cal.App.2d 963, 970, 217 P.2d 56, 18 A.L.R. 2d 919; Hupfeld v. Wadley (1948), 89 Cal. App.2d 171, 175–176, 200 P.2d 564; Di Vita v. Martinelli (1932), 123 Cal.App. 392, 394, 11 P.2d 423; 48 C.J.S., Joint Adventures, § 14–e, p. 870. It follows that the evidence supports the judgment against Phoenix equally with Oilfields.

Jury Instructions

As noted hereinabove, plaintiff's cause of action upon which trial was had was based solely upon the theory of respondeat superior in accord with the allegation in his complaint (amended), that at the time of the accident Mason was acting "as agent and employee and within the scope of authority and agency of his employers," the two defendant corporations. This allegation was specifically denied by both Phoenix and Oilfields in their answers. Oilfields further alleged "that any operation of said tractor * * * by the defendant Mason was without any authority whatsoever," and as an affirmative defense pleaded that Mason's operation of the equipment "was a taking of said equipment * * * without the permission of this defendant as the owner thereof for the purpose of said defendant Mason using and operating the same without any permission or consent whatsoever."

On defendants' behalf Butler testified that his instructions to Mason on the evening of the accident were that "he was to report at the yard at 5:00 o'clock a. m. [the next morning] and pick up his truck and go to Haypress Canyon and be out there at 6:00 o'clock." Mason, at one point in his own testimony, also stated that Bulter "told me to report to Bena [Haypress Canyon] the following morning * * * around 5:00," and it was shown that at the coroner's inquest[1] following the accident Mason testified that "I had direct orders to report to the job at five o'clock in the morning * * * But not to go out prior to morning.

1. Another truck driver, not here involved, died from injuries received in the same accident.

* * * [T]hey don't make a habit of having or letting the drivers go out at night," and that this was the first time he had "taken a truck out at night to go to a job that did not start 'til morning." Also at the inquest, in response to the question "What were your reasons for taking the truck out at that time of night when you don't have to be there until morning?" Mason replied, "Well, I sleep in my car all the time in order to avoid hotel rooms" and that he had planned to sleep in his car the night of the accident. Smith, who with two girls had been riding around with Mason in the latter's car, testified, but Mason denied, that Mason had invited first one of the two girls and then the other to ride with him in the truck to Haypress Canyon, but that each had refused.

Defendants contend that in the light of the pleadings and the above recited evidence in their favor, the court failed to fairly instruct the jury on their defense that at the time of the accident Mason was not acting within the scope of his employment and did not have permission of the defendant owner to operate the equipment, but instead was a "daytime employee" who had taken out the equipment at night for private purposes of his own and, in the language of defendants' argument, "as a device to lure two girls * * * to Haypress Canyon."

[6, 7] At the request of Oilfields the court did instruct the jury that Oilfields had alleged as part of its answer that any operation or use of its equipment by Mason "was a taking of said equipment by * * * Mason without the permission of this defendant [Oilfields] as the owner thereof for the purpose of said * * * Mason using and operating the same without any permission whatsoever." The court refused, however, to further instruct, as requested by Oilfields, that "if the jury believes that the taking of any equipment belonging to defendant Oilfields * * * by * * * Mason was without the permission of defendant Oilfields * * * as the owner thereof for the purpose of * * * Mason using and operating the equipment without any permission of defendant Oilfields" then the verdict should be in favor of Oilfields and against plaintiff. Since, as in Schellenberg v. Southern Cal. Music Co. (1934), 139 Cal. App. 777, 783, 35 P.2d 156, the question of whether Mason had permission to take the equipment at night bore upon the issue of whether he was operating it within the scope of his employment, and inasmuch as the evidence would support a finding of lack of permission, defendants were entitled to have the refused instruction given, unless the point was adequately presented by other instructions. "It is the duty of the court to instruct on every theory of the case finding support in the evidence." (Daniels v. City & County of San Francisco (1953), 40 Cal. 2d 614, 623, 255 P.2d 785; see also Wells v. Lloyd (1942), 21 Cal.2d 452, 459, 132 P.2d 471; Musachia v. Jones (1924), 65 Cal.App. 283, 297–298, 223 P. 1006; Varner v. Skov (1937), 20 Cal.App.2d 232, 238–240, 67 P.2d 123; Stickel v. Durfee (1948), 88 Cal.App. 2d 402, 406, 199 P.2d 16; 24 Cal.Jur. 833, § 96.)

At plaintiff's request the jury were told: Defendants Oilfields and Phoenix "are corporations and as such each can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is." (Based on BAJI 54–G.) Oilfields and Phoenix "have been sued on the theory that each of them was a principal for whom * * * Mason was acting as agent, within the scope of his authority, at the time of the events out of which the accident occurred. Whether the facts support this theory is an issue that you may have to decide, inasmuch as plaintiff's contentions in this respect have been denied. If you find that * * * Mason was negligent, you then must decide whether, at the time of * * * the accident, he was acting as agent for the defendant corporations or either of them and within the scope of his authority, and if you find he was acting as agent of the defendant corporations or either of them and within the scope of his authority, then you must also find liable the defendant corporations or * * * corporation for whom he was acting." (Based on

BAJI 54–B, Adapted.) Oilfields and Phoenix were engaged in a joint enterprise and therefore Phoenix "is as responsible" as Oilfields "for all acts of employees of either corporation, which are done within the course and scope of their employment on work included in or reasonably necessary to carry on the enterprise contemplated by the joint venture." The nature of a joint venture was also explained to the jury.

Further instructions given at plaintiff's request were that "An agent is a person who, by virtue of and pursuant to an agreement with another called the principal, undertakes to represent the principal in dealing with third persons, or undertakes to transact some other business, to manage some affair, or to perform some service, for the principal, whether for compensation or gratuitously. The agreement may be oral, written, express or implied. The term 'agent' is a broader term than either 'servant' or 'employee'. For the purposes of this trial, a servant or an employee is an agent, but one may be an agent, although he is neither servant nor employee. The test to determine whether at a given time one person was the agent of another is to ascertain whether or not at that time the former was subject to the orders and control of the latter and whether or not the latter had the right of control or the right to discharge the former for disobedience or misconduct." (Based on BAJI 54–B, 1950 Supp.)

The jury were next told, at the request of defendant Phoenix, that "If you find from the evidence that at the time of the accident * * * Mason was driving a vehicle owned by Oilfields * * *, and that on said date * * * Mason was an employee of said corporation, then you may infer from such evidence that said * * * Mason was acting as the agent of said Oilfields * * * and within the scope of his authority. This inference[2] does not necessarily apply to the defendant Phoenix * * * in this case as they did not own the truck involved in the accident, and the evidence has established that * * * Mason was an employee of Oilfields * * * Furthermore, you are not compelled to draw this inference, but you may do so if your reason and discretion so dictate; and if you draw such an inference, you are not required to abandon it in the face of any contradictory evidence, but must weigh the inference and such evidence as favors it against all contrary evidence to determine which, if either proponderates."

"If an agent or servant engages in a pursuit suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and while so engaged negligently commits a tort, the principal is not answerable, although he was using the principal's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to the master."

The court then continued with the following instructions, requested by plaintiff: "An employee does not depart from course and scope of employment if at the time of the questionable act he is acting on behalf of his employer, even though at such time he may also be acting for his own private purposes.

"It is not necessary that a specific act, or failure to act, be authorized as such by the principal to bring it within the scope of the agent's authority. It is within the scope of his authority if it is done while the agent is engaged in the transaction of business which has been assigned to him for attention by his principal, or while the agent is doing any reasonable thing which his contract of employment expressly or impliedly authorizes

2. At plaintiff's request, an inference was defined to the jury as "a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts 'as is warranted by a consideration of the usual propensities or passions of the person whose act is in question, the course of business, or the course of nature.' The word 'propensity' as used in this instruction means any 'natural or habitual inclination or tendency.' "

him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment."

It thus appears that although the jury were not specifically and in so many words told, in accordance with Oilfields' requested instruction, that if they believed that Mason took the equipment out on the evening of the accident without the permission of Oilfields and for the purpose of operating it without such permission, then their verdict should be in favor of Oilfields and against plaintiff, nevertheless it was made clear to them that Oilfields was claiming that Mason had taken the equipment without permission, and, further, that if they found that Mason was negligent they must then decide whether he was acting as defendants' agent and within the scope of his authority as such agent at the time of the accident, and that defendants should be held liable if the jury found in the affirmative on the issues of agency and scope of authority. In addition, the court explained to them that if an agent or servant negligently commits a tort while pursuing only his own pleasure, convenience, or business, then the principal is not answerable. Under such circumstances, and in view of the fact that plaintiff's action is based solely on the theory of respondeat superior and not upon permissive use of defendants' equipment under the provisions of section 402 of the Vehicle Code, we conclude that the jury were adequately and fairly instructed and that no prejudice to defendants resulted from failure to elaborate in more detail on their defense of lack of permission.

[8] Defendant Oilfields next urges that the court erred in telling the jury that if they found from the evidence that at the time of the accident Mason was driving Oilfields' vehicle and was an employe of Oilfields on that date then "you may infer from such evidence that said * * * Mason then was acting as the agent of said [Oilfields] * * * and within the scope of his authority," that although the jury were not "compelled to draw this inference," they could do so if their reason and discretion so dictated, and that if the jury drew "such an inference, you are not required to abandon it in the face of any contradictory evidence, but must weigh the inference and such evidence as favors it against all contrary evidence, thus to determine which, if either, proponderates." (See Day v. General Petroleum Corp. (1939), 32 Cal.App.2d 220, 227–232, 89 P.2d 718; Shields v. Oxnard Harbor Dist. (1941), 46 Cal.App.2d 477, 487, 116 P.2d 121.) Defendant's contention appears to be based on an assumption that the evidence on the issue of agency and scope of employment was without substantial conflict and wholly favored defendant (see Day v. General Petroleum Corp. (1939), supra), an assumption which, as discussed in more detail hereinabove, is not tenable, and also upon the argument that the criticized instruction in effect tells the jury that they may totally disregard such evidence as tends to favor defendant. It is clear, however, that the instruction did not tell the jury they were compelled to draw the inference and could ignore defendant's evidence, but merely that they were to weigh the inference against the other evidence in reaching their decision. The further statement, in the same instruction, that "the evidence has established that * * * Mason was an employee of Oilfields," would likewise appear not to have prejudiced defendant Oilfields, inasmuch as Mason's employment by Oilfields was not disputed and the basic issue was whether he was acting within the scope of that employment at the time of the accident.

Size of Verdict

[9–11] Defendants claim that the verdict, in the amount of $213,460.22, is excessive and appears to have been influenced by passion or prejudice. Defendants' motion for a new trial, made on that ground, among others, was denied by the trial court. On appeal, without even attempting to summarize or discuss the evidence concerning the nature and extent of the injuries to plaintiff here, defendants argue that the verdict is excessive when compared with verdicts rendered in other cases in which other "severe" injuries were received. As declared in Crane v. Smith (1943), 23 Cal.2d

288, 302, 144 P.2d 356, "The appellant's claim that the amount of damages awarded * * * is excessive, concerns an issue which is primarily factual in nature and is not therefore a matter which can be decided upon the basis of the awards made in other cases. * * * [D]amages are not excessive as a matter of law because a lesser amount has been deemed adequate compensation for a similar injury." (See also Deevy v. Tassi (1942), 21 Cal.2d 109, 120–121, 130 P.2d 389.) Since defendants' claim of excessive damages is primarily factual in nature, they are required to set forth in their briefs all the material evidence on the point, and unless this is done their contention is deemed to be waived. A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, and it is not the province of such a court to search the record in order to ascertain whether it contains evidence which will support a contention made by either party to an appeal. (Tesseyman v. Fisher (1952), 113 Cal.App.2d 404, 407, 248 P.2d 471; Kruckow v. Lesser (1952), 111 Cal.App.2d 198, 200, 244 P.2d 19.) Despite the failure of defendants to fairly set forth or refer in their briefs to the evidence on the matters of plaintiff's injuries and the damages he suffered, we have with the assistance of plaintiff found evidence to the following effect in the voluminous record on appeal:

[12] Plaintiff was 47 years of age at the time of the accident and his life expectancy was 23.08 years. He had been working for his then employer for some five years, and his monthly earnings were $410.41 after "taxes and all various items were deducted." Plaintiff testified that immediately after the accident he found himself lying on the ground, and "I discovered my right leg was badly shattered and that the pants leg was torn away from the shin bone, I guess you would call it, and I could see through it. The pain was great, it was almose unbearable." Plaintiff was taken in an ambulance to Kern General Hospital where an emergency amputation of his right leg at the upper third of the right femur, was performed. Because of gangrenous conditions a guillotine type (straight cut) of amputation was necessary, although usually deemed undesirable. Gangrenous conditions continued to develop, and three additional major surgeries on the stump became necessary. The bone and the sciatic nerve were cut back to the point where the medical experts concluded that nothing further should be done. Attempts were made to prepare plaintiff for an artificial leg or pylon, but in the opinion of plaintiff's attending surgeon he will never be able to wear one because of the condition of the stump, although plaintiff had tried sincerely and earnestly to do so; plaintiff will have to continue to get around with a wheelchair and crutches. Plaintiff testified that he constantly suffers from phantom pains in his amputated right leg, which give the sensation that the leg is still there and subject to pains and also cause embarrassing quivering in the stump, which plaintiff cannot control; many nights he does not sleep at all because of the phantom pains, and his maximum amount of sleep any one night is four hours. His surgeon testified that phantom pains are actual sensations from which plaintiff will suffer the rest of his life, and that treatment of such pains "is not very satisfactory."

Besides amputation of his right leg, plaintiff sustained multiple fractures of the left leg, which were major and serious, and extended into the knee joint. This resulted in shortening of the leg about one-half to three-quarters of an inch and in permanent stiffness, instability, and restriction of motion and flexion. Plaintiff must wear a steel brace on his left leg for the rest of his life.

Within a week after plaintiff was hospitalized he developed a critically serious complication in the form of a blood clot which had originated in his injured left knee but which had lodged in his lungs. A specialist was called in, and plaintiff was given seven blood transfusions. Plaintiff also suffers from a ringing in the ears, which the medical experts consider to be a probably permanent condition and ascribe to the large quantity of drugs which it was necessary to administer to plaintiff during the eight and one-half months he was in the hospital.

Plaintiff is also extremely irritable and nervous as the result of his injuries and necessary treatment.

Plaintiff's medical experts testified further that for the rest of his life he will need medical care, at a cost of approximately $300 a year, and will also require the services of a practical nurse, at a cost of some $200 a month.

Plaintiff's tabulation of his claimed items of damage shown at the trial may be summarized as follows:

"Medical fees incurred	$ 4,649.75	
Hospital	6,041.94	
Nurses (registered)	2,147.00	
Practical nurse	550.62	
Miscellaneous, such as ambulances, drugs, etc.	372.92	
Lost Wages, 19 months @ $410.41	7,797.79	$ 21,560.02
Future medical expense, 23 years @ $300.00	$ 6,900.00	
Future nursing care, 23 years @ $2,100 (175 a month)	48,300.00	
Future lost wages, 20 years @ $4,924.92 ($410.41 a month)	98,498.40	$153,698.40
Total itemized damages		$175,258.42
Leaving for general damages covering suffering, pain and physical discomfort, past and future		$ 38,201.60
Amount of verdict		$213,460.02"

Defendants fail to furnish or point to any computation in the record stating the present value of plaintiff's future pecuniary damages, such as the annuity charts discussed in Emery v. Southern Cal. Gas Co. (1946), 72 Cal.App.2d 821, 165 P.2d 695. Defendants argue, however, that excessiveness of the verdict is demonstrated when a reasonable rate of interest is computed upon the total award of $213,460.02, and mention that a return of four per cent on a total investment of that amount would yield something over $8,500 annually. In this argument they ignore the fact that plaintiff's past damages, as tabulated above, already total $21,560.02, a sum on which defendants do not suggest plaintiff should be allowed interest to the date of the judgment. They further do not take into consideration the facts that the computation of his wages, both past and future, is based on only the sum he was receiving after taxes and "all various items" were deducted, and that he would be obliged to pay taxes from any return upon invested moneys. Neither do defendants point to any evidence as to trends of compensation for medical and nursing care or for work of the kind which plaintiff was performing. Under such circumstances, we conclude that defendants have failed to sustain the burden of supporting their contention on appeal that the total verdict is excessive as a matter of law.

In affirming a judgment on a verdict which included some $73,000 in general damages, arising out of an accident in which the end of plaintiff's nose was cut off, it was declared (in Johnson v. Long (1947), 30 Cal.2d 54, 76, 181 P.2d 645) that "The verdict is undoubtedly high. Nevertheless, it is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice. [Citation.] The amount of the verdict must be viewed in the light of the evidence before the trial court. [Citation.] The trial court, in denying a motion for new trial, found that the verdict was not

excessive. This decision lends weight to the jury's award. [Citations.] There is considerable support in the evidence for the trial court's approval of the amount awarded." (See also Roedder v. Lindsley (1946), 28 Cal.2d 820, 822–823, 172 P.2d 353; Deevy v. Tassi (1942), supra, 21 Cal.2d 109, 120–121, 130 P.2d 389; Morgan v. Southern Pacific Co. (1892), 95 Cal. 501, 508–509, 30 P. 601; Huggans v. Southern Pacific Co. (1949), 92 Cal.App.2d 599, 615–616, 207 P.2d 864; Day v. General Petroleum Corp. (1939), supra, 32 Cal.App.2d 220, 238–240, 89 P.2d 718.) In the present case we are likewise unable to hold that the evidence fails to support the verdict and the trial court's approval of it. Under such circumstances it is not within our province to interfere on appeal.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

Rehearing denied; SPENCE, J., dissenting.

44 Cal.2d 321

L. E. CROWLEY, Individually and doing business as Crowley Sales Co., Plaintiff and Appellant,

v.

MODERN FAUCET MFG. CO., a corporation, F. K. Robertson, Dan G. Liston and Ernest Bucknell, Defendants and Respondents.

L. A. 23649.

Supreme Court of California.
In Bank.
April 19, 1955.

Action for injunctive and other relief. The Superior Court, Los Angeles County, John J. Ford, J., granted motion to dismiss, and from the ensuing judgment plaintiff appealed. The Supreme Court, Traynor, J., held that new complaint, merely alleging that parties had entered into an exclusive sales agreement and that defendants had signed and delivered to plaintiffs a written memorandum thereof, insufficiently alleged written contract, and therefore judgment entered after sustaining of demurrer to prior complaint, alleging substantially same facts, on ground that written memorandum did not meet requirements of statute of frauds, was a bar to action on the new complaint.

Affirmed.

1. Judgment ⇐572(2)

A judgment entered after a general demurrer has been sustained is a judgment on merits to extent that it adjudicates that facts alleged do not constitute cause of action and it will, accordingly, be a bar to a subsequent action alleging the same facts.

2. Judgment ⇐572(2)

Even though different facts are alleged in second action, if demurrer was sustained in first action on ground equally applicable to second, former judgment will be a bar.

3. Judgment ⇐572(2)

If new or additional facts are alleged that cure defects in original pleading, former judgment on pleadings is not bar to subsequent action, whether or not plaintiff had opportunity to amend complaint.

4. Contracts ⇐150

A written "memorandum" is not identical with a written "contract" but is merely evidence of it and usually does not contain all of the terms. West's Ann.Civ.Code, § 1624; West's Ann.Code Civ.Proc. § 1973.

See publication Words and Phrases, for other judicial constructions and definitions of "Memorandum" and "Contract".

5. Judgment ⇐572(2)

New complaint, merely alleging that parties had entered into an exclusive sales agreement and that defendants had signed and delivered to plaintiffs a written memorandum thereof, insufficiently alleged written contract; and therefore judgment entered after sustaining of demurrer to prior complaint, alleging substantially same facts, on ground that written memorandum did not meet requirements of statute of frauds, was a bar to action on the new complaint.

West's Ann.Civ.Code, § 1624; West's Ann. Code Civ.Proc. § 1973.

6. Dismissal and Nonsuit ⇐71

Plaintiff was bound to meet issue tendered by motion to dismiss, supported by affidavits, by producing writing that might take case out of statute of frauds or abide results of hearing on motion.

7. Judgment ⇐572(2)

Where only writing on which plaintiff could rely was writing that was before court in prior action in which demurrer was sustained on ground that written memorandum did not meet requirements of statute of frauds, judgment entered after sustaining of such demurrer would be a bar, even if complaint in second action, arising out of same transaction, seeking same relief, and involving same facts, did allege that contract involved was written, whereas former complaint had alleged oral agreement. West's Ann.Civ.Code, § 1624; West's Ann.Code Civ.Proc. § 1973.

8. Dismissal and Nonsuit ⇐53(2)

Where it appeared without dispute that plaintiff was in fact seeking to relitigate precise issue that had been finally adjudicated against him in prior action, trial court properly dismissed action on ground that it was a sham and frivolous.

Nicolas Ferrara, Los Angeles, for appellant.

Myron J. Glauber, Los Angeles, for respondent.

TRAYNOR, Justice.

On August 3, 1951, plaintiff brought an action seeking damages for breach of an oral contract. He alleged in his third amended complaint "That on or about the 17th day of October 1950 the plaintiff and defendants entered into an oral agreement" whereby he was given the exclusive right to buy from defendants certain patented shower heads. He also alleged that "a written memorandum of said agreement, signed by the defendants, is set forth in a letter dated October 17, 1950, a copy of which is attached hereto as Exhibit 'A' and made a part hereof as though set forth herein in full." A demurrer to this complaint on the grounds that the written memorandum did not meet the requirements of the Statute of Frauds (Civ.Code, § 1624, Code Civ.Proc. § 1973) was sustained without leave to amend pursuant to a stipulation that "if the demurrer be sustained, that it be sustained without leave to amend." Judgment was entered that plaintiff take nothing in the action and that defendant recover its costs. Plaintiff's appeal from the judgment was dismissed.

On November 12, 1953, plaintiff brought the present action seeking an injunction, an accounting, and damages. The complaint alleges that "On or about October 17, 1950, at Los Angeles County California, plaintiffs and defendants made and entered into an exclusive sales agreement, and on said date defendants made, signed and delivered to plaintiffs their written memorandum of said agreement, wherein and whereby defendants agreed that they will sell exclusively to plaintiffs, and plaintiffs agreed that they will purchase exclusively from defendants * * *." Defendants filed a motion to dismiss, and the record in the first action offered in support of the motion was received in evidence. The motion to dismiss was granted on the grounds that the alleged agreement is identical with that alleged in the first action, that the prior judgment is res judicata, and that the action is sham and frivolous. A judgment of dismissal followed, from which plaintiff appeals.

[1–3] The applicable rules are set forth in Keidatz v. Albany, 39 Cal.2d 826, 828, 249 P.2d 264, 265: (1) A judgment entered after a general demurrer has been sustained "is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts." (2) "[E]ven though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar." (3) "If, on the other hand, new or additional facts

are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint."

A comparison of the records in the two actions reveals that the facts alleged in the present action are substantially the same as those adjudicated in the first action and that the case therefore falls squarely within the first rule in the Keidatz case.

[4, 5] Plaintiff contends that the prior judgment is not res judicata on the ground that the first action was based on an oral contract, whereas the present action is for breach of a written contract. The language of his complaint does not bear out his contention, but even if it did the result would be the same.

The prior complaint alleged an oral contract. The present complaint omits that allegation but does not expressly allege a written contract. It merely alleges that the parties "entered into an exclusive sales agreement" and that defendants "signed and delivered to plaintiffs a written memorandum" thereof. The written document is referred to only as a memorandum, and only one party is alleged to have signed it. A written memorandum is not identical with a written contract (see, Restatement, Contracts, § 207); it is merely evidence of it and usually does not contain all of the terms. (See, 2 Witkin, California Procedure 1228.) The very use of the word "memorandum" implies that it is something less than a contract, and it was apparently in that sense that the word was used in section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. Plaintiff simply alleges that the parties entered into a sales agreement and is noncommittal as to whether that agreement is written or oral.

[6, 7] Even if plaintiff had inserted the word "written" before the phrase "exclusive sales agreement" he would not have escaped the bar of res judicata. The only writing on which plaintiff can rely is the writing that was before the court in the first action. The motion to dismiss and the affidavit in support thereof, tendered the issue whether there were other writings between the parties, and there were no counter affidavits. If there were other writings, plaintiff "should have produced them in opposition to the motion. He was bound to meet the issue tendered by the motion or abide the results of the hearing thereon." Cunha v. Anglo-California National Bank, 34 Cal.App.2d 383, 392, 93 P.2d 572, 577. Moreover, plaintiff admits that the written contract relied on in the present action is the same document that was attached to the prior complaint as an exhibit. The court held in the first action that it was not even a memorandum of a contract, a fortiori it cannot be a written contract. It was relied on in the first action to comply with the Statute of Frauds and was relied on in the present action for the same purpose. Both actions arose out of the same transaction, both actions were for the same breach of the same contract, and both involve the same facts. The judgment in the first action is therefore a complete bar to the present action. Keidatz v. Albany, supra, 39 Cal.2d 826, 828, 249 P. 2d 264, and cases cited therein.

[8] The trial court did not abuse its discretion in dismissing the action on the additional ground that it was sham and frivolous. Not only was it barred by the judgment in the first action, but in that action plaintiff was given leave to amend his first amended complaint for the express purpose of pleading a written contract. He deliberately declined to do so and stipulated that "if the demurrer be sustained that it be sustained without leave to amend." In the present action he sought to avoid the effect of the former adjudication by failing to disclose in his complaint that the document upon which he now relies was the same document that was before the trial court in the first action and there held insufficient to comply with the Statute of Frauds. When it appeared without dispute in this action that plaintiff was in fact seeking to relitigate the precise issue that was finally adjudicated against him in the former action, the trial court properly exercised its power to stop vexatious litigation, clearly without merit, and burdensome to the courts as well as to defendants. Cun-

ha v. Anglo-California National Bank, supra, 34 Cal.App.2d 383, 388–391, 93 P.2d 572; Neal v. Bank of America, 93 Cal.App. 2d 678, 682, 209 P.2d 825; McKenna v. Elliott & Horne Co., 118 Cal.App.2d 551, 555, 258 P.2d 528.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 272

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, Defendant and Appellant.

L. A. 22597.

Supreme Court of California. In Bank.

April 15, 1955.

Rehearing Denied May 11, 1955.

Action by telephone company against city for declaration of its franchise rights and obligations. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgment for company, and city appealed. The Supreme Court, Gibson, C. J., held, inter alia, that telephone company which acquired franchise under statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state had right to construct and maintain its lines and equipment on streets and public places located within all areas in Los Angeles annexed to or consolidated with city since 1905, even though there had been no streets or telephone service prior to annexation.

Judgment affirmed in part and reversed in part.

Opinion, 270 P.2d 903, vacated.

1. Telecommunications ⇐75

Statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state offers a franchise which is accepted in its entirety by construction, maintenance and operation of telegraph or telephone lines within state. Public Utilities Code, § 7901.

2. Telecommunications ⇐75

Privileges granted by statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state must be exercised in accordance with authority vested in Public Utilities Commission. Public Utilities Code, § 7901; West's Ann.Const. art. 12, § 23.

3. Telecommunications ⇐78

Franchise rights obtained by telephone companies under statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state do not apply to areas within 1905 boundaries of a city which, in May 1905, had a freeholders' charter giving it power to grant franchise to use its streets for telephone lines. Public Utilities Code, § 7901.

4. Telecommunications ⇐78

Telephone company would be required to obtain a municipal franchise to use streets and other public places within 1905 boundaries of city of Los Angeles, which had freeholders' charter in 1905, for telephone lines. Public Utilities Code, § 7901.

5. Telecommunications ⇐78

Telephone company whose predecessors were engaged in supplying telephone service to subscribers in areas which were without boundaries of Los Angeles in 1905 but which subsequently became part of city did not lose franchise right to construct telephone lines by reason of annexation. Public Utilities Code, § 7901.

6. Telecommunications ⇐104

Telephone company which acquired franchise to construct lines assumed obligation to provide people in area it served

with adequate communication system, including obligation to extend facilities into newly developed sections as demand for service arose. Public Utilities Code, § 7901.

7. Telecommunications ⇐104

Telephone company which acquired franchise under statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state had right to construct and maintain its lines and equipment on streets and public places located within all areas in Los Angeles annexed to or consolidated with city since 1905, even though there had been no streets or telephone service prior to annexation. Public Utilities Code, § 7901.

8. Telecommunications ⇐7½

A telephone company does not, merely by operating under a municipal franchise in areas covered by state franchise, forfeit rights acquired under statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state. Public Utilities Code, § 7901.

9. Declaratory Judgment ⇐348

In action by telephone company against city for declaration of rights under statute providing that telegraph or telephone corporations may construct lines along and on any public road and highway and across any waters or lands in state, evidence supported finding that city ordinance providing that company's predecessor, as condition to receiving franchise, should agree to vacate all other franchises, did not contemplate vacation of state franchise, and that company did not surrender or forfeit rights under state franchise by operating under city franchise. Public Utilities Code, §§ 851, 7901.

10. Telecommunications ⇐78

City of Los Angeles had no power to require telephone company to obtain a city franchise to conduct a telephone business before operating telephone system anywhere in city. Public Utilities Code, §§ 701–853, 1001, 1002, 2101; West's Ann. Const. art. 11, § 19; art. 12, § 23.

11. Telecommunications ⇐77

The business of supplying telephone service is not a municipal affair, but a matter of statewide concern, and authority to grant franchise resides in state, and city is without power to require company to obtain such franchise unless right to do so has been delegated by state.

12. Telecommunications ⇐77

Any delegation from state to city of authority to control telephone business should be clearly expressed, and any doubt resolved in favor of state.

13. Municipal Corporations ⇐618

First proviso of section of constitution dealing with supervision of public utilities, that section should not affect powers of control, vested in city, relating to making and enforcement of local, police, sanitary and other regulations, other than fixing of rates, relates solely to local regulations such as any municipality may exercise under police powers. West's Ann.Const. art. 12, § 23.

14. Municipal Corporations ⇐618

Second proviso of section of constitution dealing with supervision of public utilities that section should not affect right of city to grant franchises for public utilities upon terms and conditions and in manner prescribed by law confers no rights but merely reserves to city such power over franchises as may have been vested in it. West's Ann.Const. art. 12, § 23.

15. Telecommunications ⇐77

Constitutional provision that city may establish and operate public works for supplying inhabitants with telephone service and that persons or corporations may do same upon conditions and under such regulations as municipality may prescribe under organic law did not give city of Los Angeles power to grant or withhold right of telephone company to do business. West's Ann.Const. art. 11, § 19.

16. Telecommunications ⇐75

Statute providing that telegraph or telephone corporations may construct lines

along and on any public road and highway and across any waters or lands in state places no restriction upon what may be transmitted over these lines, and entitled telephone company to transmit messages otherwise than as articulate speech. Public Utilities Code, § 7901.

17. Telecommunications ⇐87

City of Los Angeles could not require telephone company to pay for its city franchise compensation based on revenues attributable to plant or investment located on private property inside 1905 boundaries of city or on private or public property outside these boundaries.

18. Telecommunications ⇐86

Fee which city may exact for franchise to use streets and public property for construction and maintenance of telephone lines and equipment is not a tax upon property or a license charge for privilege of operating business, but is compensation for privilege of using streets and other public property within franchise area

19. Telecommunications ⇐87

City has no power, either directly or indirectly, to exact a franchise fee from telephone company for use of property which belongs to company but which is not located upon streets or other public places within franchise area.

20. Telecommunications ⇐90

Under Los Angeles ordinance authorizing city counsel to award franchise for use of streets and public property for telephone lines to bidder offering highest percentage of gross receipts and such other compensation or consideration as may be prescribed by counsel, city could require, as condition to obtaining franchise, that telephone company furnished free service to city.

Roger Arnebergh, City Atty., Bourke Jones and John L. Flynn, Asst. City Attys., and Weldon L. Weber, Deputy City Atty., Los Angeles, for appellant.

Karl Brooks, City Atty., Petaluma, Stephen B. Robinson, Los Angeles, J. F. DuPaul, City Atty., Shelley J. Higgins, Asst. City Atty., San Diego, and T. B. Cosgrove, Special Counsel of San Diego, Los Angeles, as Amici Curiae on behalf of appellant.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall, Noble K. Gregory, San Francisco, Lawler, Felix & Hall, Oscar Lawler and Leslie C. Tupper, Los Angeles, for respondent.

GIBSON, Chief Justice.

The Pacific Telephone and Telegraph Company has been engaged in operating a telephone and telegraph system since January 2, 1907, and its lines are used in rendering a local, statewide and interstate communication service. The city of Los Angeles and surrounding areas are serviced by Pacific and connecting telephone companies. In 1951, shortly before a municipal franchise under which it had been operating was due to expire, Pacific applied to the city for a franchise to use the streets and other public places within the municipal boundaries as they existed in 1905. Territory added to the city after 1905 was not included in the scope of the application because, as to such areas, Pacific claimed it held a franchise from the state. The application was refused, and Pacific brought this action to obtain a declaration of its franchise rights and obligations. The city has appealed, contending that the judgment erroneously declares the respective rights of the parties.

[1, 2] Section 536 of the Civil Code,* as re-enacted effective May 19, 1905, offers

* This section now appears as section 7901 of the Public Utilities Code, but it will be referred to in this opinion as section 536. It reads:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

a franchise to telegraph and telephone companies to use the highways and other public places for their lines and equipment. This offer is accepted in its entirety by the construction, maintenance and operation of telegraph or telephone lines within the state. County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 382, 384, 196 P.2d 773; Postal Telegraph-Cable Co. v. Railroad Comm., 200 Cal. 463, 472–473, 254 P. 258. The privileges granted by section 536 must, of course, be exercised in accordance with the authority vested in the Public Utilities Commission by section 23 of article XII of the state Constitution and the statutes enacted pursuant thereto.

[3, 4] State franchise rights obtained by telephone companies under section 536 do not apply to areas within the 1905 boundaries of a city which, in May 1905, had a freeholders' charter giving it the power to grant a franchise to use its streets for telephone lines. Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796; City of San Diego v. Southern California Tel. Co., 92 Cal.App.2d 793, 208 P. 2d 27; City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 164 P.2d 905; see County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 382, 196 P.2d 773. The city of Los Angeles had such a charter in 1905, and it follows that Pacific may be required to obtain a municipal franchise to use streets and other public places within the 1905 boundaries of the city.

[5–7] Large areas have been annexed to the city since 1905. Pacific or its predecessors were engaged in supplying telephone service to subscribers in nearly all of those areas before they became part of the city, and the state franchise rights thus acquired were not lost by reason of the subsequent annexations. City of San Diego v. Southern California Tel. Co., 92 Cal.App.2d 793, 808, 208 P.2d 27; see County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 384, 196 P. 2d 773; Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 118, 116 P. 557. Some areas were uninhabited at the time of their annexation, and Pacific and its predecessors supplied telephone service to such sections as they became populated. The city claims that state franchise rights did not extend into areas where there had been no streets or telephone service prior to annexation. We do not agree. The grant of a state franchise to use highways and other public places in operating a telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled. See Russell v. Sebastian, 233 U.S. 195, 209–210, 34 S.Ct. 517, 58 L.Ed. 912. In acquiring a franchise under section 536, Pacific assumed the obligation to provide the people in the area it served with an adequate communications system, and this obligation necessarily included the extension of facilities into newly developed sections as the demand for service arose. A telephone system must be continually expanded to meet the demands of the public, and the right to use streets and public places in establishing such a system is commensurate with the duty which is undertaken to provide adequate service. The trial court properly concluded that the state franchise held by Pacific gave it the right to construct and maintain its lines and equipment on the streets and other public places located within all areas which have been annexed to or consolidated with the city since 1905.

The next question is whether the evidence supports the finding of the trial court that Pacific has not forfeited the rights held by it under section 536 in areas added to the city after 1905. In 1916 Southern California Telephone Company, a subsidiary of Pacific, acquired a 50-year franchise granted by the city to M. A. King in 1902. The transfer of the King franchise to Southern was approved by the city in ordinance No. 35474, enacted in 1916, which provided that Southern, its successors and assigns, should operate within the city solely under the King franchise until 1952, and that it should surrender, at the option of the city, all rights acquired by it through any other franchises theretofore granted and effective in any part of the city as the same then existed, or through

any other franchises theretofore or thereafter granted in territory outside the city which might thereafter become a part of it. Southern transferred the King franchise to Pacific in 1947, and Pacific agreed to be bound by the terms of the 1916 ordinance. In 1950 the city council passed a resolution which purported to require Pacific to surrender all rights and privileges which it held under the state franchise in areas within the city.

[8] A telephone company does not forfeit rights acquired under section 536 merely by operating under a municipal franchise in areas covered by its state franchise. See City of San Diego v. Southern California Tel. Co., 92 Cal.App.2d 793, 807–808, 208 P.2d 27; City of Oakland v. Great Western Power Co., 186 Cal. 570, 584, 200 P. 395. The question then is whether Pacific may be compelled, at the option of the city, to surrender its state franchise rights because it agreed to be bound by the terms of the 1916 ordinance.

The ordinance makes no reference to section 536 or to the forfeiture of any rights acquired from the state. Extrinsic evidence, consisting of reports and recommendations considered by the city council prior to the adoption of the ordinance, was received without objection to aid the trial court in determining the meaning and effect of the surrender provision. It appears that competing telephone companies were operating in the Los Angeles area, that there was no interchange of service between the subscribers of the different companies and that the city wished to eliminate the resultant inconvenience and expense by the consolidation of all telephone franchises and properties into a single system owned and operated by one company. In order to effect such a consolidation, Southern proposed to acquire the King franchise, several franchises granted by neighboring cities, and two county franchises which covered part of the city as well as unincorporated territory. The city engineer recommended that, as a condition to the consent of the city to the assignment of the King franchise, Southern should agree to vacate all other franchises "whether county or city" covering any portions of the city as then defined and sections without the city as they became part of it, so that all operations within the city would be confined to the King franchise.

[9] Since the object of the plan of consolidation was the establishment of a unified telephone system, the court could reasonably find that the purpose of the surrender provision was to insure the continuation of this plan during the life of the King franchise by requiring Southern and its successors to relinquish any rights they held or might acquire under other municipal franchises or under county franchises covering any new territory which should be annexed to the city and that the framers of the ordinance did not intend to provide for the surrender of rights acquired under state franchises. Moreover, no consent to the surrender of the state franchises held by Pacific and its predecessors was obtained from the Railroad Commission or its successor the Public Utilities Commission, as required by section 851 of the Public Utilities Code. The commission expressly approved the transfer of municipal and county franchises necessary to effect the consolidation plan, and it is significant that no reference was made in the commission's order to the surrender of any state franchise held by any of the companies involved. The finding and conclusion of the trial court that neither Southern nor Pacific surrendered or forfeited any rights or obligations under their state franchises is amply supported by the record.

[10] As we have seen, Pacific may be required to obtain a municipal franchise to use the streets and other public places for the construction and maintenance of telephone lines within the city boundaries as they existed in 1905. The city contends that it may also require Pacific to obtain a municipal franchise to conduct "a telephone business" before Pacific can operate a telephone system anywhere in the city. It seems clear that the city does not have the power to grant such a franchise, as distinguished from one to use the streets and other public places for the construction and maintenance of telephone lines and that Pa-

cific need not get permission from the city to engage in the telephone business.

[11, 12] The authority to grant a franchise to engage in the telephone business resides in the state, and the city is without power to require a telephone company to obtain such a franchise unless the right to do so has been delegated to it by the state. See Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 477, 147 P. 118; City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 498–499, 164 P.2d 905; People ex rel. Metropolitan St. Ry. Co. v. State Board of Tax Com'rs, 174 N.Y. 417, 67 N.E. 69, 72, 63 L.R.A. 884; McQuillin on Municipal Corporations [3d ed. 1950], vol. 12, § 34.14. The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern. See Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 475–476, 147 P. 118; City and County of San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 250–251, 135 P. 971; City of San Diego v. Southern California Tel. Co., 92 Cal.App.2d 793, 800–801, 208 P.2d 27; People ex rel. Public Utilities Comm. v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397, 401. Therefore, any delegation from the state to the city of authority to control the right of Pacific to do a telephone business should be clearly expressed, and any doubt as to whether there has been such a delegation must be resolved in favor of the state. See Bay Cities Transit Co. v. City of Los Angeles, 16 Cal.2d 772, 777, 108 P.2d 435; Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 477, 147 P. 118; City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 498–499, 164 P.2d 905. We are unable to find any constitutional or statutory provision conferring this authority on the city. On the other hand, the Legislature, pursuant to the authority contained in section 23 of article XII of the Constitution, as amended in 1914, has vested in the Public Utilities Commission the exclusive jurisdiction to supervise and regulate public utilities and to prescribe the character and quality of the service and fix the compensation therefor. Pub.Util.Code, §§ 701–853, 1001, 1002, 2101.

[13, 14] It is declared in section 23 of article XII that the right of the Legislature to confer powers upon the commission with respect to public utilities is plenary and unlimited by any provision of the Constitution, and that all powers respecting public utilities vested in cities shall cease insofar as they shall conflict with powers conferred upon the commission. It is provided, however, "that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city * * *"; and it is further provided "that this section shall not affect the right of any city * * * to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law." The first proviso quoted above relates solely to local regulations such as any municipality may exercise under its police powers. See Bay Cities Transit Co. v. City of Los Angeles, 16 Cal. 2d 772, 776, 108 P.2d 435; City of San Mateo v. Railroad Comm., 9 Cal.2d 1, 8, 68 P.2d 713; Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 451–452, 166 P. 351; People v. Willert, 37 Cal.App.Supp.2d 729, 737–740, 93 P.2d 872. The second proviso does not confer any rights; it merely reserves to a city such power over franchises as may have been vested in it.

[15] The city claims that section 19 of article XI of the Constitution as amended in 1911 in effect declares that the granting of a franchise to engage in the telephone business is a municipal affair and that, therefore, the right to grant such a franchise is reserved to the city. The section provides that a city "may establish and operate public works for supplying its inhabitants with * * * telephone service or other means of communication * * *" and that persons or corporations may do the same upon "such conditions and under such regulations as the municipality may prescribe under its organic law * * *." There is nothing in this provision which is inconsistent with the established rule that the right to exist as a telephone corporation and conduct a telephone business is a mat-

ter of statewide concern and not a municipal affair. The statement printed on the ballot in support of the amendment describes its scope, as follows: "The right of individuals or private corporations to operate these utilities will not be taken away, but such operation and the manner of using the public streets must be in accordance with such regulations as the cities may prescribe in their charters." The section did not give a city the power to grant or withhold the right of a telephone company to do business, but, on the contrary, it recognized the existence of that right and merely authorized the city to regulate the manner in which the company might use the public streets.

The city attacks the declaration in the judgment that Pacific is entitled to use its lines interchangeably "for transmitting telephone messages, telegraph messages, teletypewriter messages, telephotographs, program services (including radio and television broadcasts) and any other communication service by means of the transmission of electrical impulses." It is contended that the state franchise does not give Pacific the right to use its telephone lines for the transmission of anything other than "articulate speech."

[16] Section 536, which authorizes telephone companies to construct their lines along public highways, places no restrictions upon what may be transmitted by means of electrical impulses over those lines, and we are of the view that the rights of Pacific with respect to the uses to which its lines may be put are correctly declared in the judgment. If the state franchise granted to a telephone company were limited to the transmission of "articulate speech," the company would be required to obtain numerous local franchises in order to give its subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development. Such a result would defeat the very purpose of section 536, as it would interfere substantially with the ability of telephone companies to provide adequate communication service to the people of the state. See County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 384–388, 196 P.2d 773.

There is nothing in the cases of Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796, or City of Hanford v. Hanford Gas, etc., Co., 169 Cal. 749, 147 P. 969, which requires us to construe section 536 as placing any restriction upon what may be transmitted over telephone lines by means of electrical impulses. The Pasadena case held that the grant to telegraph companies of the right to construct and maintain lines along streets and highways did not confer similar privileges upon telephone companies. In reaching this conclusion the court took into consideration the difference between the business of a telephone company and that of a telegraph company with respect to the extent of the burden which their operations place on public streets. It was pointed out that a telephone company must construct and maintain lines along many streets in order to serve its subscribers in a city, whereas a comparatively few streets are used by a company engaged exclusively in the transmission of telegraph messages. The Hanford case involved the construction of a provision of the Constitution which granted the right to use public streets so far as necessary to supply a city with gaslight. The court held that the privilege granted was specifically limited to the particular purpose expressed and that the gas company did not have a franchise to furnish gas for heat and power. As before stated, section 536 is not so limited, and it places no restriction upon the communication purposes for which telephone lines may be used.

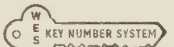
[17–19] We come finally to a consideration of the provisions of the judgment with respect to the franchise fee which may be charged by the city for the use of the streets and other public places within the 1905 boundaries of the city. The judgment correctly declares that the city may not require Pacific to pay for such franchise any compensation based on revenues attributable to plant or investment located on private property inside the 1905 boundaries of the city or on private or public property

outside the franchise area. The fee which a city may exact for a franchise to use streets and other public property for the construction and maintenance of telephone lines and equipment is not a tax upon the property of the utility or a license charge for the privilege of operating its business; it is compensation for the privilege of using the streets and other public property within the territory covered by the franchise. See City of San Diego v. Southern California Tel. Corp., 42 Cal.2d 110, 117–118, 266 P.2d 14; County of Tulare v. City of Dinuba, 188 Cal. 664, 674, 206 P. 983; San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 82, 225 P. 304. The city has no power, either directly or indirectly, to exact a franchise fee from Pacific for the use of property belonging to it which is not located upon streets or other public places within the area covered by the franchise. See County of Tulare v. City of Dinuba, 188 Cal. 664, 681, 206 P. 983; Ocean Park, etc., Corp. v. City of Santa Monica, 40 Cal.App.2d 76, 84–87, 104 P.2d 668, 879; City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 660–661, 296 P. 117.

[20] The judgment also declares that the city may not require Pacific to provide it with free telephone service as a part of the compensation for the franchise. We are of the view that this part of the judgment cannot be allowed to stand. The city council is authorized by ordinance to award the franchise to the bidder offering to pay the highest percentage of gross receipts and such other compensation or consideration as may be prescribed by the council. City Ordinance No. 58200, § 5. It has been held that when a statute provides that a franchise must be sold to the highest bidder, without stating other terms or conditions, it means the sale must be for cash. Thompson v. Board of Supervisors, 111 Cal. 553, 557–558, 44 P. 230. However, the ordinance here expressly provides that the franchise fee may be based on a percentage of gross receipts or that it may consist of or include such other compensation or consideration as the council may prescribe. We find nothing in the Constitution or the statutes which precludes the city from requiring a telephone company to furnish free service as a part of the franchise fee, provided the total charge is a reasonable one.

The portion of the judgment which declares that the city may not require free telephone service as a condition to the granting of a franchise is reversed with directions to the superior court to amend its findings of fact, conclusions of law and judgment in accordance with the views expressed in this opinion. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



44 Cal.2d 284

The CITY OF PETALUMA, Plaintiff and Appellant,

v.

The PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Defendant and Respondent.

Sac. 6353.

Supreme Court of California.

In Bank.

April 15, 1955.

Action by city to restrain telephone company from using city streets for telephone and telegraph service without obtaining municipal franchise. The Superior Court, Sonoma County, Hilliard Comstock, J., sustained demurrer, and city appealed. The Supreme Court, Gibson, C. J., held that where city was a city of the fifth-class in 1905, date of re-enactment of statute providing that telegraph and telephone corporations may construct lines along and upon public roads or highways, although it subsequently obtained a freeholders' charter, telephone company, whose predecessor had operated under municipal franchise, was not required to obtain renewal

of franchise to use streets and public places for lines and equipment.

Judgment affirmed.

1. Telecommunications ⇐75

In 1905, Legislature had power to grant franchises to telephone companies to use streets and other public places within municipalities then existing as cities of fifth class. Public Utilities Code, § 7901.

2. Telecommunications ⇐77

State's power to grant franchises may be delegated to cities, but intention to do so must be clearly expressed, and any doubt whether there has been delegation must be resolved in favor of retention of power by state.

3. Telecommunications ⇐75

The state has exclusive power to grant franchises for use of all streets, highways, and public places for construction, maintenance and operation of telephone lines and equipment except as to those areas within 1905 boundaries of cities which then had freeholders' charters giving them such franchise powers. Public Utilities Code, § 7901; St.1905, pp. 46, 47, § 764, subds. 13, 19; Government Code, § 26001.

4. Telecommunications ⇐77

Statute providing that city of fifth class has power to permit construction and maintenance of telegraph, telephone and electric light lines in public streets was superseded, to extent that it authorized granting of franchises for telegraph and telephone lines, by statute providing for state grant of such franchises. Public Utilities Code, § 7901; Government Code, § 26001.

5. Statutes ⇐207

The latest legislative expression is controlling when there are conflicting statutory provisions.

6. Telecommunications ⇐78

Where city was a city of the fifth class in 1905, date of re-enactment of statute providing that telegraph and telephone corporations may construct lines along and upon public roads or highways, although it subsequently obtained a freeholders' charter, telephone company, whose predecessor had operated under municipal franchise was not required to obtain renewal of franchise to use streets and public places for lines and equipment. Public Utilities Code, § 7901; Government Code, § 26001.

7. Constitutional Law ⇐101

Franchise rights acquired by telephone company under statute providing that telegraph or telephone corporations may construct lines along and upon any public road or highway were, where utilized by telephone company within bounds of fifth-class city, vested rights, which could not be impaired by subsequent delegation of power to city under freeholders' charter. Public Utilities Code, § 7901.

Karl Brooks, City Atty., Petaluma, and Stephen B. Robinson, for appellant.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall and Noble K. Gregory, San Francisco, for respondent.

GIBSON, Chief Justice.

The city of Petaluma brought this action to restrain Pacific Telephone and Telegraph Company from using city streets for telephone and telegraph service until it obtains a municipal franchise to conduct a communications business and to use the streets and other public places for its lines and equipment. A general demurrer was sustained to the complaint, and the city has appealed from the ensuing judgment.

Petaluma operated as a city of the fifth class from 1884 until 1911, when it obtained a freeholders' charter. The Sunset Telephone and Telegraph Company commenced the operation of a telephone system within the city in 1891 under a 25-year municipal franchise, which was later extended to 1926. Sunset assigned its properties and franchises to Pacific in 1917, and Pacific operated under the Sunset franchise until it expired. A new franchise was granted to Pacific in 1926 for a 25-

year term, and upon its expiration in 1951 Pacific refused to apply to the city for a further franchise.

The principal question to be decided is whether Pacific is entitled to use the streets and other public places within the city for its telephone lines and equipment under a state franchise which it claims to have acquired pursuant to the provisions of section 536 of the Civil Code, as reenacted in 1905.* Stats.1905, p. 492.

[1] The city concedes, as indeed it must, that in 1905 the Legislature had the *power* to grant franchises to telephone companies to use streets and other public places within municipalities then existing as cities of the fifth class. It is contended, however, that the Legislature did not intend to exercise this power by the reenactment of section 536. In support of this contention the city asserts that in 1905 it had the right to grant a telephone franchise under section 764 of the Municipal Corporations Act of 1883, and that it does not clearly appear that there was an intention to deprive the city of its franchise rights by the subsequent reenactment of section 536. In 1905, section 764 of the Municipal Corporations Act provided that the board of trustees of a city of the fifth class shall have the power to "permit the construction and maintenance of telegraph, telephone, and electric light lines" in the public streets, and to "do and perform any and all other acts and things necessary and proper to carry out the provisions of this chapter, and to exact and enforce within the limits of such city all other local, police, sanitary, and other regulations as do not conflict with general laws." Stats. 1905, pp. 45, 46, 47, Mun.Corp.Act, § 764, subds. 13, 19. [The effective date of the 1905 amendment of section 764 was approximately 17 days before the effective date of section 536 as reenacted.]

[2, 3] Although the power of the state to grant franchises may be delegated to cities, the intention to do so must be clearly expressed, and any doubt as to whether there has been such a delegation must be resolved in favor of retention of the power by the state. See Pacific Tel. & Tel. Co. v. City of Los Angeles, Cal., 282 P.2d 36. There would appear to be considerable doubt whether section 764 authorizes a city to grant a franchise for the use of streets and public places by a telephone company or merely recognizes the power of a city to regulate the location and manner of installation of telephone lines and equipment. We need not decide this question, however, since we are satisfied that, after the reenactment of section 536 in 1905, the state has had the exclusive power to grant franchises for the use of all streets, highways and public places for the construction, maintenance and operation of telephone lines and equipment except as to those areas within the 1905 boundaries of a city which then had a freeholders' charter giving it such franchise powers.

Before the reenactment of section 536, county boards of supervisors had been given the power to "grant franchises along and over the public roads and highways for all lawful purposes". County Government Act, Stats.1897, pp. 452, 466, Pol.Code, § 4041, subd. 35, now contained in Government Code, § 26001. Pursuant to this authorization county franchises were granted to telephone companies to use highways outside of incorporated areas for the construction and maintenance of lines and equipment. See County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 196 P.2d 773; County of Inyo v. Hess, 53 Cal.App. 415, 419, 200 P. 373. In the County of Inyo case, the court in considering the effect of the reenactment of section 536 upon the right of a county to grant a franchise for the use of highways

* This section now appears as section 7901 of the Public Utilities Code, but it will be referred to in this opinion as section 536. It reads: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

for construction and maintenance of telephone lines, concluded that the state franchise tendered by section 536 to telephone corporations was superior to and free from any grant made by a subordinate legislative body. The opinion states that "for reasons satisfactory to the Legislature, it, instead of delegating to local legislative bodies the power to act in such matters, has itself, by section 536, tendered to all [telephone and telegraph] corporations a franchise to use the highways for their lines, an acceptance of which is signified by their act in constructing the same over the highways so offered." 53 Cal.App. at page 422, 200 P. at page 376. The decision necessarily was based on the theory that section 536 took precedence over the broad provision of the County Government Act of 1897 authorizing counties to grant franchises along and over public highways.

[4, 5] The reasoning underlying the decision in the County of Inyo case is equally cogent in determining the effect of section 536 upon section 764 of the Municipal Corporations Act and leads to the conclusion that section 764 was superseded to the extent that it authorized the granting of franchises for telegraph and telephone lines. In accord with the rule that the latest legislative expression will be held controlling when there are conflicting statutory provisions, it has been held that various provisions of the Municipal Corporations Act were superseded to the extent that they were inconsistent with later enactments. Millsap **v.** Balfour, 154 Cal. 303, 304, 97 P. 668; City of Sonora v. Curtin, 137 Cal. 583, 588, 70 P. 674; see Ex parte Jackson, 143 Cal. 564, 566, 572–573, 77 P. 457. It is apparent that, insofar as section 536 tendered a franchise to use city streets, it was inconsistent with section 764. The words "along and upon any public road or highway" in section 536 as originally enacted were intended to mean all public highways in the state, including city streets, Western Union Telegraph Co. **v.** Hopkins, 160 Cal. 106, 118–119, 116 P. 557, and there is no indication of any different intent when the same words were used in reenacting the section in 1905, the only purpose of the change being to add telephone corporations, see County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 382, 196 P.2d 773; City of Salinas **v.** Pacific Tel. & Tel. Co., 72 Cal.App.2d 494, 497, 164 P.2d 905. Accordingly, section 536, being the later enactment, must be held to have superseded section 764 to the extent that the sections were inconsistent.

[6, 7] It follows that Sunset, Pacific's predecessor, by constructing, maintaining and operating telephone lines, acquired a state franchise to use the streets and other public places in the city for telephone lines and equipment. The state franchise rights thus acquired were vested rights which could not be impaired by a subsequent delegation of power to the city under a freeholders' charter. Cf. Pacific Tel. & Tel. Co. **v.** City of Los Angeles, Cal., 282 P.2d 36; Postal Telegraph Cable Co. **v.** Los Angeles County, 160 Cal. 129, 131, 116 P. 566; Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 120, 116 P. 557; City of San Diego **v.** Southern California Tel. Co., 92 Cal.App.2d 793, 808, 208 P.2d 27; see County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 384, 196 P.2d 773. Pacific, as assignee of Sunset's franchises, may not, therefore, be required to obtain a municipal franchise to use the streets and other public places for its lines and equipment.

The other questions presented on this appeal are disposed of by our decison in Pacific Tel. & Tel. Co. **v.** City of Los Angeles, Cal., 282 P.2d 36.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 241

Application of Warren E. BARTGES for Writ of Habeas Corpus.

Cr. 5643.

Supreme Court of California, In Bank.

April 6, 1955.

Habeas corpus proceeding. The Supreme Court, Schauer, J., held that where District Court of Appeal, on appeal, had modified judgment of trial court convicting accused of one count of grand theft and one count of forgery, to recite only one previous conviction, instead of three, District Court of Appeal should have remanded cause for determination by trial court as to whether upon changed record probation should be granted or denied, and whether sentences, if reimposed, should run concurrently or consecutively, and should not have affirmed judgments as modified by it.

Petition granted.

Traynor, Edmonds, and Spence, JJ., dissented.

1. Evidence ⇐35

The Supreme Court takes judicial notice of the statutory definition of a crime in a sister state. West's Ann.Code Civ. Proc. § 1875, subd. 3.

2. Habeas Corpus ⇐79

In habeas corpus proceeding, where sheriff's return showed petitioner was held under a modified abstract of judgment showing only one prior conviction, petitioner's contention that judgments determining that two prior convictions recited therein are true, were incorrect and beyond power of Superior Court to make and District Court of Appeal to affirm was moot.

3. Criminal Law ⇐1188

Where District Court of Appeal, on appeal from judgment of conviction of one count of grand theft and one count of forgery, which recited three previous convictions, modified judgment to recite only one previous conviction, right of petitioner to have trial court determine upon corrected record whether probation should be granted or denied and whether sentence should run cumulatively or concurrently was a substantial one and District Court of Appeal should have remanded cause to trial court to make such determination rather than affirming judgment as modified. Pen.Code, §§ 669, 1203, 1213, 1213.5, 3021, 3024, 3024.5, 3043.

4. Habeas Corpus ⇐25(1)

That trial court refused to compel a witness called by accused to testify, after witness refused to testify on ground that evidence might tend to incriminate him, would not entitle accused to relief on habeas corpus. U.S.C.A.Const. Amend. 5; West's Ann.Const. art. 1, § 13; West's Ann.Code Civ.Proc. § 2065.

5. Habeas Corpus ⇐109

In granting writ of habeas corpus to petitioner whose judgment of conviction of one count of grand theft and one count of forgery had been modified by the District Court of Appeal to recite only one previous conviction instead of three, and as modified, affirmed, Supreme Court did not discharge petitioner from custody of sheriff, but ordered his production before trial court so trial court could consider petitioner's application for probation, if made, and court could direct whether sentences, if pronounced, shall run cumulatively or concurrently. Pen.Code §§ 1484, 1493, 1505.

Lowell Lyons, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., Los Angeles, for respondent.

SCHAUER, Justice.

In this habeas corpus proceeding the ultimate question is whether the District Court of Appeal, after modifying consecutive sentence judgments in two consolidated criminal cases by striking out findings of two prior convictions, has power to itself implicitly determine upon the changed record whether probation shall be granted or denied and whether the sentences shall

run cumulatively or concurrently, or must remand the cause to the trial court for such determinations and appropriate proceedings. We conclude that petitioner is entitled to the writ, not to be discharged from custody of the sheriff but to be produced in the superior court for proceedings appropriate to the state of the record as hereinafter explained.

Petitioner was convicted of one count of grand theft and one count of forgery and it was found that he had suffered three prior convictions of felony. Probation was denied; the judgments which were thereupon entered recited the three prior convictions and ordered that the sentences run consecutively. Defendant appealed and the District Court of Appeal affirmed the judgments in People v. Bartges (1954), 126 Cal.App.2d 763, 776, 273 P.2d 49, holding in substance, inter alia, that "Since appellant was shown to have been convicted of at least three prior felonies" it could not be said that the trial court abused its discretion in denying probation and in ordering that the sentences run consecutively. There was no petition for rehearing or for a hearing in this court, and the judgment of the District Court of Appeal became final.

After petitioner had filed the petition for habeas corpus which is now before this court, the District Court of Appeal recalled its remittitur and modified the trial court's judgments to recite only one prior conviction. However, it did not remand the cause for determination by the trial court as to whether upon the changed record probation should be granted or denied, and whether, if reimposed, the sentences should run concurrently or consecutively, and for resentencing, if and as appropriate. Instead, the District Court of Appeal affirmed the judgments as modified by it. (People v. Bartges (1954), 128 Cal.App.2d 496, 275 P.2d 518.)

Petitioner (subject to bail as fixed by the superior court) is in the custody of the sheriff of Los Angeles County and stay of execution has been granted by the superior court "to the time when the application to the State Supreme Court has been determined and to the time within which an appeal to the United States Supreme Court may be perfected."

Petitioner complains that the trial court's determination that his sentences should run consecutively rather than concurrently was based on its mistaken belief as to the number of prior convictions which he has suffered. The record supports this contention to the extent and for the reasons hereinafter stated. Petitioner further contends that the trial court violated due process by upholding the refusal of a witness, called by petitioner, to testify on the ground that he might incriminate himself (U.S.Const. Amendment V; Cal.Const. art. I, § 13; Code Civ.Proc. § 2065). This contention was correctly disposed of on petitioner's appeal from the judgments of conviction (People v. Bartges (1954), supra, 126 Cal.App.2d 763, 273 P.2d 49).

The judgments of conviction recited that "the Court * * * found allegations of prior convictions * * * true, to-wit: Arson, a felony [in Oregon in 1932] * * *; Larceny and Larceny by Bailee, felonies [in Oregon in 1941], * * * Grand Theft, a felony [in Arizona in 1949]," with service of terms in the respective state prisons. Before the District Court of Appeal petitioner contended, among other things, that two of the prior convictions were not proved. As petitioner points out, although exemplified copies of the Oregon conviction of larceny and larceny by bailee and of the Arizona conviction of grand theft were produced by the prosecuting attorney and numbered for identification, such copies were not offered or received in evidence; instead, the prosecuting attorney moved "to dismiss the second and third prior convictions as alleged in the information" and the trial court granted the motion. The District Court of Appeal, perhaps misled by the fact that the index to the reporter's transcript mistakenly shows that such exemplified copies were in evidence, and not having had its attention directed to the fact of dismissal, and presuming the judgments to be correct, rejected the contention of petitioner that the prior convictions had

not been established (at pages 774–776 of 126 Cal.App.2d, at pages 55–56 of 273 P. 2d).

[1] The reason for the prosecuting attorney's not offering evidence of the two prior convictions, and for moving to dismiss the charges, was stated by him at the trial. He seems to have been of the opinion that the prior convictions should not be charged and proved because they were adjudications that the defendant had committed acts which, had they been committed in California, would not have amounted to grand theft as defined by the law of this state (theft of money or property of a value exceeding $200 [Pen.Code, § 487]). This appears from the statement of the prosecuting attorney that "I understand now that the dividing line between petty theft and grand theft in Arizona is $50 and in Oregon the dividing line is $35, so although those would stand as felony convictions in the other States, they would not be felony convictions in California." Although this court, as required by statute since 1927 (Stats. 1927, p. 110; Code Civ.Proc., § 1875(3)), takes judicial notice of the statutory definition of a crime in a sister state (see In re McVickers (1946), 29 Cal.2d 264, 278, 176 P.2d 40), the District Court of Appeal did not judicially notice the Oregon and Arizona statutory delineations between grand and petty theft referred to in the quoted statement of the prosecuting attorney; it mistakenly said (at page 775 of 126 Cal.App.2d, at page 56 of 273 P.2d), "There being no evidence to the contrary, it will be assumed that the law with respect to the crimes charged as prior convictions in the sister states is the same as it is in California."

After the decision of the District Court of Appeal became final petitioner filed the petition for habeas corpus which is now before us. He contends, in effect, that the superior court exceeded its jurisdiction in finding him guilty of two prior convictions the charges of which had been dismissed and which were not supported by proof, and that the District Court of Appeal likewise exceeded its jurisdiction in affirming those judgments. He points to the District Court's holdings that "Since appellant was shown to have been convicted of at least three prior felonies it cannot be said that in imposing consecutive sentences herein the court was improperly influenced to the prejudice of appellant by the prior conviction of larceny by bailee in the State of Oregon," and that "we cannot say that the denial of probation under such circumstances, amounted to an abuse of discretion" (at page 776 of 126 Cal.App.2d at page 56 of 273 P.2d). This court issued an order to show cause, and the sheriff filed his return.

Thereafter the attorney general advised the District Court of Appeal of an entry in the clerk's transcript on appeal which apparently had not been previously directed to the attention of that court by either party to the appeal. Such entry shows that during the trial "Motion of the District Attorney to dismiss the second and third prior convictions as alleged in the information is granted." The District Court of Appeal (People v. Bartges (1954), supra, 128 Cal.App.2d 496, 275 P.2d 518) determined that "A mistake of fact on the part of an appellate tribunal which results in prejudicial error or a miscarriage of justice affords a proper ground for recall and correction of the remittitur [citations] * * *. Since the motion to dismiss the last two prior convictions was granted by the trial court and was not brought to the attention of this court prior to rendition of its decision affirming the judgments containing a finding that all three priors charged were true, we are persuaded that such decision being inadvertently rendered under a mistake of fact entitles us to take such steps as are necessary to bring into agreement the facts and the law."

The District Court of Appeal recalled its remittitur. It noted the fact that petitioner urged "that the improper finding of three prior convictions resulted in improper imposition of consecutive sentences" and modified its original order of full affirmance to provide that "The judgments are modified by striking therefrom the finding of the truth of the second and third prior conviction [sic]," but, as hereinabove indicated, instead of thereupon reversing the

judgments and remanding the cause to the trial court for determination of the questions as to whether, with the findings as to the two prior convictions stricken out, probation should be granted or denied and whether the sentences, if to be reimposed, should run cumulatively or concurrently it impliedly and implicitly undertook to itself make those determinations by ordering that "as so modified the judgment and order are affirmed." (People v. Bartges (1954), supra, 128 Cal.App.2d 496, 275 P.2d 518, 519.)

[2] The sheriff then filed a supplemental return which shows that petitioner is held under a modified abstract of judgments which show only one prior conviction (of arson). Therefore, petitioner's contention that the judgments were incorrect and beyond the power of the superior court to make (and the District Court of Appeal to affirm) in determining that the two prior convictions last recited therein (the charges of which had been dismissed) are true, has become moot in that he has secured the relief in that respect to which he was entitled.

[3] Petitioner still complains, however, that the trial court must be understood to have been influenced to some extent in ordering that the sentences run consecutively by its mistaken belief that he had suffered three prior convictions of crimes which, if committed in California, would have amounted to felonies, and that the issue on this matter is not moot. The record and the law support petitioner in this contention. As this court has previously held, it cannot be said that the trial court's unwarranted determination as to the number of prior convictions of felony did not influence it in sentencing petitioner to consecutive rather than concurrent terms. (People v. Morton (1953), 41 Cal.2d 536, 545, 261 P.2d 523.) Furthermore, as hereinabove shown, the District Court of Appeal in disposing of certain of petitioner's contentions adversely to him specifically relied upon the mistaken assumption that petitioner "was shown to have been convicted of at least three prior felonies" (at page 776 of 126 Cal.App.2d at page 56 of 273 P.2d). The right of petitioner to have the trial court determine upon the corrected record whether probation shall be granted or denied and whether the sentences, if reimposed, shall run cumulatively or concurrently is a substantial one. Inasmuch as the statutes (Pen.Code, §§ 1203; 669; see also id., §§ 1213; 1213.5; 3021; 3024; 3024.5; 3043) vest the power to make such determinations in the trial court and as the District Court of Appeal was acting only as a reviewing court, we conclude that the latter court exceeded its power and that the writ should issue for the purposes hereinafter specified.

[4] As indicated above, the petition for habeas corpus raises the further contention that petitioner was denied a fair trial in that the trial court refused to compel one Forrest Jameson to testify when called as a witness for petitioner. Jameson was jointly charged with petitioner with grand theft. His trial had been severed. He refused to testify on the ground that any evidence which he gave might tend to incriminate him. Petitioner presents no argument in this connection which would entitle him to relief on habeas corpus or which was not disposed of by the District Court of Appeal in People v. Bartges (1954), supra, 126 Cal.App.2d 763, 771–774, 273 P.2d 49.

[5] A question remains as to the form and substance of the order to be made in this case. In construing the meaning of the word "discharging" as used in section 1506 of the Penal Code[1] this court has recently noted that "The function of the writ of habeas corpus is solely to effect 'discharge' from unlawful restraint, though the illegality in respect to which the discharge from restraint is sought may not go to the fact of continued detention but may be simply as to the circumstances under which the prisoner is held" and that he "may be discharged from illegal conditions

1. Section 1506 provides that: "An appeal from a final order of a superior court may be taken * * * by the people made upon the return of a writ of habeas corpus discharging a defendant after his conviction in all criminal cases * * *".

of restraint although not from all restraint." (In re Chessman (1955), 44 Cal. 2d 1, 279 P.2d 24, 27; see also Pen.Code, § 1484 ["The court * * * must * * * dispose of such party [petitioner] as the justice of the case may require"]; id., § 1493 ["In cases where any party is held under illegal restraint or custody * * * the * * * court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto"]; In re McCoy (1945), 32 Cal.2d 73, 77, 194 P.2d 531; In re James (1952), 38 Cal.2d 302, 313–314, 240 P.2d 596.) Upon initial consideration of the petition for the writ of habeas corpus we issued not the writ but an order to show cause why the relief prayed for should not be granted. The sheriff made his return to such order and the parties have stipulated that the petition for the writ shall be treated as a traverse to the return of the respondent sheriff. We also treat the return of the sheriff to the order to show cause as a return to the writ which is to be granted. We have concluded that the writ should be granted, not to discharge the petitioner from custody of the sheriff but to discharge him from only the illegal circumstances of his restraint which have been depicted above and to order his production before the superior court so that he may be dealt with according to law as a person properly convicted of, but not yet properly sentenced for, the substantive crimes charged in the informations in Los Angeles superior court criminal cases number 155767 and number 155768 and of the first, and only the first, prior conviction alleged in each of the above numbered informations.

For the reasons hereinabove stated, the petition for the writ of habeas corpus is granted and the petitioner is remanded to the custody of the sheriff of the County of Los Angeles to be brought before the superior court in that county to be dealt with according to law as a person validly and finally convicted of, but not since the modifications of the record as to prior convictions sentenced for, the substantive crimes charged in the informations in Los Angeles superior court criminal cases number 155767 and number 155768, and found to have been previously convicted of, and to have served a term in a state prison for, one, and only one, prior conviction of felony, to wit, arson, a felony (in Oregon), as alleged in the information in each of the above numbered cases.

Upon production of the petitioner in the superior court as above ordered that court shall proceed to arraign him for judgment upon the record as amended by the order of the District Court of Appeal in People v. Bartges (1954), 128 Cal.App.2d 496, 275 P.2d 518. Upon such arraignment the superior court will have power to consider, and in its discretion to grant or deny, an application for probation, if petitioner so requests, and will have power, and the duty if it determines that judgments shall again be pronounced, to direct whether the sentences shall run cumulatively or concurrently.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting opinion).

I dissent.

Petitioner was convicted of one count of forgery and one count of grand theft, and it was found in the judgment of conviction that he had suffered three prior felony convictions, although two of the three priors charged against him had been dismissed on motion of the district attorney before the case was submitted to the jury. Probation was denied, and it was ordered that the sentences on the primary counts should run consecutively. Petitioner appealed. The judgment was affirmed and became final. People v. Bartges, 126 Cal. App.2d 763, 273 P.2d 49. No petition for hearing was filed in this court. Petitioner then applied to this court for a writ of habeas corpus, and we issued an order to show cause why the writ should not issue. Thereafter, the District Court of Appeal was apprised of the fact that two of the three priors charged had been dismissed and on grounds of mistake it recalled the remittitur and modified the judgment of conviction by striking therefrom the find-

ing that petitioner had suffered two of the three prior felony convictions. The judgment, as modified, was affirmed. People v. Bartges, 128 Cal.App.2d 496, 275 P.2d 518. Thus, the judgment no longer finds petitioner guilty of a charge not contained in the information.

The controlling question in this habeas corpus proceeding is whether the District Court of Appeal acted in excess of its jurisdiction in affirming the judgment as modified rather than reversing it insofar as it imposed consecutive terms of imprisonment. Although the trial court, in denying petitioner's application for probation and in sentencing him to consecutive terms on the primary offenses, might have been influenced by the mistaken belief that he had suffered three prior felony convictions and although the District Court of Appeal could have reversed the judgment with directions to resentence petitioner and to reconsider his application for probation in the light of the corrected judgment, see, People v. Morton, 41 Cal.2d 536, 545, 261 P.2d 523, I do not believe that if the District Court of Appeal erred in affirming the judgment as modified, its error was jurisdictional.

It is not suggested that the claimed error in the present case raises any constitutional or other question of extraordinary importance that would justify departure from the usual limitation that the writ of habeas corpus can be used only as a test of jurisdiction. See, In re Bell, 19 Cal.2d 488, 492–495, 122 P.2d 22; In re Trombley, 31 Cal.2d 801, 812, 193 P.2d 734. Thus, if a sentence is within the power of the trial court and the judgment is regular on its face, the fact that under the circumstances the sentence may be unduly severe cannot be inquired into by a writ of habeas corpus. In re Marley, 29 Cal.2d 525, 531, 175 P.2d 832; Ex parte Miller, 89 Cal. 41, 42, 26 P. 620; In re Nicholson, 24 Cal.App.2d 15, 16–17, 74 P.2d 288; In re Azevedo, 42 Cal.App. 662, 663, 183 P. 952; see also, In re Pedrini, 33 Cal.2d 876, 878, 206 P.2d 699.

It is within the discretion of the trial court to direct that a defendant, who has been found guilty of the offense charged against him, be denied probation, Pen.Code, § 1203, and that he serve consecutive sentences, Pen.Code § 669. The denial of probation and the imposition of consecutive sentences on petitioner were therefore within the power of the trial court even though it might have erred in exercising its discretion. On appeal, the District Court of Appeal had power to "reverse, affirm, or modify" the judgment. Pen. Code § 1260; People v. Craig, 17 Cal.2d 453, 458, 110 P.2d 403. It did modify and affirm and, even if it erred in affirming rather than reversing with directions to resentence, it did not "exceed its power" in doing so.

At most, the District Court of Appeal erred in applying the provisions of Article VI, section 4½, of the California Constitution by failing to reverse the judgment with directions to resentence petitioner and to reconsider his application for probation in the light of the corrected judgment. If the propriety of an appellate court's application of Article VI, section 4½, can be questioned by a petition for a writ of habeas corpus, then a great number of this court's rulings on questions of prejudicial error will be subject to further review and the finality of criminal judgments will be seriously impaired.

Moreover, at the time the District Court of Appeal recalled the remittitur,[1] the Attorney General, in his "Suggestion of Grounds For Recall of Remittitur," raised the question of the propriety of modifying the judgment without reversing for reconsideration of petitioner's application for probation and resentencing on the basis of the judgment as modified. Counsel for petitioner was served with a copy of this document, but made no reply, and failed to petition for a rehearing in the District Court of Appeal or to file a petition for hearing in this court after the District Court of Appeal had filed its opinion modi-

1. For the purposes of our decision in the present habeas corpus proceeding, the fact that the District Court of Appeal recalled the remittitur and modified the judgment has no more effect than if the judgment as thus modified had been entered originally. See, In re Rothrock, 14 Cal.2d 34, 39, 92 P.2d 634.

fying and affirming the judgment of conviction. Petitioner has not offered any excuse for his failure to exhaust his remedies by way of appeal. "The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but where not, raised upon a timely appeal from a judgment of conviction. [Citations.]" In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513, 514.

I would deny the writ.

EDMONDS and SPENCE, JJ., concur.

44 Cal.2d 252

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Michael Timothy CAVANAUGH, Defendant and Appellant.

Cr. 5624.

Supreme Court of California.

In Bank.

April 12, 1955.

As Modified on Denial of Rehearing May 11, 1955.

Defendant was convicted of murder in first degree. The Superior Court, San Diego County, C. M. Monroe, J., rendered judgment, and defendant appealed. The Supreme Court, Schauer, J., held, inter alia, that evidence whether defendant had murdered victim in perpetration of robbery was sufficient to sustain conviction.

Judgment affirmed.

Carter and Traynor, JJ., dissented.

1. Criminal Law ⇐564(2)

Territorial jurisdiction in criminal prosecution could be established by preponderance of evidence. Pen.Code, §§ 27, 790.

2. Criminal Law ⇐564(3)

Territorial jurisdiction in a criminal case, like any other fact, can be shown by circumstantial evidence.

3. Criminal Law ⇐564(1)

In prosecution for murder, evidence was sufficient to sustain finding that crime had been committed in venue county. Pen. Code, §§ 27, 790.

4. Criminal Law ⇐720(6)

In murder prosecution wherein defendant challenged venue, prosecutor's statement that he did not know where location of crime had been was not an admission of failure of proof where statement had properly been made that place of killing could be inferred. Pen.Code, §§ 27, 790.

5. Criminal Law ⇐369(2)

A defendant cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but evidence which is relevant in establishing guilt of the crime charged is admissible, though it tends to connect defendant with an offense not included in the charge.

6. Escape ⇐1

Escape from a state mental hospital is not a crime.

7. Criminal Law ⇐369(3), 1186(4)

In murder prosecution, evidence of defendant's escape from mental hospital and of his nonviolent crimes was not sufficiently relevant to violent robberies and killing to warrant its admission, but, considering comparatively minor nature of offenses, admission of such evidence was not prejudicial and did not result in miscarriage of justice. Const. art. 6, § 4½.

8. Criminal Law ⇐371(4)

In murder prosecution, wherein defendant was alleged to have killed victim in course of robbery, evidence tending to show that defendant had subsequently committed a battery and robbery upon another person was relevant as tending to show defendant's purpose in each case.

9. Criminal Law ⇐372(1)

Evidence of similar crimes is relevant not only if it tends to show premeditated,

calculated design, but also where it tends to show that defendant was guilty of crime charged by showing a peculiar or characteristic behavior pattern manifest in both cases.

10. Homicide ⇐253(6)

Evidence whether defendant had murdered victim in perpetration of robbery was sufficient to sustain conviction for murder in first degree. Pen.Code, § 189.

11. Criminal Law ⇐406(1)
Witnesses ⇐380(2)

Defendant's own extra-judicial statements, as admissions, were not vulnerable to hearsay objection and were also admissible to impeach defendant as a witness.

12. Criminal Law ⇐404(1)

Except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify circumstances of crime is admissible despite its prejudicial tendency.

13. Criminal Law ⇐338(7)

Relevant evidence is not necessarily inadmissible because of its tendency to prejudice jury.

14. Criminal Law ⇐404(1), 438, 1186(4)
Homicide ⇐174(2)

In murder prosecution, introduction of victim's fingers, testimony of decomposed condition of body, photographs of body, testimony of smell of putrefying blood about victim's automobile and articles found therein, and of the articles themselves, although improper and erroneous, did not, in view of evidence lawfully adduced, produce miscarriage of justice. Const. art. 6, § 4½.

15. Criminal Law ⇐1186(4)

In murder prosecution, prosecutor's argument that defendant's nonviolent crimes against property tended to show that defendant was the sort of person who would viciously beat a person in order to rob him did not, although it was improper reasoning, result in miscarriage of justice. Const. art. 6, § 4½.

Richard E. Adams, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Jay L. Shavelson, Dep. Attys. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged by information with the murder of Ralph R. Welch, on or about July 23, 1953, and with two prior convictions of felony (issuing a check with intent to defraud and issuing a check with no account). He pleaded not guilty and not guilty by reason of insanity. A jury found defendant guilty of murder of the first degree and made no recommendation as to penalty;[1] the jury further found that defendant was sane at the time of the commission of the offense charged. No disposition was made of the allegations of prior convictions of felony and none appears to be necessary. This is an appeal from the judgment imposing the death penalty and from an order denying defendant's motion for new trial or for modification of the judgment by reduction of the offense to second degree murder.

Defendant contends: There is no evidence that Welch was killed in San Diego County, California, as charged. There is no evidence of the circumstances surrounding the killing to show that it was murder of the first degree. Evidence of other offenses was improperly admitted over objection. Hearsay evidence prejudicial to defendant was introduced over objection. Prejudicial error was committed by the introduction in evidence of revolting and inflammatory exhibits unnecessary to the People's case. The prosecuting attorney was guilty of prejudicial misconduct in his opening statement and argument. We have concluded that the record discloses no error which, in the circumstances of this case, is ground for reversal.

In April, 1953, defendant was committed to Patton State Hospital, an institution for the mentally ill, at his own insistence. Defendant gave a history of asserted "black-

1. The jury had been instructed that such a finding and omission of recommendation as to penalty would result in imposition of the death sentence.

outs" during which, without knowing what he was doing, he would leave his home and write and pass bad checks. The psychiatrist who examined defendant in connection with the commitment to Patton found no evidence of any psychosis or physical condition which would cause amnesia and did not believe that defendant "blacked out," but made the diagnosis "psychotic" because of defendant's desire for treatment at a state institution. On July 12 defendant left the hospital without a discharge and went to Chula Vista, San Diego County, where he had lived. Between July 12 and July 23 he cashed a number of bad checks.

Welch had been honorably discharged from the Marine Corps on May 28, 1953, in Tucson, Arizona. He and his wife were living in Chula Vista on July 23, 1953, the alleged date of the homicide.

On the afternoon of July 23 defendant was drinking beer at Thompson's Cafe in Chula Vista, about six miles from the Mexican border, at about 5:30 p. m. he called a cab and went to various stores where he made purchases, including a watch, and cashed or attempted to cash bad checks; he falsely represented that he was a doctor and a commander in the United States Navy. Defendant returned to the cafe at about 6:30 p. m. Meanwhile Welch had entered the cafe. He and defendant then met for the first time. They talked and drank beer together. The waitress heard Welch tell defendant that his head was bothering him and defendant say that he was a doctor in the Navy and "I will fix your head." At about 10 p. m. Welch said that he would like to go home; he had indicated where he lived; defendant said that he would go with him because he too lived "out that way." They left the cafe together. Welch was not seen alive again by any witness (other than defendant) who testified.

The only direct evidence as to what occurred to and between defendant and Welch during the next hour and a half consists of conflicting extra-judicial admissions and testimony of defendant, and a "confession" of defendant that he killed Welch in Tijuana, Mexico. The People take the position that defendant killed Welch but not in Tijuana; defendant takes the position that Welch was killed in Tijuana but not by him. According to defendant's testimony, he and Welch went to Tijuana in Welch's 1951 Ford convertible; in Tijuana Welch said that he wished some food; defendant went into a cantina, leaving Welch in the back seat of the car; when defendant returned after about 20 minutes Welch was naked and had been killed by blows on the head and stab wounds in the chest; defendant, apprehensive of the Mexican authorities, put the body in the trunk of the car and returned to Chula Vista.

According to defendant's "confession," as distinguished from his testimony above related, he and Welch picked up two girls in Tijuana; when defendant returned to the car after purchasing the food Welch was sexually mistreating the girl whom defendant was with; defendant became enraged and beat Welch and stabbed him with a souvenir knife which defendant had purchased; the girls vanished; defendant put the body in the trunk, threw away the knife and Welch's clothes, and returned to Chula Vista.

Defendant was next seen (by witnesses who testified at the trial) at about 11:30 or 11:45 p. m. of the same day. He came into the Club 13, near Chula Vista, had a beer, repaid a waitress $20 which defendant's wife had borrowed, and gave the waitress $25 which he asked her to give his wife. He then decided to see his wife, drove Welch's car to her home, and they returned to the Club 13 and drank beer. They left the Club 13 a little before 1:00 a. m. Defendant drove his wife home. He told her nothing of Welch; he said that he would return to Patton State Hospital and left.

To show defendant's whereabouts after he left his wife and before he was apprehended the prosecution introduced evidence which disclosed that during this period defendant had committed various crimes.

Defendant was in Kingman, Arizona, on July 25, 1953. Representing himself to be

Ralph Welch, he pawned the watch he had bought on the 23rd and received $10.

On Sunday, July 26, in Santa Fe, New Mexico, defendant induced a priest to lend him $20 by representations that defendant was a student on his way to the University of Denver and had run out of funds.

At about 6:00 p. m. on July 27, 1953, defendant sent two collect wires from the Western Union office in Colorado Springs, Colorado. One was to Welch's parents in Tucson, Arizona, and one to his wife in Chula Vista. Each was signed "Ralph R. Welch" and asked for $75. Welch's wife wired the money as requested and defendant received it at the Colorado Springs Western Union office on July 28 after presenting Welch's identification. He asked the clerk to forward the other money order to Denver. She did so and defendant received and cashed it there.

On the evening of July 29, 1953, defendant and a man named Jack Jones went into a bar just outside the city limits of Denver. Defendant seemed nervous and belligerent. He attracted considerable attention by announcing that he would burn a dollar bill and doing so. Defendant and Jones left the bar shortly after 7:00 p. m.

At about 9:15 p. m. on July 29 Denver police officers patrolling in a radio car went to St. Luke's Hospital pursuant to a radio call. Defendant had brought Jones to the hospital; Jones had severe head lacerations and a badly mangled left hand; all his pockets were turned out. Defendant told the officers that he was Ralph Welch of Tucson, Arizona, and that while driving through Denver on his way to Columbia University he saw an injured man lying on the street, put him in his car, and obtained directions to the hospital from a small boy. After some conversation the officers informed defendant that he was under arrest. Defendant agreed to go with the officers to the Detective Bureau. As they passed Welch's Ford defendant said that it was his. The officers said that they would look at defendant's car. Defendant said, "You're not going to check my car" and ran down the street. The officers ran after him and shouted for him to stop. When defendant continued to run they fired several shots. One bullet hit defendant in the left buttock and he fell. Defendant was abusive and hostile; the two officers had to hold him. Other police and an ambulance arrived and defendant was taken to a hospital.

On the back seat and back floor and in the trunk of the Ford was putrefying blood. On a jack found in the car was putrefying blood and also fresh blood. A tooth, part of a dental bridge, hair, and sun glasses, all subsequently identified as Welch's, were found in the car. In defendant's pockets were $178, a table knife, a bank book of Jack Jones, Welch's wallet with his certificate of discharge from the Marine Corps and his Arizona driver's license, and blank checks from the Chula Vista branch of the Bank of America.

The Denver police ascertained that Welch was missing from Chula Vista. They questioned defendant repeatedly. On July 30, 1953, defendant said that he was Michael Timothy Cavanaugh of National City, California, that he had never heard of Welch, and that he had no recollection of what had happened to him on the night of July 29. On July 31 defendant denied that he had known Jones or Welch or had anything to do with Welch's car. On August 3, taken to look at Welch's car, defendant said that it smelled as if it had contained a body but that he could not recall having seen the car before. On the 4th and 5th defendant continued to deny that he had ever seen Welch. On August 6 an officer told defendant that the authorities believed defendant had killed Welch and that they were anxious to locate his body, and asked defendant whether he would submit to questioning under the influence of "truth serum." Defendant agreed to such a test and it was performed on the afternoon of August 7.

Sodium amytal was administered intravenously and defendant was questioned by a psychiatrist in the presence of police officers. A transcript of what defendant said was made but not offered in evidence. Defendant testified that he recalls being at the hospital and receiving an injection at

the beginning of the test, that he then lost consciousness and has no knowledge of what took place until he regained consciousness in the county jail the next morning.

After the questioning of defendant during the sodium amytal test ended on August 7, 1953, an officer drove defendant to the jail. During their drive defendant gave an account of Welch's death on July 23 like that in his testimony, supra [282 P.2d 55]. Defendant said that he intended to take the body from Tijuana to the Chula Vista police; after he crossed the border he thought he should get the advice of his wife but when he met her he did not mention Welch; he then decided to take the body to Welch's parents in Tucson; instead he drove through Kingman and into New Mexico; he planned to turn the body over to the police in Albuquerque but became frightened; by this time the body smelled so bad that he felt he had to get rid of it; he drove off the road into the desert, left the body covered with defendant's coat, and said a prayer or two; he then went on through Santa Fe, borrowing money from the priest, and Colorado Springs, wiring Welch's parents and wife for money, and to Denver, as hereinbefore described; while he was drinking at a Denver night club on the evening of July 29 he met Jack Jones; defendant and Jones went to various night clubs, drinking heavily; they met two "fast" girls; Jones took one of the girls to the car to "have a party"; after about 30 minutes defendant went to the car and found Jones with his head beaten; defendant became frightened; he asked a small boy directions to a hospital; at St. Luke's defendant did not want to be involved with the police because of his possession of Welch's car, tried to flee, and was shot and apprehended.

From defendant's account of where he left Welch's body the Denver police gave the Albuquerque authorities information which enabled them to find the body. It was so decomposed and eaten by vermin that the physician and pathologist who performed the autopsy could not determine the cause of death. The greater portion of the flesh and inner organs had been eaten away and the organs could not be identified. There were large holes in the chest wall; their primary cause could not be determined. The upper jaw was fractured in seven or eight places. Insofar as autopsic conclusions are concerned, death could have been from natural causes, from multiple stab wounds, or from a severe beating about the head and face. Enough skin remained on three fingers to enable the taking of fingerprints; comparison of these with Welch's Marine records established identity of the body. There is no contention that the evidence as a whole fails to establish that Welch came to his death by criminal means; defendant's own testimony is to this effect.

On August 8, 1953, defendant, again questioned by the Denver police, said he remembered nothing of what occurred the day before. Defendant was returned to California in August but was not charged with the murder of Welch until February 25, 1954. On October 21, 1953, sodium amytal was again administered intravenously and a psychiatrist questioned defendant concerning the death of Welch. The results of this questioning were not offered in evidence. The phychiatrist testified that in his opinion defendant during the questioning was controlling his answers and shamming.

On November 16, 1953, defendant was being tried before Judge Dean Sherry of the San Diego Superior Court for issuing checks without sufficient funds. Defendant's attorney stated in open court that defendant wished to make a statement to Judge Sherry in the presence of the district attorney and outside the presence of the jury. The ensuing proceedings in chambers were reported by a stenographer. Defendant was not coerced and no promises were made to him. He said, "It is my opinion I am in this court at this time for something I actually don't know, and I can't quite understand * * * being punished for something that I do not know. I would much rather be punished for something that I do know. * * * I make the statement of my own free will and stand set to accept any consequences that may

follow. Here, I have a slip of paper and my own signature * * *." Defendant then read from the paper, "I, Michael T. Cavanaugh, do admit by this self-written document that on July 23, 1953, at Tijuana, Mexico, I, Michael T. Cavanaugh, did kill one Ralph Welch as an aftermath of an argument resulting from a drunken orgy. Signed: Michael T. Cavanaugh."

Defendant proceeded to make the "confession" summarized supra [282 P.2d 55]. Defendant said that he was so enraged by Welch's asserted mistreatment of the girl that he cut off Welch's penis. (Actually, this had not been done to Welch's body.) After defendant completed his "confession," he said insistently that his claimed "blackouts" while writing checks were real; "I have no knowledge of writing the checks that you have charged me with. * * * I just can't seem to be found guilty of something I don't know, and I would much rather have them shoot me for something I do know." Asked, "[I]n respect to the Welch affair * * *, do you contend that you were under any blackout conditions?" defendant replied, "No, sir. I did not state that. * * * I am not making any contention * * * that at the time I was in a blackout. * * * I just simply blew my top."

The Mexican correspondent for a San Diego paper, who acted as interpreter at interviews between defendant and the chief investigator for the Tijuana police force, in November, 1953, testified for the People that defendant made various statements as to where he had killed Welch and where he had disposed of Welch's clothes and the knife; the Mexican authorities checked each of defendant's stories, attempted unsuccessfully to find the girls whom defendant said he and Welch had picked up and to find anyone who had seen defendant in Tijuana, and found no evidence that a killing had been committed in Tijuana on July 23, 1953.

Patrick O'Riley (who had testified for the People at the preliminary hearing and who was subpoenaed by both the People and defendant) testified for defendant at the trial as follows: He met defendant in the San Diego jail in November, 1953, and for two months they were cell mates. They corroborated in preparation of the "confession" which defendant made to Judge Sherry because they thought that defendant might receive a light sentence if he were tried for a homicide in Mexico. When flaws in the story were revealed by investigation of the Mexican authorities they changed the story in attempts to cover up the discrepancies. O'Riley was playing diverse roles while he was in jail with defendant: he was dealing with defendant in what defendant believed was a good faith attempt to enable defendant to obtain lighter punishment; he was passing out information to confuse the Mexican authorities; and he was working with the California authorities to get a confession from defendant. Defendant at no time told O'Riley that he had actually killed Welch or that he knew that Welch was killed in California.

As previously stated, defendant's testimony at the trial was that he and Welch went to Tijuana, that he left the car for a short time and found Welch's body when he returned. Defendant repeatedly stated on the stand that he would only testify as to the killing of Welch; he said that he would not answer questions as to past prosecutions or as to where he got the money which he had at Thompson's Cafe on the afternoon of July 23; asked why he wired Welch's parents and wife for money, he replied that he would only answer as to the killing of Welch in Mexico.

A witness testified for defendant that as an experiment he had made a trip to Tijuana similar to the one described in defendant's testimony, starting from Thompson's Cafe at 10 p. m., stopping as indicated by defendant in his testimony, returning across the border, and reaching the Club 13 at 11:26 p. m.

Defendant, as previously stated, urges that there is no evidence that Welch was killed in California. Section 27 of the Penal Code provides in material part that "The following persons are liable to punishment under the laws of this state: 1. All persons who commit, in whole or in part, any crime within this state * * *." Section 790 provides in material part, "The

jurisdiction of a criminal action for murder or manslaughter is in the county where the fatal injury was inflicted or in the county in which the party injured died or in the county in which his body was found * * *."

At the close of the People's evidence on the issue of guilt defendant moved to dismiss on the ground that there was no evidence of jurisdiction, and after defendant rested he moved for an advised verdict on the ground of lack of proof of venue or jurisdiction. These motions were denied.

The jury were instructed that "in order to convict the defendant you must find by a preponderance of the evidence that the fatal injury was inflicted upon Ralph Welch by the defendant in San Diego County, or that Ralph Welch died in San Diego County as a result of the injuries inflicted by the defendant. * * * Guilt, as I have repeatedly said to you, must be proven beyond a reasonable doubt. * * * As to the place of the commission of the crime, the law merely requires that it be proven by a preponderance of the evidence * * *."

[1, 2] The instruction to the effect that territorial jurisdiction could be established by a preponderance of the evidence was correct. (People v. Megladdery (1940), 40 Cal.App.2d 748, 766, 106 P.2d 84; People v. Guernsey (1947), 80 Cal.App.2d 463, 466, 180 P.2d 27.) And such jurisdiction, like any other fact, can be shown by circumstantial evidence. (People v. Hill (1934), 2 Cal.App.2d 141, 151, 37 P.2d 849; People v. Harkness (1942), 51 Cal.App.2d 133, 139, 124 P.2d 85.)

[3] Here the jury could infer that the killing occurred in California from the following circumstances: Defendant and Welch left Thompson's Cafe at 10 p. m. and defendant arrived at the Club 13 in Welch's car at 11:30 or 11:45. According to a witness for defendant who made an experimental trip to and from Tijuana similar to that described in defendant's testimony, such trip took one hour and 26 minutes. According to defendant's testimony he was able to move Welch's bleeding body from the back seat of the car into the trunk without getting blood on his clothes, and he wiped the blood from the car with a rag. According to defendant, he was frightened when he brought the body across the border; he testified, "[I] held my breath while the man asked me where I was born and had I bought anything and he shined his light in the front seat and in the back and just passed me through." There is no evidence that defendant attracted attention during the check of cars which pass the border.[2] Defendant's wife saw no blood in the back seat when she looked there shortly after defendant's return, and defendant himself was not bloodstained or disheveled. It is a reasonable conclusion that he would not have had time to make the trip to Tijuana as he testified and still to have moved the body, naked and bleeding as he claims, from the back seat to the trunk without leaving traces of blood which would have been observed by border guards, and that therefore he and Welch did not leave this state or San Diego County. The evidence that defendant believed he would receive a lighter punishment if he were tried in Mexico lessens the credibility of his statements which place the crime in that country.

[4] Defendant asserts that the prosecuting attorney in argument admitted that the People had not proved venue. He refers to counsel's statement that "Mr. Adams [attorney for defendant] says that we haven't told you exactly where it [the location of the killing] is, and I think the Judge is going to instruct you in that regard. I don't know where it is. It is going

2. A United States immigration inspector who was on duty at the place where defendant testified he crossed the border on the night of July 23, 1953, described the procedure of checking persons who come into the United States in automobiles. Entrants are questioned and at night the inside of their cars is examined by flashlight; if they appear intoxicated they are stopped; if they are nervous or the questioning officer's suspicions of illegal entry or customs violation are otherwise aroused they are detained for more thorough interrogation and search.

to be locked in this man's heart, probably forever." This was not an admission of a failure of proof. The statement was properly made in the course of argument that the place of killing could be inferred.

[5] Much of the evidence of defendant's activity both before and after the killing of Welch tends to show the commission of crimes other than the one for which he was on trial. Defendant argues that the evidence of other crimes was not relevant to the crime charged and served no purpose except the improper one of prejudicing defendant. Both defendant and the People recognize the correctness of the statements of law as to evidence of other crimes quoted in People v. Newson (1951), 37 Cal.2d 34, 47, 230 P.2d 618, from People v. Dabb (1948), 32 Cal.2d 491, 499, 500, 197 P.2d 1: "A defendant in a criminal action cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but this rule does not exclude evidence which incidentally discloses the commission of another offense. Evidence which is relevant in establishing guilt of the crime charged is admissible notwithstanding the fact that it tends to connect the accused with an offense not included in the charge. [Citations.] * * * The relevancy of evidence that proves crimes other than that charged must, of course, be examined with care, due to the prejudicial nature of all such evidence, and it should not be admitted simply on the showing that some part of that transaction is relevant to the case. The possibility of severing relevant from irrelevant portions should, in every case, be considered, thereby protecting the defendant against reference to other crimes where it has no tendency to establish facts pertinent to the proof of the crime charged." (To the same effect see People v. Peete (1946), 28 Cal.2d 306, 314–315, 169 P.2d 924; see also Fricke, California Criminal Evidence, 2d Ed. (1950), p. 223.)

Defendant urges that the persons who observed his activities in Chula Vista prior to his meeting with Welch could have testified to his presence in the town without describing his cashing of worthless checks and his falsely impersonating a Naval officer, and that his flight after the killing could have been shown by witnesses testifying simply that they saw him in Kingman, Albuquerque, Colorado Springs, and outside Denver, without describing the crimes he committed there (pawning the stolen watch, criminally obtaining money from the priest and from Welch's relatives, and mutilating United States currency).

[6] The People urge that the evidence that defendant escaped from a state mental hospital (not a crime; see 18 Cal.Jur.2d, pp. 251–252) and passed bad checks prior to the homicide was relevant to show a motive for the homicide; i. e., that he desired to escape from the neighborhood where he had done these improper things and that therefore he killed Welch to obtain his automobile and identification papers. And the People argue that the evidence that after the homicide defendant pawned the watch which he had obtained by writing a forged check and defrauded a priest tends to show defendant's need for money and thus tends to show that thereafter, still needing money, he attacked Jones in order to rob him; and the crimes against Jones in turn tend to show that defendant killed Welch for the purpose of taking his property.

[7] We do not believe that, according to logic and experience, the evidence of defendant's escape from the hospital and of his nonviolent crimes sufficiently tends to show a motive for or has enough relevance toward proving the violent robberies and the killing of Welch to have been properly admitted. (See People v. Glass (1910), 158 Cal. 650, 654–659, 112 P. 281.) However, we have concluded that in the circumstances the admission of such evidence did not prejudice defendant or result in a miscarriage of justice. (Cal.Const. art. VI, § 4½.) Consideration of the comparatively minor offenses against property could hardly have influenced the jury one way or the other in their appraisal of the evidence as to the crime against life.

[8, 9] The evidence tending to show the more serious offenses of battery and robbery of Jones was relevant because of the

striking similarity in significant respects between defendant's conduct in that case and in the case of Welch, tending to indicate in each case a purpose of defendant to acquire the property of a casual drinking acquaintance by force. (See People v. Peete (1946), supra, 28 Cal.2d 306, 318, 169 P.2d 924.) In each case there is evidence tending to show that defendant viciously attacked and robbed a victim with whom he had become acquainted when they drank together in a bar; in each case defendant told a rather implausible story of his drinking companion being in the car for a short time with a girl or girls whom he and defendant had "picked up" and of defendant returning to the car to find the victim bloody and beaten; and in each instance defendant was thereafter in possession of property of the victim. In this connection it should be observed that while it is often said that evidence of similar crimes is relevant to show plan, scheme, system, or design, this is not to be understood as meaning that such evidence is admissible only if it tends to show premeditated, calculated design; it also is relevant and may be admissible where, as here, it tends to show that defendant was guilty of the crime charged by showing a peculiar or characteristic behavior pattern of defendant which is manifest in the conduct of the transgressor in both crimes. (See People v. Burns (1952), 109 Cal.App. 2d 524, 535–538, 241 P.2d 308, 242 P.2d 9.)

[10] Defendant argues that this is a case where the evidence of the circumstances leading to the homicide is so uncertain that at the most it can be said only that defendant killed deceased and that therefore the finding that the killing was murder of the first degree should not be upheld (citing People v. Howard (1930), 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385; People v. Moreno (1936), 6 Cal.2d 480, 481, 58 P.2d 629). Contrary to defendant's argument, the evidence which has already been related is sufficient to show that the jury could find that defendant murdered Welch in the perpetration of robbery, as shown by his subsequent possession of Welch's property and his posing as Welch (see People v. Watts (1926), 198 Cal. 776, 788, 247 P. 884), and that therefore the murder was of the first degree. (Pen.Code, § 189; see also People v. Thomas (1945), 25 Cal.2d 880, 895, 899, 156 P.2d 7; People v. Bender (1945), 27 Cal.2d 164, 163 P.2d 8; People v. Valentine (1946), 28 Cal.2d 121, 135–136, 169 P.2d 1; People v. Honeycutt (1946), 29 Cal.2d 52, 59, 172 P.2d 698; People v. Peterson (1946), 29 Cal.2d 69, 71, 173 P.2d 11.)

[11] Defendant's argument that he was prejudiced by the use of hearsay testimony involves the peculiar contention that defendant's own extra-judicial statements are inadmissible hearsay. Although such statements are evidence which tends to prove the truth of the matter stated, they constitute admissions and are not vulnerable to the hearsay objection; also, evidence of defendant's self-contradictions was admissible to impeach him as a witness. (Bonebrake v. McCormick (1950), 35 Cal.2d 16, 19, 215 P.2d 728; People v. Southack (1952), 39 Cal.2d 578, 585, 248 P.2d 12; see also 4 Wigmore, Evidence, 3d Ed., (1940), § 1048.)

Defendant argues that the prosecution improperly used evidence, unnecessary to the proof of the case against defendant because cumulative, which was calculated, and could tend, to inflame the passions of the jury. The pathologist who performed the autopsy cut off the three fingers which formed the basis of fingerprint identification of Welch and they were introduced in evidence. There is testimony that the body when found was in a revolting condition, badly decomposed, much eaten by vermin, and crawling with maggots. Photographs of the body were introduced in evidence. There was much testimony as to the smell of putrefying blood which was about Welch's car and articles found therein. Such articles (gravel, a blood-stained leather sleeve, a jack, a blood-stained seat cover, a tooth, the car itself) were introduced in evidence.

[12, 13] Generally, "except in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency." (People v. Adamson (1946), 27 Cal.2d 478, 486, 165 P.2d 3.) This rule is another application of

the principle, applied in the case of evidence of other crimes, that relevant evidence is not necessarily inadmissible because of its tendency to prejudice the jury. The admission of gruesome and horrifying photographs and objects, over objection, has been repeatedly upheld by this court under the circumstances of the particular case (People v. Gomez (1930), 209 Cal. 296, 300, 286 P. 998; People v. Harris (1934), 219 Cal. 727, 730–731, 28 P.2d 906; People v. Shaver (1936), 7 Cal.2d 586, 592, 61 P.2d 1170; People v. Goodwin (1937), 9 Cal.2d 711, 714, 72 P.2d 551; People v. Lisenba (1939), 14 Cal.2d 403, 411–412, 94 P.2d 569; People v. Smith (1940), 15 Cal.2d 640, 649, 104 P.2d 510; People v. Dunn (1947), 29 Cal.2d 654, 659–660, 177 P.2d 553; People v. Isby (1947), 30 Cal.2d 879, 892, 186 P.2d 405; People v. Guldbrandsen (1950), 35 Cal.2d 514, 521–522, 218 P.2d 977; People v. Osborn (1951), 37 Cal.2d 380, 383, 231 P.2d 850; People v. Reed (1952), 38 Cal.2d 423, 432, 240 P.2d 590), although it has occasionally said of shocking evidence which was relevant but unnecessary to establish the People's case, that "the prosecution is not to be commended for offering it in evidence" (People v. Burkhart (1931), 211 Cal. 726, 732, 297 P. 11; People v. Sisson (1934), 1 Cal.2d 510, 511 36 P.2d 116; People v. Madison (1935), 3 Cal.2d 668, 679, 46 P.2d 159 ["Although we cannot give sanction to the practice of exhibiting unnecessarily to the jury gory physical evidences of the crime which are calculated or likely to inflame the jury's deliberations, nevertheless we cannot say that the exhibition during the trial of the bed or bedding [in which deceased was slain] * * * necessarily was beyond propriety or had that effect. The questions whether the exhibit should remain and was needed to substantiate and illustrate the expert and other testimony as to the shots fired and whether it would tend to inflame the jury to the prejudice of the defendant, were questions addressed in the first instance to the discretion of the trial court"]; see also People v. Logan (1953), 41 Cal.2d 279, 285, 260 P.2d 20 [error, but not prejudicial, to admit photographs of defendant with bleeding victim at scene of crime and of defendant with a baseball bat and the purse of victim at police station; "it is not apparent how the jury would be aided in solving the facts of the case by pictures showing defendant in the presence of the victim. * * * [The several relevant matters pictured together] could have been shown without the graphic connection of defendant and the victim which resulted from photographing them together"].)

One California case has been found in which it was held that admission of gruesome photographs of the victim of a homicide was an abuse of discretion and because of this and other errors the judgment of conviction was reversed. (People v. Burns (1952), supra, 109 Cal.App.2d 524, 541–542, 241 P.2d 308, 242 P.2d 9.) The photographs were made after the autopsy. They were particularly horrible, and not a representation of the condition of the victim when she died, because in connection with the autopsy the head had been shaved and wounds and incisions made. The court said that admission of the photographs improperly crossed the line between "a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors."

[14] Here no useful and proper purpose was served by emphasizing to the jury, by repeated testimonial and photographic description, the horrible condition in which the body was because if its having been left on the desert. No useful and proper purpose was served by introducing in evidence the fingers of deceased. The purpose for which they were received, identification, could be and was accomplished by testimonial evidence of a fingerprint expert. Without such testimony the fingers would have meant nothing to the jury. With such testimony, they were unnecessary. The use of this evidence, like the use of the irrelevant evidence of other non-violent crimes, in the manner and extent to which it was done, was improper and erroneous. Nevertheless, by the mandate of section 4½ of article VI of the Constitution of California, we may not reverse a judgment unless we conclude, after examination of the entire record, that there has been a mis-

carriage of justice. Such examination of the record here leaves us with the view that upon the evidence lawfully adduced, and notwithstanding that improperly presented, no miscarriage of justice is shown. In a closer case the misconduct related could well deprive the defendant of a fair trial and require reversal of the judgment.

[15] Defendant's further contention that the district attorney was guilty of prejudicial misconduct in oral argument to the jury is without merit. Neither the portions of the argument specifically directed to our attention by defendant's counsel nor other portions thereof are improper except in one respect. That exception is the argument that defendant's non-violent crimes against property tend to show that defendant was the sort of person who would viciously beat a person in order to rob him. This argument is not an improper appeal to passion; rather, it is improper reasoning, and resort to it might well tend to weaken rather than strengthen the case of the prosecution. But however it be viewed, as previously indicated we have concluded that, in all the circumstances of the case, the presentation of this theory to the jury did not, by itself or cumulatively with other errors, result in a miscarriage of justice.

For the reasons above stated, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Once again a majority of this court has permitted the use of evidence of crimes other than the one for which the defendant was on trial. As I said in my dissent in People v. Westek, 31 Cal.2d 469, 484, 190 P.2d 9, 18, where the evidence of other crimes was offered by way of impeachment, "While the majority base their holding in this case, that evidence of other crimes was admissible, upon the ground that such evidence was offered by way of impeachment, the effect is just the same as if it had been offered as a part of the prosecution's case in chief [as here]. If it would have been immaterial and irrelevant as part of the prosecution's case in chief, it was likewise immaterial and irrelevant as impeaching evidence." I said there that "lip service" was paid to the general rule but that the majority was in effect abrogating the rule. That has been done in the instant case where the rule is quoted at length as it was set forth in People v. Dabb, 32 Cal.2d 491, 499, 500, 197 P.2d 1, and then with legal dexterity, part of the evidence so admitted is held not prejudicial and the balance thereof is imaginatively held to be relevant "because of the striking similarity in significant respects between defendant's conduct in that case and in the case of Welch * * *." There is no such similarity. The difference between the forgery of a check and murder should be apparent to almost anyone. Many people suffer from a need for money without resorting to murder to satisfy that want. There is also a great difference between assault and battery and murder. This evidence was only admitted for its inflammatory effect and to say that it shows a "peculiar or characteristic behavior pattern of defendant which is manifest in the conduct of the transgressor in both crimes" is sheer sophistry. The only thing the prosecution needed to prove was where defendant had been prior to his arrest and that could have been done quite simply by witnesses who said merely that they had seen him in the various locations. There was no necessity of admitting evidence of alleged crimes committed by him in those locations and the only result to be achieved was that of prejudicing the defendant in the eyes of the jury—the precise thing the rule of inadmissibility of evidence of other crimes was designed to prevent. Nothing could be more prejudicial! I have fully set forth in other dissents the reasons why evidence of other crimes should not be admitted, see People v. Peete, 28 Cal.2d 306, 322, 169 P.2d 924; People v. Zatzke, 33 Cal.2d 480, 486, 202 P.2d 1009; People v. Westek, 31 Cal.2d 469, 483, 190 P.2d 9; People v. Dabb, 32 Cal.2d 491, 501, 197 P.2d 1 (concurring opinion) and it would be unnecessarily repetitious to repeat here what I stated in those cases.

I also disagree with the holding of the majority that venue was proved by a preponderance of the evidence. The only evidence leading to jurisdiction is the inference that time did not permit defendant's story to be true. This inference is based on witness' testimony that defendant left the cafe at 10 p. m. and returned at either 11:30 or 11:45 p. m. and testimony that the driving time to and from Tijuana would be one hour and twenty-six minutes; that defendant could not have moved the body in 19 minutes. It appears to me that this inference is a far cry from the preponderance of proof of venue required for jurisdiction.

I also disagree with the majority holding that the admission in evidence of the dreadful and horrible objects and photographs did not constitute prejudicial error. I agree that it could serve no useful or proper purpose—I also agree that its *only* purpose was to prejudice defendant in the interest of securing a conviction by any means.

The majority has here condoned two highly prejudicial errors in the instant case: That of admitting in evidence testimony of other crimes allegedly committed by the defendant; and photographs and objects which no normal or reasonable person could view without revulsion and hatred for the one who had, allegedly, committed an act bringing about such a vile result. The first error could have had no other purpose than to tell the jury what a bad person the defendant was and had been; the other error would insure the result desired by the prosecution—that defendant be shown no sympathy by a horrified and inflamed jury. Under the facts of any case, no matter what the record showed, these errors would be prejudicial. In addition, we have the extremely dubious showing of venue. It appears to me that if we do not honestly recognize the prejudicial nature of such errors and move to correct them, we shall be guilty of condoning such practices in the future and will, ultimately, deprive those accused of crime of due process of law in its most practical sense.

I would therefore reverse the judgment.

TRAYNOR, Justice.

I dissent.

Had it been necessary for the jury to determine only whether defendant killed decedent in the perpetration of a robbery, I could agree that the errors committed at the trial were not prejudicial. The jury was also presented, however, with a very close question whether the crime was committed in California, and it was required to determine the penalty that should be imposed. The majority opinion concedes that unnecessary but highly inflammatory evidence and evidence of other crimes was erroneously admitted, and it is apparent from the record that the prosecutor deliberately presented his case with the purpose of inflaming the jury. I cannot say that he did not succeed in this purpose or that a different verdict would have been improbable had the evidence been excluded. People v. Bemis, 33 Cal.2d 395, 401, 202 P.2d 82; People v. Newson, 37 Cal.2d 34, 46, 230 P.2d 618. Accordingly, the judgment and order appealed from should be reversed.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

44 Cal.2d 364

Geo. SMITH, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION, Mutual Stevedoring Company, Fireman's Fund Indemnity Company, and State of California Subsequent Injuries Fund, Respondents.

S. F. 19019.

[Supreme Court of California, In Bank.

April 22, 1955.]

Proceeding on petition for writ of review and annulment of order of Industrial Accident Commission denying petitioner's claim for additional workmen's compensation from the Subsequent Injuries Fund.

The Supreme Court, Schauer, J., held that even though employee's permanent disability rating for purpose of workmen's compensation payments would have been ratable at 100% prior to injury causing permanent disability of 5¼% employee was within purview of statute concerning injuries sustained by employee, who prior to injury was permanently "partially" disabled, and therefore he was entitled to compensation from Subsequent Injuries Fund for last injury sustained.

Order annulled and matter remanded.

Opinion, 272 P.2d 895, vacated.

1. Workmen's Compensation ⇐803

An employee may receive a permanent disability rating of 100% and be entitled to disability payments incident to such rating although he is able to return to work at wages he received before injury which caused disability. Labor Code, § 4751.

2. Workmen's Compensation ⇐803

Showing of loss of earning power is not a prerequisite to payment of compensation for a permanent disability. Labor Code, § 4751.

3. Workmen's Compensation ⇐856

The phrase "permanently partially disabled" in workmen's compensation statute refers to disability rated at less than 100%. Labor Code, § 4751.

See publication Words and Phrases, for other judicial constructions and definitions of "Permanently Partially Disabled".

4. Workmen's Compensation ⇐1030

Even though employee's permanent disability rating for purpose of workmen's compensation payments would have been ratable at 100% prior to injury causing permanent disability of 5¼%, employee was within purview of statute concerning injuries sustained by employees, who prior to injury were permanently "partially" disabled, and therefore he was entitled to compensation from Subsequent Injuries Fund for last injury sustained. Labor Code, §§ 3201–6002, 3202, 4658, 4662, 4750, 4751; West's Ann.Const. art. 20, § 21.

Julius M. Keller, San Francisco, for petitioner.

Everett A. Corten, T. Groezinger, Edmund G. Brown, Atty. Gen., and Gerald F. Carreras, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

George Smith, an applicant for workmen's compensation, seeks review and annulment of an order of the Industrial Accident Commission that he take nothing by reason of a claim against the Subsequent Injuries Fund. Whether Smith is entitled to compensation from such fund depends upon the meaning of section 4751 of the Labor Code, hereinafter summarized. We have concluded that the section can and should be liberally interpreted in favor of the applicant to give him the relief which he seeks.

In earlier litigation (Subsequent, etc., Fund v. Industrial Accident Comm. (1952), 39 Cal.2d 83, 86, 91, 244 P.2d 889) we considered the general plan and objectives of the subsequent injuries legislation and held that it is encompassed within the purview of the "complete system of workmen's compensation" which is authorized by the state Constitution (art. XX, § 21) and which various statutes, particularly, in this connection, Division IV of the Labor Code (§§ 3201–6002, which include the subsequent injuries plan), are intended "to make effective" (Lab.Code, § 3201). "The provisions of Division IV * * * shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab.Code, § 3202.)

The subsequent injuries plan provides as follows: An employer of a workman who has a permanent physical impairment and who thereafter sustains a compensable injury resulting in permanent disability, is not liable for compensation for the ensuing combined disabilities, but only for that portion of permanent disability which is caused by the last injury. (Lab.Code, § 4750.) "If an employee who is permanently *partially* disabled receives a subsequent

compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 per cent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article [art. 5, entitled "Subsequent Injuries Payments"]." (Lab.Code, § 4751; italics added.) The special additional compensation last mentioned is paid from "funds appropriated for such purpose" (Lab.Code, § 4754); thus the taxpayers as a whole, rather than the employer of the already handicapped worker, pay additional compensation to the worker if he sustains an industrial injury which causes increased permanent disability coming within the limits defined.

In terms the subsequent injuries plan applies only to an employe whose previous disability is *partial*. The Industrial Accident Commission takes the position that "'permanently *partially* disabled', as used in Labor Code Section 4751, can be interpreted only as meaning having disability which is ratable at less than 100%." The applicant urges that an employe who, prior to sustaining a subsequent injury, has a disability rating of 100 per cent may nevertheless (when in fact he is performing services for which he is receiving compensation) be eligible for subsequent injury compensation. In other words, the commission is of the view that by the language of the statute it is precluded, insofar as applying the Subsequent Injuries Fund provisions is concerned, from treating as partially disabled an employe who has been rated as totally disabled for the purpose of workmen's compensation payments while, on the other hand, the petitioner urges that a rating of total disability for workmen's compensation purposes is neither synonymous with the fact of actual total disability nor, in view of the objectives of the legislation, does it preclude payments from the Subsequent Injuries Fund to an employe who, although already rated totally disabled for workmen's compensation allowances, has actually been gainfully employed and suffered further disabling injury in such subsequent work.

Smith sustained the industrial injury which gave rise to this proceeding on August 14, 1952. As a result of this injury he lost part of the little finger of his right hand. This disability, considered alone, received a permanent disability rating of 5¼ per cent.

On June 6, 1949, Smith, who was then employed as a longshoreman, had sustained an industrial injury to his left arm and shoulder which received a permanent disability rating of 38½ per cent. Before he sustained the 1949 injury Smith suffered from swelling of the right hand. This condition, the result of arthritis, has grown worse and now affects both arms and hands and the left leg. After being injured on June 6, 1949, Smith was unable to return to work until July, 1951. Since then he has worked as a sweeper on the docks. This work is less demanding physically and does not pay as much as that of longshoreman. Smith did not work every day as a sweeper, sometimes because work was not available and sometimes because he could not work due to his physical condition. The Permanent Disability Rating Bureau concluded that Smith's disability immediately prior to his injury of August 14, 1952, would be ratable at 100 per cent.

[1, 2] The employe contends, in effect, that the determination that he had a prior 100 per cent ratable disability is untenable in the light of the undisputed evidence that he was working and earning wages. This contention, in the form in which it is stated, is incorrect. It is settled law in this state that an employe may receive a permanent disability rating of 100 per cent and be entitled to the disability payments incident to such rating although he is able to return to work at the wages he received before the injury which caused disability. "[T]he right to compensation is not lost

or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him. The statute does not require a showing of loss of earning power as a prerequisite to the payment of compensation for a permanent disability, but, on the contrary, provides for the payment in installments of a fixed and definite sum of money therefor." (Postal Telegraph Cable Co. v. Industrial Accident Comm. (1931), 213 Cal. 544, 550, 3 P.2d 6; see also Frankfort General Ins. Co. v. Pillsbury (1916), 173 Cal. 56, 58, 159 P. 150; Mercury Aviation Co. v. Industrial Accident Comm. (1921), 186 Cal. 375, 377, 199 P. 508; Department of Motor Vehicles v. Industrial Accident Comm. (1939), 14 Cal.2d 189, 191, 194, 93 P.2d 131. We conclude, nevertheless, for the reasons hereinafter explained, that it is permissible and desirable to distinguish between a formula or rule-established "100 per cent disability" for certain rating purposes, and actual total disability insofar as productive work or compensated employment is concerned.

[3] The phrase "permanently partially disabled" is not defined in the Labor Code and does not appear elsewhere in that code than in section 4751. However, the phrase is in common use in connection with workmen's compensation. (See 58 Am.Jur., Workmen's Compensation, § 283 ["Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent"]; 2 Schneider, Workmen's Compensation Law (1932), pp. 1332–1333, § 400 ["There are four designated classes of disability for which compensation is payable. They are permanent total, permanent partial, temporary total and temporary partial"].) The California cases, without discussion of the meaning of the phrase "permanent partial disability," have used it to refer to disability rated at less than 100 per cent. (Massachusetts, etc., Ins. Co. v. Pillsbury (1915), 170 Cal. 767, 768, 151 P. 419; Frankfort General Ins. Co. v. Pillsbury (1916), supra, 173 Cal. 56, 57, 159 P. 150; Mercury Aviation Co. v. Industrial Accident Comm. (1921), supra, 186 Cal. 375, 377, 199 P. 508; Baroni v. Rosenberg (1930), 209 Cal. 4, 6, 284 P. 1111.)

The employe urges that although permanent partial disability has been accepted in other contexts as meaning disability rated at less than 100 per cent, the Legislature must have intended that so far as section 4751 is concerned "as long as one is able to be employed and in a position to become injured, he is within the contemplation of the statute, and 'partially disabled.'" According to the employe, under the commission's interpretation of section 4751 "the most worthy cases" would not be entitled to subsequent injury compensation; for example, such compensation could not be awarded to the blind employe, since section 4662 of the Labor Code provides that blindness is "conclusively presumed" to be a total disability, or to the employe who has severe impairment of the functions of the neck, since the commission's schedule for rating permanent disabilities lists such impairment as a 100 per cent disability.

The following example suggested by the employe illustrates the apparent injustice of a strict interpretation of section 4751: An employe, such as the applicant here, who has prior permanent disability rated at 100 per cent but who is gainfully employed sustains an industrial injury causing permanent disability rated at 5¼ per cent; the combined effect of the last injury and the previous disability is a permanent disability rated at 100 per cent; the employe is entitled to receive 5¼ per cent disability payments from his employer and nothing from the Subsequent Injuries Fund. An employe who has a prior permanent disability rated at 99 per cent sustains an industrial injury causing permanent disability rated at 5¼ per cent; the combined effect of the last injury and the previous disability is a permanent disability rated at 100 per cent; he is entitled to receive 5¼ per cent disability payments from his employer and 94¾ per cent disability payments from the subsequent injuries fund.

On the other hand, it could be argued with considerable plausibility, although we do not imply that we would so hold, that

the employe's interpretation of section 4751 might lead to the following inequable situation: A workman, though he has a permanent disability rating of 100 per cent, is able to continue earning wages. He sustains a series of industrial injuries, each of which results in a permanent disability rating of 10 per cent but none of which actually incapacitates him. On the occasion of each such injury he will be entitled not only to 10 per cent permanent disability payments from his employer but also to 90 per cent permanent disability payments from the Subsequent Injuries Fund. The latter payments are 65 per cent of his average weekly earnings for 360 weeks and 30 per cent of his average weekly earnings for the remainder of his life (Lab.Code, § 4658). It may be doubted that the Legislature contemplated that the subsequent injuries fund would have to bear the burden of paying one employe not one but several weekly permanent disability payments throughout his life.[1]

[4] These hypothetical examples of themselves do not impel a conclusion in accord with or contrary to the employe's argument. They probably indicate that the subsequent injuries legislation was drafted without any actual legislative intent as to, or thought of, a situation such as that presented by the present case. The matter should have further legislative attention. Pending clarification by the Legislature, however, the Industrial Accident Commission, and this court, must deal with the legislation as it exists and with cases as they arise. In the circumstances it appears socially desirable and juridically proper to give the words "permanent partial disability" as used in section 4751 a liberal construction extending its benefits to the disabled employe. If an employe may properly be rated at 100 per cent disability to qualify him for the basic form of workmen's compensation, even though his earning power has not in truth, for practical purposes, been impaired,[2] it should be at least equally permissible to penetrate the fiction of 100 per cent disability and accept the truth of his remaining earning ability so that the further truth of a subsequent injury with increased actual disability may be compensated from the fund set up for that purpose.

For the reasons above stated the order of the commission is annulled and the matter is remanded for further proceedings consistent with the views expressed in this opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached by the majority, but in the interest of uniformity of decision I deem it advisable to call attention to the inconsistency in the reasoning upon which the majority opinion here is based and the reasoning of the majority in the cases of Bryant v. Industrial Accident Comm., 37 Cal.2d 215, 231 P.2d 32; Aetna Life Ins. Co. v. Industrial Accident Comm., 38 Cal.2d 599, 241 P.2d 530, and Garcia v. Industrial Accident Comm., 41 Cal.2d 689, 263 P.2d 8, in all of which last cited cases I dissented. In the last cited cases the mandate of liberal construction of the identical statutes here under consideration contained in Labor Code section 3202 was ignored by the majority. Had this mandate been followed the result in the last cited cases would have been favorable to the disabled employee as it is in this case.

1. As discussed in cases concerning other phases of remedial legislation for disabled workers, the intention of the Legislature to provide a comprehensive system of benefits, but not duplicating compensations, for individuals who are unemployed because of either illness or injury, whether industrially caused or otherwise, is clearly expressed in the enactments there pertinent. (See Bryant v. Industrial Accident Comm. (1951), 37 Cal.2d 215, 218, 231 P.2d 32; Aetna Life Ins. Co. v. Industrial Accident Comm. (1952), 38 Cal.2d 599, 604, 241 P.2d 530; Garcia v. Industrial Accident Comm. (1953), 41 Cal.2d 689, 692–693, 263 P.2d 8; California Compensation Ins. Co. v. Industrial Accident Comm. (1954), Cal.App., 276 P.2d 148, 152, 153.

2. See cases cited, supra, 282 P.2d 67.

44 Cal.2d 225

Grady AUSTIN, Plaintiff and Respondent,

v.

RIVERSIDE PORTLAND CEMENT CO., J. E. Haddock Co., Ltd.; Haddock Company, a co-partnership, composed of T. J. Haddock and J. E. Haddock, general partners, and G. A. Mashon and O. Ketting, limited partners, California Electric Power Company, Robert C. Fisher and Glen Hartman, Defendants.

Riverside Portland Cement Co., Appellant.

Willis Lyle BOEHM, Plaintiff and Respondent,

v.

RIVERSIDE PORTLAND CEMENT CO., J. E. Haddock Co., Ltd.; Haddock Company, a co-partnership, composed of T. J. Haddock and J. E. Haddock, general partners, and G. A. Mashon and O. Ketting, limited partners, California Electric Power Company, Robert C. Fisher and Glen Hartman, Defendants.

Riverside Portland Cement Co., Appellant.

L. A. 23300, 23301.

Supreme Court of California, In Bank.

April 6, 1955.

Rehearing Denied May 4, 1955.

Actions for injuries sustained by contractor's employees who received electrical shocks when contractor's crane came into contact with overhead power lines on defendant cement company's premises. The Superior Court, San Bernardino County, Martin J. Coughlin, J., rendered judgments for plaintiffs and such defendant appealed. The Supreme Court, Carter, J., held that questions whether company was negligent in failing to anticipate that crane would be used near wires and in having superior knowledge of dangerous condition, and whether such negligence was proximate cause of employees' injuries, were for jury.

Judgments affirmed.

Opinion, 271 P.2d 943, vacated.

1. Electricity ⇐14(1)

One maintaining wires carrying electricity is required to exercise care that person of ordinary prudence would exercise under circumstances, and among circumstances are dangerous character of electricity and inherent risk of injury to persons or property if it escapes.

2. Electricity ⇐16(2)

Wires carrying electricity must be carefully and properly insulated at all places where there is reasonable probability of injury to persons or property therefrom.

3. Electricity ⇐16(5)

Upon those controlling wires carrying electricity is imposed duty of reasonable and prompt inspection of wires and appliances.

4. Electricity ⇐16(5)

In places where there is probability of injury, persons maintaining wires carrying electricity must not only make wires safe by proper installation, but must keep them so by vigilant oversight and repair.

5. Negligence ⇐32(2.3, 2.8)

Employees of independent contractor which had been hired by defendant cement company to repair rock crushers on its premises, were invitees or business visitors rather than licensees or trespassers.

6. Negligence ⇐28

Owner of property is under duty to keep in safe condition all portions of premises over which he has control.

7. Negligence ⇐32(1), 52

Possessor of land who knows, or reasonably should know, of natural or artificial condition upon his premises which, he should foresee, exposes his business visitors to unreasonable risk and who has no basis for believing that they will discover condition or realize risk involved therein, is under duty to exercise ordinary care either to make condition reasonably safe for their use or to give warning adequate to enable them to avoid harm.

8. Electricity ⇐19(9)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, questions whether com-

pany was negligent in failing to anticipate that crane would be used near wires and in having superior knowledge of dangerous condition, and whether such negligence was proximate cause of employees' injuries, were for jury.

9. Negligence ⇐61(1)

Negligence of defendant need not be sole cause of injury in order to create liability, but it is enough if it is contributory factor which is proximate cause of injury.

10. Electricity ⇐19(12)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, question whether employees were free from contributory negligence in failing to observe wires on company's premises and attempting to avoid them, was for jury.

11. Negligence ⇐69

In determining question of contributory negligence, momentary forgetfulness may be in accord with conduct of reasonably prudent man.

12. Negligence ⇐136(14, 25, 26)

Questions of negligence, proximate cause and contributory negligence in personal injury actions are to be determined by trier of fact.

13. Electricity ⇐19(12)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, question whether employees assumed risk of working on company's premises was for jury.

14. Negligence ⇐65

Contributory negligence arises from lack of due care.

15. Negligence ⇐105

Defense of assumption of risk will negative liability regardless of fact that plaintiff may have acted with due care.

16. Negligence ⇐66(1), 105

Where facts are such that plaintiff must have had knowledge of hazard, situation is equivalent to actual knowledge, and there may be assumption of risk, but where it merely appears that he should or could have discovered danger by exercise of ordinary care, defense is contributory negligence and not assumption of risk.

17. Electricity ⇐19(13)
Trial ⇐261

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, company's requested instructions which advised jury that employees would have assumed risk if in exercise of ordinary care they should have known of and appreciated risk rather than that they must have had knowledge of danger, were erroneous, and trial court was under no duty to revise such requested instructions to state law accurately.

18. Negligence ⇐65, 105

Assumption of risk and contributory negligence are distinguishable and based on different theories.

19. Trial ⇐296(6)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, instruction that doctrine of assumption of risk was not applicable to case was not prejudicial to company, where elsewhere court advised jury what was meant by doctrine of assumption of risk and other instructions advised jury that employees could not recover if they placed themselves in position of danger.

20. Negligence ⇐136(26)

Whether forgetfulness of known danger constitutes contributory negligence is question for trier of fact, giving consideration to circumstances even though there is no sudden disturbance or peril confronting plaintiff and causing lapse of memory.

21. Negligence ⇐9

To forget is not negligence unless it shows want of ordinary care.

22. Electricity ⇐19(13)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into

contact with high voltage wires on company's premises, instruction that if jury found that employees knew that high voltage lines were present and constituted hazard, such fact did not necessarily establish that employees were contributorily negligent and that mere forgetfulness of known danger would not bar recovery unless such forgetfulness constituted negligence under circumstances, was not erroneous, and properly left question to jury.

23. Electricity ⇐19(13)

In action by contractor's employees against cement company for injuries sustained when contractor's crane came into contact with high voltage wires on company's premises, instruction as to amount of care which workman is bound to exercise for his own safety, was not erroneous in that such principle only applied to persons whose work was performed in public streets where there were moving vehicles, and instruction properly left question whether employees were acting as persons of ordinary prudence under circumstances to jury.

24. Electricity ⇐19(13)

In action by contractor's employees against cement company for injury sustained when contractor's crane came into contact with high voltage wires on company's premises, instruction that it was duty of cement company to use ordinary care to furnish employees safe place to work was correct statement of general duty of company, and was not erroneous.

Swing & Gillespie and Donald S. Gillespie, San Bernardino, for appellant.

Long & Levit, William H. Levit, Los Angeles, Bert W. Levit, San Francisco, Curtis, Knauf, Henry & Farrell and John P. Knauf, San Bernardino, for respondents.

CARTER, Justice.

In these actions plaintiffs sought damages for personal injuries alleged to have been caused by the negligence of Riverside Cement Company, hereafter referred to as defendant, and California Electric Power Company, hereafter referred to as California. The jury awarded $50,000 to plaintiff Austin (reduced to $25,000 on motion for new trial) and $100,000 to plaintiff Boehm against defendant. Its verdict was for California and against plaintiffs. The injuries were caused by electricity burns when a crane came in contact with an overhead conduit of electricity.

Defendant appeals from the judgments entered on the verdicts. It asserts that the evidence was insufficient to establish any negligence on its part; that any claimed negligence on its part was not the proximate cause of the injuries; that plaintiffs were contributively negligent as a matter of law; and error was committed in the giving of instructions to the jury.

Defendant owns and operates a plant for the manufacture of cement on a plot of about 6 acres of ground. A contract was made between it and Haddock Company to perform, as independent contractor, extensive alteration and construction work on the plant and premises and Haddock was engaged in doing repair work for defendant on one of defendant's rock crushers at the time of the accident on January 10, 1947. Plaintiffs were Haddock's employees. The job was a "rush" job and it was known by defendant that the work would require night as well as day work. At all times defendant continued the operation of its plant night and day. It retained control of its premises and plant, although not of Haddock's employees, equipment and operations, and had a man on the job (Mr. Brophy at the time here pertinent) whose duties were to observe Haddock's work and to represent defendant in connection therewith. Haddock was to interfere as little as possible in its work with the operation by defendant of its plant. Defendant through its supervisory employees knew that Haddock frequently used cranes with 60-foot booms [1] in

1. A crane as referred to consists of a mobile truck or tractor on which is mounted a boom and the machinery necessary to raise and lower it and its cables. The operator of the boom performed his work in a cab on the truck or tractor and the driver of the truck or tractor performed his function from a cab on the truck or tractor.

its work; that the cranes worked in various places about the place in the vicinity of and under the power lines thereon; that they were necessary to perform the work; and that a danger existed from the possibility of a crane coming too close to a power line; it also knew that much of Haddock's work was done at night. The use of a crane was the normal and usual method used as a part of the process of repairing a rock crusher. The same crusher had been repaired by Haddock in December, 1947, and a crane was used.

On defendant's premises, as a means of access to the crusher to be repaired, was a ramp or private road. Crossing the road, and about 160 feet from the crusher, California owned and maintained an uninsulated three-wire power line carrying 33000 volts for use by defendant in its plant. The wires were 43.8 feet above the ground. While, as stated, the line was owned by California, defendant could request, and the request would be granted, to have the power shut off—the line de-energized. In fact the request had been granted on previous occasions. Haddock had no authority to have the lines de-energized. Such de-energization would stop the operation of defendant's plant but would cause no damage thereto other than the loss of production during the shutdown and the de-energization and re-energization is a simple process of opening and closing a switch. The crusher repair job would take several hours. There also was no obstacle to the posting of warnings by defendant. (The poles supporting the wires had notices of high voltage presumably placed there by California.) In addition to the general knowledge of defendant of the danger of cranes operating near power lines, it had specific knowledge that the de-energization of those lines, when cranes were being operated near the power lines, was a proper safety precaution. Prior to the repair job on the crusher in December, and in connection therewith, Haddock's superintendent Martin requested defendant's superintendent Brophy that the power be shut off so it would be safe to move a crane about and Brophy refused because it would require the shutdown of defendant's plant. (There is considerable conflict on this issue but the testimony is reasonably susceptible of the foregoing.) It could be inferred that defendant knew the same de-energization would be needed for the safety of Haddock's men during the January 10th repair of the crusher but should not expect Haddock to make the request in view of the recent refusal.

The only lights supplied by defendant in the vicinity of the crusher were those on a tower thereon. Lights on portable standards were maintained by Haddock.

The rock crusher consisted of a structure in which rock was deposited. It was crushed by a mauler attached to the end of a 20-foot steel shaft. The repair required that the shaft and mauler be removed from the structure in order that the joinder of the mauler and the shaft could be made secure by removing the zinc holding the two together and placing new zinc in its place.

Late in the afternoon of January 10th, Haddock's employees were directed to assist in the repair of the crusher and the work thereon proceeded between five-thirty and six o'clock. A crane together with a boom cable operator and truck operator were present to lift the shaft and mauler. Plaintiffs testified that it was dark and the power line was not visible; there was barely enough light to work on the crane. To fit the crane for the job required a rigging of three cables on the boom on the lifting end of which was the lifting hook. Plaintiffs were assisting in rigging. The boom was parallel to the ground, the end being five or six feet above the ground. The three cable rigging had been done and plaintiffs went to the crane truck to get the headache ball, a weight to be attached near the lifting hook to keep the cables taut and in proper place. On returning to the end of the cable and hook to attach the ball, the boom had been raised to about 45° and evidently the truck had been moved toward the power line to shorten the distance the ball would have to be carried. The hook was several feet above the ground. Plaintiffs were carrying the ball together and Austin grasped the hook to attach the ball. The hook was charged with electricity be-

cause of the proximity of the boom to the power line. When Austin grasped the hook, the electricity flowed through him, the ball and Boehm resulting in the injuries for which damages were awarded.

[1–7] This court recently stated the rule with reference to the duty owed by one who has control of electricity. "'On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. [Citations.] Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom. [Citations.] Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. [Citations.] And, in the places where there is a probability of injury, they must not only make the wires safe by proper insulation, but as stated in Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 186, 106 P. 587, "keep them so by vigilant oversight and repair."'" Dunn v. Pacific Gas & Electric Co., 43 Cal.2d 265, 272 P.2d 745, 749. It is true that California rather than defendant was maintaining the power line, yet defendant had control to the extent that it could have the line de-energized and as it controlled its premises it could provide adequate lighting for night work and proper warnings. Hence the care required of it must be measured by the hazard inherent in highly charged wires together with the duty it owed to Haddock's employees (plaintiffs) who were as to defendant, insofar as it had control of the premises, invitees or business visitors rather than licensees or trespassers; that their status was invitees is clear. Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 258 P.2d 75; Lamar v. John & Wade, Inc., 70 Cal. App.2d 806, 161 P.2d 970; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26; La Malfa v. Piombo Bros., 70 Cal.App.2d 840, 161 P.2d 964; Prosser on Torts, p. 636. "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. * * * The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Rest., Torts, § 414. Generally the owner of property "* * * is under a duty to keep in a safe condition all portions of 'premises over which he has control,'" Sexton v. Brooks, 39 Cal.2d 153, 156, 245 P.2d 496, 498, and in more detail: "A possessor of land who knows, or reasonably should know, of a natural or artificial condition upon his premises which, he should foresee, exposes his business visitors to an unreasonable risk and who has no basis for believing that they will discover the condition or realize the risk involved therein, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm." Crane v. Smith, 23 Cal.2d 288, 296, 144 P.2d 356, 361; see, also, Prosser on Torts, pp. 642 et seq.

[8] Under the facts in the instant case, the jury was justified in finding, as it impliedly did, that defendant was negligent and its negligence was the proximate cause of plaintiffs' injuries. The jury could conclude that, knowing as defendant did, that Haddock's cranes operated in the vicinity

of the power line, unless the power was cut off a danger existed; that work called for night operation and the lighting was such that the wires were not visible; that it should have anticipated that the boom of the crane might come in contact with the wires permitting the electricity to be conducted to a place where it would cause injury; that there was not adequate basis for believing that Haddock's employees would discover the condition or realize the danger involved because the wires were not visible and the employees might justifiably assume that they were not charged or they might momentarily have forgotten their presence due to the rush job and nature of the work.

Defendant refers to the testimony of Martin, Haddock's superintendent, that he knew of the presence of the wires when the work on the crusher was being done and that of plaintiffs that they knew of the wires. Martin's testimony was contradictory and could have been disbelieved by the jury. The jury could have concluded that while plaintiffs knew generally of the presence of the wires, the nature of the job and visibility conditions were such that the danger was not so obvious to plaintiffs that defendant would be relieved of liability.

[9] Stress is also laid upon the duty under the statutes and regulations and that it was Haddock's non-delegable duty to its employees to furnish a safe place to work, not operate near high voltage wires, see Hard v. Hollywood Turf Club, 112 Cal.App. 2d 263, 246 P.2d 716, and it is urged that its breach of duty was the cause of the injury. It should be remembered however that defendant also owed a duty as above discussed. Defendant's negligence need not be the sole cause of an injury; it is enough if it is a contributory factor which is a proximate cause of the injury, Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350; McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783; 19 Cal.Jur. 557, and "'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' Rest. Torts, § 449. It has been held that the rules on the subject in the Restatement of Torts, sections 442–453, are applicable in this state. Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 375, 67 P. 2d 678." Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872. The cases relied upon by defendant are distinguishable. For illustration, in Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231, among other differences there was no knowledge by defendant of the use of cranes or the work in progress. The work was not a rush job and was done in the daylight.

[10, 11] The foregoing discussion is also pertinent to the question of contributory negligence. On the basis of the above discussed evidence the jury was justified in finding that plaintiffs were free from contributory negligence. While plaintiffs may have observed the wires on defendant's premises they may, as persons of ordinary prudence, have momentarily forgotten their presence under the circumstances. Momentary forgetfulness may be in accord with the conduct of a reasonably prudent man. See Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32; Bartuluci v. San Joaquin Light & Power Corp., 21 Cal.App.2d 376, 69 P.2d 440; Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 626, 275 P.2d 761; and cases cited infra.

[12] Moreover, it should be emphasized that the questions of negligence, proximate cause and contributory negligence under circumstances such as we have here are to be determined by the trier of fact. Nevis v. Pacific Gas & Electric Co., supra, 43 Cal. 2d 626, 275 P.2d 761.

[13–17] Defendant asserts that plaintiffs assumed the risk as a matter of law. From the foregoing discussion there was sufficient evidence from which the jury could conclude that plaintiffs did not assume the risk. The rule on assumption of risk was recently stated by this court. "The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other

hand, will negative liability regardless of the fact that plaintiff may have acted with due care. * * * It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. * * * Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not asumption of risk." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161–162, 265 P.2d 904, 906. Defendant's offered jury instructions on the defense of assumption of risk were refused but the basic one was erroneous under the Prescott case in that it advised the jury that plaintiffs would have assumed the risk if in the exercise of ordinary care they should have known of and appreciated the risk rather than that they must have had knowledge of the danger. The other instructions were connected with the basic one and would have been confusing if the basic one were not given. Such instructions are erroneous and the trial court was under no duty to revise them to state the law accurately. Prescott v. Ralph's Grocery Co., supra, 42 Cal.2d 158, 265 P.2d 904; Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 240 P.2d 580; Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1.

[18, 19] The court, however, on its initiative gave an instruction that it was not instructing on "the doctrine of assumption of risk because that doctrine is not applicable in this case. However, the court is instructing you on the doctrine of contributory negligence" and the instructions on that issue will govern your deliberations on the issue of contributory negligence. The evidence would have justified an instruction on assumption of risk; however, we believe that, while assumption of risk and contributory negligence are distinguishable and based on different theories, Prescott v. Ralph's Grocery Co., supra, 42 Cal.2d 158, 265 P.2d 904, defendant suffered no prejudice by the court's instruction because elsewhere the court did not advise the jury what it meant by the "doctrine of assumption of risk" and other instructions advised the jury that plaintiffs could not recover if they placed themselves in a position of danger. Indeed, some of those instructions sound like assumption of risk or at least gave the jury the elements thereof and told it that plaintiffs could not recover if those conditions existed. See Hayes v. Richfield Oil Corp., supra, 38 Cal.2d 375, 385, 240 P.2d 580. For illustration the jury was instructed: "Whether or not it is negligence for one to proceed into a dangerous situation of which he had previous notice is a question of fact not always and necessarily to be answered in the affirmative. *If at the time he was aware of the danger and also appreciated its extent and if he voluntarily and unnecessarily exposed himself to it then he was negligent as a matter of law.* But to forget a danger once known to exist or to be in a state of abstraction or absent-mindedness or to err in judgment may or may not be negligent depending on whether or not in the circumstances it shows a want of ordinary care. Also the jury must consider the character of the notice received, whether recent or remote and the impression such information would make upon the mind of an ordinarily prudent person in a like situation." (Emphasis added.) And as part of an instruction with regard to relying upon care by another: "One is not justified in ignoring obvious danger although it is created by another's misconduct nor is he ever excused from exercising ordinary care." And: "* * * a person must make a reasonable use of his faculties of sight and hearing to avoid injury from the lawful acts of others, and to avoid injury to others engaged in acts which they are lawfully entitled to perform. Furthermore, one who approaches a place which he knows or in the exercise of ordinary care ought to know to be one of danger is bound to use ordinary care to avoid causing injury or being injured."

Defendant contends error in the following instruction requested by plaintiffs but modified by the court: "If you should find that plaintiff knew that high voltage lines were present, * * * and constituted a

hazard, such fact does not necessarily establish that plaintiff was contributively negligent. Mere forgetfulness of a known danger will not bar recovery unless such forgetfulness constitutes negligence under the circumstances. In this connection, you may consider that a workman cannot be expected to retain in his memory at all times because of the nature of his work the fact that there are dangerous conditions surrounding him. A workman must do his work where required to do it and is necessarily bound to put his attention on such work while performing it, and it is for you to determine whether in so doing he acted as a prudent person under the circumstances." It claims that the instruction assumes the wires were a hazard and defendant was negligent because they were on its premises. We do not find such assumptions. The instruction deals with what plaintiffs knew and in other instructions the question of hazard and negligence were adequate.

[20–22] Defendant's main contention is that the instruction is not a correct statement of the law in that momentary forgetfulness cannot indicate lack of contributory negligence unless plaintiff is acting after being confronted with a sudden and disturbing situation which causes the forgetfulness. It should be remembered the work in which plaintiffs were engaged required them to be in the vicinity of the wires and the job was a "rush" one being done in the dark. The rule with respect to the bearing of forgetfulness on contributory negligence has been stated in many cases. As expressed in many cases, and recent ones, whether forgetfulness of a known danger constitutes contributory negligence is a question for the trier of fact, giving consideration to the circumstances even though there is no sudden disturbance or peril confronting the plaintiff and causing the lapse of memory; to forget is not negligence unless it shows a want of ordinary care. Generally the question is one for the jury. Hayes v. Richfield Oil Corp., supra, 38 Cal. 2d 375, 385, 240 P.2d 580; Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 840, 161 P. 2d 673, 164 A.L.R. 1; Neel v. Mannings, Inc., 19 Cal.2d 647, 656, 122 P.2d 576; Gibson v. County of Mendocino, 16 Cal.2d 80, 89, 105 P.2d 105; Hall v. Barber Door Co., 218 Cal. 412, 420, 23 P.2d 279; Meindersee v. Meyers, 188 Cal. 498, 503–504, 205 P. 1078; Giraudi v. Electric Imp. Co., 107 Cal. 120, 125, 40 P. 108, 28 L.R.A. 596; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500; Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 483, 137 P. 232; Jacobson v. Oakland Meat, etc., Co., 161 Cal. 425, 430, 119 P. 653; Harris v. Joffe, 28 Cal.2d 418, 425, 170 P.2d 454; see cases collected 19 Cal.Jur. 587–83, 8 Cal.Jur. 10-Yr.Supp. 324–5. Such cases as Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 P. 962, 39 L.R.A.,N.S., 896, and Ergo v. Merced Falls Gas & Elec. Co., 161 Cal. 334, 119 P. 101, 41 L.R.A.,N.S., 79, see cases collected 19 Cal.Jur. 586–7, 598–600, which state the proposition that a person is necessarily contributively negligent as a matter of law when he forgets a known danger unless the lapse of memory is due to a sudden disturbance are too broad in the light of the cases above cited. Moreover they indicate there may be circumstances justifying forgetfulness other than a sudden emergency, such as haste in doing the work as we have here. We have heretofore discussed the nature and character of the work being performed and the surrounding circumstances in the instant case. The instruction correctly states the law and leaves the question to the jury mentioning the circumstances of the work. The problem was well summarized in Andre v. Allynn, 84 Cal.App.2d 347, 351, 190 P.2d 949, 951, quoting from Schleif v. Grigsby, 88 Cal.App. 174, 263 P. 255: "'The rule of law contended for is as follows: Momentary forgetfulness of a known danger not induced by a sudden and adequate disturbing cause is contributory negligence, qualifying this by the statement that to forget is not negligence unless it shows a want of ordinary care. The qualification is not absolute, but depends upon the facts of the particular case. There is a long line of cases holding that forgetfulness is as a matter of law negligence that will defeat recovery. [Citing cases.] It is upon this theory that appellant bases her claim of

contributory negligence chargeable to respondent. However, as is said in Jacobson v. Oakland Meat Co., 161 Cal. (425), 430, 119 P. 653, Ann.Cas.1913B, 1194, one element in all these cases is the plaintiff's familiarity with the danger he forgot. To arbitrarily adopt as a standard of negligence *per se* the rule that if one may be charged with a knowledge, past or present, of a danger, he is precluded from recovery for injuries sustained therefrom and let the rule rest there for all cases would be to establish a doctrine dangerous in its application and unsound in principle and one not warranted by the present weight of authority. Courts are unwilling to declare that forgetting a known danger always amounts to negligence (Jacobson v. Oakland Meat Co., supra [161 Cal. 425, 119 P. 653]). The true rule to be deducted from the cases cited is that the forgetfulness shown must be under circumstances sufficient to enable a court to determine that such lack of memory constituted negligence *per se*. * * *'"

[23] Defendant attacks the following jury instruction: "The amount of care which a workman is bound to exercise for his own safety must be determined by a rule of reasonable necessity. When a person's lawful employment requires that he work in a dangerous location or a place that involves unusual possibilities of injury and to give attention to his work, or requires that, in the lines of his duty, he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, in so far as they limit the caution that he may take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care." It contends that here plaintiffs' work on the crane did not require them to work on the crane in dangerous proximity to the wires and the wires were not dangerous because they were stationary and 43 feet above ground. As we have seen, there is evidence that the work was done in the normal manner and place and plaintiffs were required to perform it. It is urged that the rule announced in the instruction only applies to persons whose work must be performed in public streets where there are moving vehicles. See Jacobs v. Bozzani Motors, Ltd., 109 Cal.App.2d 681, 241 P.2d 642. It has long been recognized that "* * * where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case. Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 40, 120 P. 767; Roddy v. American Smelting, etc., Co., 34 Cal.App.2d 457, 460–461, 93 P.2d 841; Mecham v. Crump, 137 Cal.App. 200, 203–204, 30 P.2d 568; Woods v. Wisdom, 133 Cal.App. 694, 696–697, 24 P.2d 863; Jones v. Hedges, 123 Cal.App. 742, 752, 12 P.2d 111; Driscoll v. California St. Cable R. Co., 80 Cal.App. 208, 215, 250 P. 1062 et seq. Whether or not respondent was guilty of contributory negligence on all the facts disclosed by the evidence was a jury question." Ostertag v. Bethlehem, etc., Corp., 65 Cal.App.2d 795, 801, 151 P.2d 647, 650. We see no reason why the rule should be different whether the danger is stationary or moving. The question of whether plaintiffs were acting as persons of ordinary prudence under the circumstances was left to the jury by that instruction and others on the same subject.

[24] The following jury instructions are challenged. Instruction No. 64: "It was the duty of the defendant cement company to use ordinary care to furnish plaintiffs with a safe place to work. The general rule in that regard is that an owner of premises, who, by invitation, express or implied, induces or permits a workman to come on the premises for the performance of work for the benefit of the owner, is required to use ordinary care to supply him with a reasonably safe place in which to work, and to warn him of any existing danger which he knew or, in the exercise of ordinary care, should have known. This duty to plaintiffs was not limited to conditions if any actually known to be dangerous but extended also to conditions if any which might have been found to be dangerous by the exercise of ordinary care by defendant cement company." Instruction No. 65:

"If defendant Riverside Cement Co. knew or in the exercise of ordinary care should have known that work of the general type in which plaintiff was engaged at the time of the accident was reasonably likely to occur in the vicinity of the high voltage lines, then said defendant cement company was under a duty to exercise ordinary care to prevent the occurrence of injuries reasonably likely to occur in connection with such work through contact with said wires, if any. It is not necessary that the cement company have knowledge of or be able to foresee the exact work or manner in which it was to be done, but it is sufficient if you find that the cement company knew or in the exercise of ordinary care should reasonably have anticipated that work of this general nature was likely to be done on its premises." Defendant's attack on these instructions is that they do not include the principle that an owner or occupier of premises is not liable for obvious dangers and indicate that the defendant as owner would be liable for the negligence of Haddock or conditions created by it. See Hard v. Hollywood Turf Club, supra, 112 Cal. App.2d 263, 246 P.2d 716; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501. The instructions correctly state the general duty of defendant as heretofore stated. They were not formula instructions which purported to embody all the bases for liability. In an instruction immediately following instruction No. 64 and in other instructions the jury was clearly advised that defendant was not required to give warning of obvious dangers. The instructions do not purport to hold defendant responsible for Haddock's negligence. But even if there were an intimation to that effect the jury was expressly instructed that the employer of an independent contractor is not liable for the negligence of the contractor.

The judgments are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

132 Cal.App.2d 410

Hyder KHAN, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, Defendant and Appellant.

Civ. 8582.

District Court of Appeal, Third District, California.

April 19, 1955.

Rehearing Denied May 13, 1955.

Hearing Denied June 16, 1955.

Action under Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for loss of sight of right eye due to retinal detachment. The Superior Court, Sacramento County, Ralph McGee, J., entered judgment on a verdict for plaintiff, as reduced by remittitur, and from such judgment and orders denying defendant's motions for judgment notwithstanding the verdict, defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was sufficient to support verdict for plaintiff on questions of negligence of defendant and whether such negligence proximately caused injury to plaintiff.

Judgment affirmed.

1. Master and Servant ⇐276(8), 278(17)

In action under Federal Employers' Liability Act for loss of sight of right eye due to retinal detachment, evidence was sufficient to support verdict for plaintiff on questions of negligence of defendant in requiring employee to remove heavy steel couplers from disorderly pile on concrete platform and whether such negligence proximately caused injury inflicted by flying concrete particle dislodged from platform when heavy coupler fell from pile. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Appeal and Error ⇐1001(1)

Master and Servant ⇐276(2)

In action under Federal Employers' Liability Act for loss of sight of right eye due to retinal detachment, implied finding that retinal detachment was caused by particle of concrete striking eye was supported by substantial evidence and must be

accepted on appeal. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Damages ⇐26

Damages are recoverable for prospective detriment only if occurrence of such detriment is shown with such a degree of probability as amounts to a reasonable certainty that such detriment will result from original injury.

4. Damages ⇐208(1)

Whether prospective detriment is reasonably certain to result from original injury and should therefore be considered in awarding damages for such injury is generally a question for jury.

5. Evidence ⇐528(2), 571(9)

In action under Federal Employers' Liability Act to recover damages for partial blindness, testimony of medical expert witness as to remote possibility that detachment of retina of right eye might result in sympathetic ophthalmia leading to blindness of left eye was admissible, though insufficient in itself to justify award of damages for such future detriment. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Damages ⇐208(3)

Evidence as to reasonable probability that detachment of retina of right eye would result in blindness of left eye due to sympathetic ophthalmia authorized submission to jury of question of such prospective detriment as an element of damages recoverable for injury to right eye.

7. Damages ⇐208(4)

In action under Federal Employers' Liability Act to recover damages for loss of sight of right eye of laborer employed in railroad yard, question of damages for future loss of earnings due to such partial blindness was properly submitted to jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

8. Evidence ⇐5(2)

It is common knowledge that a common laborer in competition for jobs will be discriminated against because of defective vision which renders him less able to perform tasks which fall to common labor and peculiarly expose him to risk of industrial injury.

9. Appeal and Error ⇐1004(3)
Damages ⇐228

Trial courts exercise a wholesome control over verdicts in respect to the amount thereof and are much better fitted than reviewing courts to exercise such control.

10. Appeal and Error ⇐932(1), 969

A verdict reduced by trial judge comes before reviewing court with strong presumptions that control over amount awarded by jury has been properly exercised, and judgment so arrived at will not be reversed or reduced on appeal, unless it can be clearly said that trial court abused its discretion, thus in effect acting without the bounds thereof.

11. Damages ⇐132(14)

Award to laborer, as reduced by remittitur to $25,000, for loss of sight of right eye due to retinal detachment was not excessive.

Devlin, Diepenbrock & Wulff, Sacramento, for appellant.

Nathaniel S. Colley, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment for damages and from two orders denying motions for judgment notwithstanding the verdict in an action brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for partial blindness allegedly caused by an industrial accident claimed to be due to appellant's negligence.

It is not disputed that respondent has lost the sight of his right eye due to a retinal detachment first observed about September 9, 1952. It was respondent's theory that this retinal detachment was of traumatic origin or of traumatic-degenerative origin and that the trauma resulted from his eye being struck by a particle of concrete dislodged from a concrete floor when a heavy piece of steel fell against the concrete while respondent was working close to the

point where the steel struck. It was the theory of the appellant that the retinal detachment as wholly of degenerative origin and that it long antedated the occurrence to which respondent ascribed his injury. It is not disputed that at and for some time prior to the time that the condition of respondent's eye was ascertained he was and had been employed as a laborer in one of appellant's railroad yards in Sacramento, and that on the morning of September 8, 1952, his foreman had ordered him to assist in moving a number of large steel railroad car couplers, each of which weighed several hundred pounds, from a pile of the couplers which lay upon a concrete platform onto which they had been unloaded from a gondola car by means of a magnetic crane. There is substantial evidence that these couplers which had been dropped onto the concrete platform as the crane swung overhead had fallen on top of each other in disorderly fashion and that after the unloading operation they lay on the concrete in an uneven pile three or four feet in height; that they were to be moved by hand trucks to pallets and to one of the appellant's shops for use in new car construction; that respondent in doing the work assigned to him would upend the couplers one at a time in such position that they could be picked up and moved by a hand truck; that this necessitated moving not only those which lay directly upon the concrete, but also as the work progressed the moving of those which lay on top of the pile as the pile diminished; that while respondent was stooped over upending a coupler, another fell or rolled from the top of the pile and struck the concrete and that immediately respondent felt pain in his eye as from a blow; that these heavy couplers had squared shanks with squared corners and rectangular edges and that the head or coupling end wherein was the greatest weight of steel in the mass had edges more or less sharp; that upon feeling a foreign body strike his eye and the ensuing pain therefrom respondent reported to his foreman and was sent to the company's emergency hospital where he was treated by Dr. Jones, appellant's emergency hospital physician, whose written report supports the inference that he then removed a foreign body from respondent's eye (at the trial Dr. Jones testified that when he examined respondent's eye he found no foreign body therein but found merely a small corneal stain which he believed to have been caused by some object about half the size of a pin head having struck the cornea); that on the following morning respondent complained to the foreman that his eye pained him and he was again sent to the emergency hospital; that upon this visit Dr. Jones determined that he was suffering from a retinal detachment in the right eye; that Dr. Jones caused him to go at once to San Francisco and there to enter the company's general hospital for treatment; that there Dr. Jones' diagnosis of retinal detachment was confirmed by the hospital physicians and that reparative surgery was in due time attempted; that the surgeons did not succeed in reattaching the retina; that by reason of the detachment blindness of the right eye ensued and is permanent. The verdict of the jury was for damages in the sum of $44,200. A motion was made for a new trial and the trial court denied the same, upon condition, however, that respondent submit to a reduction of the award to $25,000 which condition respondent accepted.

On appeal appellant contends that the amount of the judgment is excessive, that the judgment is not supported by the evidence in that no negligence upon appellant's part was shown to have caused respondent's injury and that the evidence is also insufficient to show that appellant's injury could be attributed to trauma in whole or in part. Complaint is also made in respect to the giving and refusing of certain instructions.

[1] We think the jury from the evidence could reasonably infer that appellant was guilty of negligence in sending respondent to work in the way and in the place described. It was reasonably foreseeable that if a workman were engaged close to the disorderly pile of couplers in moving the couplers from the pile and upending them to be carted away by the hand truck, some of the couplers, during the operation, might fall or roll from the pile and strike either the workman or the concrete and cause injury to him. The jury could

conclude that these heavy steel objects with their irregular conformation would be beyond the capacity of one man to handle with safety when they were piled as they were. Certainly the jury could say that if one started to slip from the top of the pile the workman could do nothing to prevent its fall and since he was required to work close to the pile he could well be injured. Further, they could say that when an edged steel joist weighing as much as did these couplers struck a concrete surface particles of concrete might be projected with great speed and that it was reasonably foreseeable that such a particle could strike a destructive blow to an eyeball if it hit it. We think the haphazard high piling of these couplers upon a concrete surface, the sending of the respondent to work in moving and disturbing the couplers on the pile in close proximity to the pile, when considered in connection with the great weight of these objects, added up to negligent conduct on the part of appellant and that the evidence substantially supports the conclusion by the jury that by the falling of the coupler and the blow to appellant's eye such damage as that blow inflicted was proximately caused by that negligence.

[2] A more serious question is presented when we come to consider the evidence relied upon by respondent to support the implied holding of the jury that the blow to appellant's eye caused the retinal detachment which eventuated in blindness in that eye. Here it is the contention of appellant that the situation calls for the application of the rule that "when the diagnosis of a physical condition depends essentially upon the knowledge, skill and experience of medical expert witnesses, and is not within the common knowledge of non-expert laymen, the evidence of such medical experts is conclusive upon that issue." Guarantee Ins. Co. v. Industrial Accident Comm., 88 Cal. App.2d 410, 413, 199 P.2d 12, 14. We quote further from the cited case: "'Properly analyzed, these cases merely represent specific applications of a broader rule that uncontradicted medical opinion cannot be ignored and must be followed. Competent evidence must be rebutted and overcome by competent evidence or the former controls the record. * * * When the question is one within the knowledge of experts only, their testimony is conclusive.'" (See cases cited in opinion quoted from.) We consider, however, that the evidence in this case does not reveal a situation where the rule contended for can find justifiable application. To be sure, the medical experts who testified in behalf of appellant were men of eminence in their profession and were positive in their opinion that the retinal detachment suffered by respondent was not, and could not have been, caused traumatically from the eye being struck by a flying particle, as contended by respondent. However, this is not a case where the medical testimony was all one way. There was evidence that, when somewhat over a year before the accident respondent was employed by appellant, his eyes had been examined and the acuity of his right eye found to be 20/30. While that was not keen vision, the eye was useful and far from blind. Respondent testified that he had no trouble with the sight of either eye; that he had good sight in both. There was testimony also that this condition continued up to the time of the accident and that soon thereafter he was almost totally blind in that eye from retinal detachment. Dr. Zimmerman, a witness for the respondent, testified that from such a history he would diagnose respondent's condition as a traumatic separation of the retina, and that from that history he would say the retinal detachment was at least aggravated, if not entirely caused by the accident; that it was well known that most retinal detachments are caused traumatically. There was other expert testimony that retinal detachment is often caused by trauma. We have said that the jury could have inferred that when the steel coupler hit the surface of the concrete it could have impelled a sizeable piece of concrete with violence against respondent's eye; that the jury could infer that this was what happened and that the blow struck was adequate to supply the striking force which experts testified could cause retinal detachment, particularly in view of testimony that respondent had been afflicted with diabetes, one effect of which is to weaken retinal attachment and make it

easier for the retina to become detached. On this point appellant seems to base a great deal on an assumption that the jury must have accepted the testimony of appellant's witnesses that nothing more than a piece of material half the size of a pin head had struck the respondent's eye. This is not so. The jury were not compelled to accept that testimony. Under these circumstances, therefore, the rule contended for by appellant can have no application. We hold the jury's implied finding that the blow to appellant's eye caused the retinal detachment which eventuated in blindness in that eye is supported by substantial evidence and must be accepted on appeal.

Appellant states its next contention as follows: "The trial court erred in permitting the jury to consider and award damages for future loss of vision of plaintiff's other or left eye." There was some testimony concerning the possible loss of vision in respondent's left eye caused by what the medical experts termed "sympathetic ophthalmia" resulting from the detriment to the right eye. Basing its request upon a claimed insufficiency of the evidence, the appellant asked the court to instruct the jury as follows: "I instruct you that you may not award damages to plaintiff for a future loss of vision in his left eye." Appellant also requested the court to instruct the jury in this way: "I instruct you that you may not award damages to plaintiff for future loss of vision in his left eye unless plaintiff proves by a preponderance of the evidence that this event is reasonably certain to occur. It is not enough that there is a remote possibility or chance that it may occur." Both instructions were refused, and the court gave the following general instruction:

> "You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.
>
> "However, should you determine that the plaintiff is entitled to recover, you should compensate him for prospective detriment if it has been shown by a preponderance of the evidence that there is such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury."

[3–6] The subject matter of the second requested instruction as stated above is clearly covered by the instruction given. Prospective detriment must be so proven that from the proof the jury can reasonably conclude that the claimed detriment is reasonably certain to occur. Bauman v. City and County of San Francisco, 42 Cal. App.2d 144, 163–165, 108 P.2d 989. But, as pointed out in the authority cited, it is generally a question for the jury to determine from the evidence whether or not the claimed prospective detriment is reasonably certain to occur. It was the contention of appellant at the trial that the evidence was not sufficient to furnish foundation for such a finding by the jury and that, therefore, it was entitled to have the court tell the jury that as a matter of law the evidence was thus insufficient. Certainly, the record is not free from doubt upon this matter. In the main respondent relied upon the testimony of Dr. Zeeman, who, when asked about the matter, stated that "sympathetic Ophthalmia", although rare, could not be ruled out with respect to respondent's condition. The doctor's examination of respondent's left eye had disclosed, so he testified, a low-grade infection therein, the cause of which he did not ascertain; and he said that, considering the low-grade infection which he found there was a chance, but a remote chance, that it might result in sympathetic ophthalmia, leading to blindness of the left eye. He emphasized that the most he could say was that such a result was a possibility, although a remote one. Such testimony, although it does not measure up to the quantum of proof required for the award of damages for future detriment, was nevertheless admissible. Bauman v. City and County of San Francisco, supra, 42 Cal.App.2d at page 164, 108 P.2d at page 1000. In addition to it there was a statement by one of appellant's physicians that under all the circumstances sympathetic ophthalmia affecting the left eye could not be ruled out. There was evidence also from the respondent's testimony, and from the eye tests

that had been made when he sought employment, and shortly after the injury to his eye, and before the trial, that his left eye, though possessed of nearly normal visual acuity when he was employed, had progressively worsened until shortly before the trial his sight was far from normal. He testified further that he had good vision in that eye until some time after the accident. From the whole of the evidence upon the matter it cannot be said from this record as a matter of law that a finding by the jury of prospective detriment arising from the injury to the right eye would not be supported. Under the circumstances the trial judge was justified in refusing the requested instruction that would have removed this issue from the consideration of the jury, and in giving instead the general instruction which told the jury the test to which they must bring the evidence before they could make an award for such prospective detriment.

[7, 8] Appellant further contends that the trial court erred in submitting to the jury the question of damages for future loss of earnings. The court had refused to give at appellant's request the following instruction: "I instruct you that you may not award damages to plaintiff for future loss of earning capacity unless plaintiff proves by a preponderance of the evidence that this event is reasonably certain to occur. It is not enough that there is a remote possibility or chance that it might occur." While refusing this instruction, the court did tell the jury that it might award such sum "as will compensate said plaintiff reasonably for whatever detriment, if any, he is reasonably certain to suffer in the future as a result of any loss of earning power caused by the injury in question." We fail to ascertain any substantial difference in the instruction requested and that given. The court in the same instruction further instructed the jury as follows: "In fixing this amount you may consider what said plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or, if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suffered." We think that the court properly submitted to the jury the question of damages from future loss of earnings. Assuming that by the accident plaintiff had lost the sight of his right eye, then even though his work generally was that of a common laborer, yet it is common knowledge that such a man in that occupation will in the competition for jobs be discriminated against because his defective vision renders him less able to perform many of the tasks which fall to common labor and peculiarly expose him to the risk of industrial injury. It was proper for the court to permit the jury to consider awarding damages through loss of future earning power.

[9–11] Finally, the appellant contends that the judgment is excessive. As we have stated, the verdict was originally for $44,200, which the court order remitted to the extent of $19,200 as a condition for the court's denial of the motion for a new trial. This condition was accepted by respondent. Trial courts exercise a wholesome control over the verdicts of juries in respect to the amounts thereof and trial judges are much better fitted than are appellate justices to exercise such control. When a trial judge has reduced a verdict and it comes before the appellate tribunal with strong presumptions that control over the amount awarded by the jury has been properly exercised, the judgment so arrived at will not be reversed or reduced on appeal, unless it can be clearly said the trial court abused its discretion, thus in effect acting without the bounds thereof. McSweeney v. East Bay Transit Company, 60 Cal.App.2d 807, 141 P.2d 787. We hold that this is not a proper occasion for this Court to either further reduce or wholly reverse the judgment appealed from on the ground that it was excessive.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

Robert A. HOLDERBY, Plaintiff and Respondent,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, an unincorporated association, R. B. Bronson, P. A. Judd and William C. Carroll, Defendants and Appellants.

Civ. 20727.

District Court of Appeal, Second District, Division 2, California.

April 19, 1955.

Rehearing Denied May 5, 1955.

Hearing Granted June 16, 1955.

Action for declaratory relief directing that member be reinstated in union. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held that it was a jurisdictional prerequisite to action for judicial relief that plaintiff first have invoked and exhausted remedies provided by provisions of constitution of defendant union.

Reversed.

1. Labor Relations ⇐416

Party to collective bargaining agreement which provides grievance and arbitration machinery for settlement of disputes within scope of such contract must exhaust those internal remedies before resorting to courts, in absence of facts which would excuse him from pursuing such remedies.

2. Labor Relations ⇐111

Union constitution provision for suspension for nonpayment of dues could be effective without hearing or any further action on part of union.

3. Declaratory Judgment ⇐345

In action for judgment declaring plaintiff entitled to reinstatement in union, evidence established that plaintiff had not complied with remedies provided in constitution, after local union executive board had denied him reinstatement, before turning to courts for relief.

Parker, Stanbury, Reese & McGee, Los Angeles, for appellants.

Aaron Sapiro, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff against defendants, hereinafter referred to as the union, in an action for declaratory relief directing that the member be reinstated in the union, defendants appeal.

Chronology

i. October, 1952, plaintiff became a member of defendant union, local number 12.

ii. November 1, 1952, he became delinquent in the payment of his dues.

iii. Plaintiff's name appeared with other delinquent members on the delinquent list of January, 1953, and in accordance with the Constitution[1] of the union, the

1. Article XXIII, Subdivision 7, Section (d) of the union's Constitution provided:

"Penalties for Members in Arrears to Local Union Members thirty (30) days in arrears in payment of current dues, assessments or fines may upon vote of the Local Union be denied voice and vote therein.

"Members sixty (60) days in arrears in payment of dues, assessments or fines may upon vote of the Local Union be barred from meetings or removed from committees or both, or suspended from membership.

"Members ninety (90) days in arrears in payment of dues, assessments or fines may upon vote of the Local Union be penalized by one or more of the following: removed from employment where agreements between the Local Union and employers permit, removed from office without trial.

"Members six (6) months in arrears in payment of dues, assessments or fines may, upon report thereof by the Financial Secretary at a regular meeting of a Local Union, be expelled by a majority vote of the members present.

"The local executive board is likewise authorized and empowered to take the same action provided hereinabove and to enforce the foregoing penalties for arrearages against members, whenever, upon findings by it said arrearages are found to exist, and the same authority and power is conferred upon Supervisors

* Opinion vacated 291 P.2d 463.

Executive Board on February 5, 1953, suspended plaintiff for nonpayment of dues.

iv. Pursuant to the Constitution of the union[2], plaintiff applied to the general secretary-treasurer of the union for reinstatement which was granted upon the conditions (1) that he pay $19.00 which was a reduction of the normal amount which would have been required, and (2) that he supply a statement from his doctors substantiating his statement that he had been ill during the last few months of 1952. In making the foregoing concessions the union's letter called for "immediate" attention.

v. It was over two months, to wit, May 8, 1953, before plaintiff paid the amount upon which his reinstatement was predicated.

vi. June 6, 1953, the executive board refused plaintiff's application for reinstatement in the union.[3]

vii. July 1, 1953, without taking any further proceedings before the union, plaintiff instituted the present action in the Superior Court of Los Angeles County.

Question: Was it a jurisdictional prerequisite to an action for judicial relief that plaintiff first invoke and exhaust the remedies provided by the provisions of the Constitution of defendant union before resorting to the courts?

Yes. The rule is accurately stated in Cone v. Union Oil Co., 129 Cal.App.2d 558, at page 563, 277 P.2d 464, at page 468, where Mr. Justice Fox, speaking for the court, says:

[1] "It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. (Citing cases.)" (Cf. Jackson v. Howser, 66 Cal.App.2d 870, 871 [1], 153 P.2d 423, hearing denied by the Supreme Court.)

in charge of Local Unions under International Supervision.

"No member of any Local Union shall seek to affiliate with another Local Union save in the manner and form required by the Constitution. Such member shall be required to make full disclosure to such other Local Union of his previous memberships including all facts as to any fine, penalty or other disability imposed within the organization and existing and unsatisfied against him and in addition such member shall strictly conform to and discharge any and all constitutional requirements governing the lifting of the said fine, penalty or disability.

"In addition to the penalties hereinabove provided, Local Unions may also impose the penalties provided for the causes herein set forth."

2. Article XXIII, Subdivision 7, Section (h) of the Constitution reads:

"A member who has been suspended under the provisions of this subdivision may be restored to membership in good standing and to his membership number only by making application on the form furnished by the General Secretary-Treasurer, together with the payment of all dues, assessments and fines then in arrears, the reinstatement assessment and in addition an amount equal to three months' dues. When all the foregoing requirements have been fulfilled by the applicant, notice thereof shall be given by the Financial Secretary to the General Secretary-Treasurer on the next monthly report, accompanied by all documents, reinstatement assessment and other charges due thereon."

3. Minutes of the executive board meeting on June 6, 1953, read:

"Minutes, Advisory Board of District No. 1, and report on membership transactions was by motion approved and concurred in with the exception of the reinstatement case of Robert A. Holderby, Registry No. 748663. A motion was made, seconded and carried that all previous action of the Executive Board in the case of Robert A. Holderby be rescinded. A motion was made and seconded that the application for reinstatement of Robert A. Holderby be rejected and that all moneys paid into the Local Union by him be refunded. On the motion it was thoroughly established that Holderby was not a qualified engineer and that his actions during the past six months had marked him as an individual undesirable for membership in this Union."

In the present case Article XVII, Section 3, of defendant union's Constitution read in part as follows:

"No suit or other action at law or equity shall be brought in any court by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. * * *"

It was also provided in Article XVII, Section 1(a) in part as follows:

"Any General Officer who shall have filed in a Local Union charges against a member thereof, and any officer or member of a Local Union, may appeal to the General Executive Board from the adoption of any action by said Local Union, or from any decision rendered by the General President. Any Local Union, or member thereof which belongs to a local, State or Provincial Organization or Joint Executive Board may appeal to the General Executive Board from any act or decision of said local, State or Provincial Organization or Joint Executive Board * * *."

In the instant case it is clear that the action of the executive board was "action by" the local union, and that therefore plaintiff could have appealed under the Constitution of the union to the General Executive Board. This he failed to do. Therefore he has not met the jurisdictional requirements prerequisite to filing an action in the courts.

Plaintiff attempts to avoid the application of the above doctrine to the facts of this case on the theory that defendants failed to comply with the union Constitution in not filing charges against him and giving him a trial.

[2] This contention is devoid of merit for the reason that plaintiff had not committed any offense which, under the Constitution of the union, he could be charged with and tried. The provisions of the union Constitution for suspension for nonpayment of dues would, in the instant case, be effective without hearing or any further action on the part of the union. (DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 154, 187 P.2d 769, 175 A.L.R. 382.)

Assuming for the purpose of argument only that plaintiff was expelled from the union, he still was required to appeal to the General Executive Board under the union Constitution before applying to the courts for redress. Article XXIII, Subdivision 7, Section (q), reads in part as follows: "Any member of a Local Union fined, disciplined or expelled shall have the right to appeal to the General Executive Board in the manner and form provided in the Constitution and the Laws and Rules established thereunder." This provision in conjunction with the provisions of Article XVII, Section 3, quoted supra, make it clear that in this case plaintiff did not exhaust his administrative remedies in the union before taking action.

In the present case the real contention of plaintiff is not that he was improperly suspended from the union, but that he was improperly refused reinstatement. Hence since this is conceded for the purpose of this appeal only, it is obvious there was no necessity to file charges against plaintiff and give him a trial in order to suspend him for nonpayment of dues.

[3] It becomes evident that the only problem presented is: *Did plaintiff comply with the remedies provided in the Constitution after the local union executive board denied him reinstatement before he turned to the courts for relief?*

It is clear he did not.

In view of our conclusions it is unnecessary to discuss other questions and cases presented by counsel.

Reversed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 377

Ruth BECKWITH, Plaintiff and Appellant,

v.

COUNTY of LOS ANGELES, City of Los Angeles, and Eugene W. Biscailuz, Sheriff of Los Angeles County, California, Defendants and Respondents.

Civ. 20793.

District Court of Appeal, Second District, Division 1, California.

April 19, 1955.

Hearing Denied June 16, 1955.

Action for damages for malfeasance of public officials and for false arrest. The Superior Court, Los Angeles County, James G. Whyte, J., dismissed action, and plaintiff appealed. The District Court of Appeal held that where no return of summons was made within three years after commencement of action, although summonses had been served within three years, dismissal of action was required.

Judgment affirmed.

1. Dismissal and Nonsuit ⇐60(2)

Where no return of summons in action for damages from malfeasance of public officials and for false arrests was made within three years after commencement of action, although summonses had been served within three years, dismissal of action was required. West's Ann.Code Civ.Proc. § 581a.

2. Dismissal and Nonsuit ⇐50

Where there had been no return of summons within three years of commencement of action, so that dismissal was mandatory, defendant's filing of motion to dismiss and demurrer to complaint, both filed after expiration of three year period, did not waive right to dismissal. West's Ann. Code Civ.Proc. § 581a.

Elon G. Galusha, Los Angeles, G. H. Wende, Glendale, and Frank J. Ryan, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondents County and the Sheriff.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Ralph J. Eubank, Deputy City Atty., Los Angeles, for respondent City.

PER CURIAM.

The instant action for damages for malfeasance of public officials and for false arrest was filed on July 18, 1951, and summons issued on that date. Nothing further was done by any of the parties until July 16, 1954, when a copy of the summons was filed and service was made on the County of Los Angeles and on defendant Sheriff. Service on the City of Los Angeles was made on July 19, 1954.

Notices of motion to dismiss said action were filed by the City on July 22nd and by the County and the Sheriff on July 23rd. These motions were based on lack of jurisdiction, in that no return of summons was made within three years after commencement of the action, as required by section 581a of the Code of Civil Procedure.

Proof of service as to each defendant was returned herein by filing affidavits thereof in the office of the County Clerk on July 28, 1954. On that same day, the City of Los Angeles filed a general demurrer to the complaint.

At a hearing held on August 13, 1954, the trial court ordered the demurrer off calendar, and granted the respective motions to dismiss.

From the judgment which followed, plaintiff appeals.

It is here urged: (1) That it is the actual service of summons and not the return thereof which must be made within the required three-year period; and (2) That respondent City of Los Angeles by filing a general demurrer waived its right to insist upon a dismissal.

Section 581a, Code of Civil Procedure, under which respondents proceeded, reads:

> "*Dismissal; lack of prosecution.* No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall

have been commenced, on its own motion, or on motion of any party interested therein * * * unless summons shall have issued within one year, and all such actions must be in like manner dismissed, *unless the summons shall be served and return thereon made within three years after the commencement of said action,* except where the parties have filed a stipulation in writing that the time may be extended. *But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years* in the same manner as if summons had been issued and served * * *." (Emphasis added.)

Frohman v. Bonelli, 91 Cal.App.2d 285, 287, 291, 204 P.2d 890, 893, holds that the provisions of said section are mandatory. And "* * * that the phrase 'all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action,' as used in section 581a of the Code of Civil Procedure, means that an action must be dismissed unless the summons is served and filed with the clerk of the court together with the officer's certificate of service, if it was served by an officer, or the affidavit of service of the person who served it, if it was served by any other person, within the three year period." See, also, Atchison T. & S. F. Ry. Co. v. Rollaway W. S. Co., 101 Cal.App.2d 763, 767, 226 P.2d 763, and authorities therein cited, particularly Modoc Land & Live-Stock Co. v. Superior Court, 128 Cal. 255, 60 P. 848, and Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470.

[1] The record herein discloses that the return of service was not made as to any of the respondents until July 28, 1954, more than three years after commencement of the instant action. It was therefore mandatory upon the trial court to dismiss the action upon motion.

[2] With respect to her second point, appellant asserts that respondent City appeared in the action by filing its demurrer to the complaint. The cited section requires that such appearance must be made within the three-year period. However, since respondent City's motion to dismiss and its demurrer to the complaint were both filed after the expiration of the three-year period, neither can operate as a waiver of said respondent's right to a dismissal under the provisions of said section 581a, supra.

For the reasons stated, the judgment is affirmed.

132 Cal.App.2d 374

Orval J. QUINN, Plaintiff and Appellant,

v.

WHITEMAN AIRPORT COMPANY, a corporation; Whiteman Air Park, a corporation; Western Aviation Company, a corporation, and John Doe Whiteman, Defendants,

Whiteman Airport Company, a corporation; Marvin E. Whiteman, d/b/a Whiteman Aviation; and Whiteman Air Park, a corporation, Respondents.

Civ. 20493.

District Court of Appeal, Second District, Division 1, California.

April 19, 1955.

Hearing Denied June 16, 1955.

Action against airpark owner, and against lessee of airpark owner's hangar, for injuries sustained when plaintiff, who leased rights from airpark owner, fell when ladder borrowed from lessee broke. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment and order of nonsuit, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that evidence whether ladder had belonged to airpark owner was insufficient to present issue of owner's negligence.

Judgment affirmed.

1. Negligence ⇐136(18)

In action by owner of airplane, who leased rights from airpark owner, against

airpark owner for injuries sustained when airplane owner, who had borrowed step-ladder from lessee of airpark owner's hangar, fell due to defect in ladder, evidence whether the ladder had belonged to airpark owner was insufficient to present an issue of negligence in respect to airpark owner.

2. Bailment ⇐9

Where plaintiff, who leased rights from airpark owner, borrowed stepladder from lessee of airpark owner's hangar, he assumed risk of any open and obvious defect, and could not recover for injuries sustained by reason of a defect not open and obvious in absence of showing that lessee knew or should have known of defect.

3. Negligence ⇐121(3)

Doctrine of res ipsa loquitur did not apply to action for injuries sustained when plaintiff, who leased rights from defendant airpark owner, borrowed a stepladder from another lessee, and fell when rung on ladder broke.

4. Master and Servant ⇐332(1)

In action against airpark owner and lessee of airpark owner's hangar for injuries sustained when plaintiff, who leased rights from airpark owner, fell when step-ladder borrowed from lessee broke, evidence was insufficient to present issue whether employee of lessee who had loaned ladder had been ostensible agent of airpark owner.

Murchison & Cumming, R. Bruce Murchison and Bicknell J. Showers, Los Angeles, for appellant.

Sampson & Dryden and R. S. Harrington, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff rented for $10 a month the right to land and take off and to tie down his airplane at the airpark of defendant Whiteman Airport Company. This was the fictitious name of a business owned and conducted by Marvin E. Whiteman.

Western Aviation Company, the other defendant, leased from Whiteman Airport Company a large airplane hangar, with the concession for the sale of gasoline and oil.

On May 24, 1952, plaintiff appeared at the airpark, intending to wash his airplane. He saw a step-ladder standing on the premises of Western Aviation Company, and asked an employee of that company if he could borrow it to wash his airplane. This employee said "sure, go ahead and use it."

So plaintiff took the ladder and put it up close to the side of his airplane. Unfortunately when he climbed to the third step of the ladder and put both feet on it, it gave way. He was holding a water hose, and in trying to maintain his balance he fell and broke both of his arms.

After the accident it was found that the iron rod under the third step of the ladder was broken. It appeared to be a fresh break.

Plaintiff brought this action for personal injuries against the two defendants named, and the individual owners, and a jury was sworn to try the issues. When he rested his case the trial judge granted motions for nonsuit by both defendants. Plaintiff appeals from the order and judgment that followed.

[1] Using the well known rules for testing the legality of granting nonsuits, it appears that plaintiff failed to prove ownership of the ladder by Whiteman Airport Company. About five months before the accident Mr. Whiteman had found a defective wooden ladder being used at the airpark, and ordered it placed in a pen, to be destroyed. But there is no evidence that this was the same ladder used by plaintiff. He, therefore, failed to prove any negligence as against Whiteman Airport Company.

[2] It may be inferred that the other defendant, Western Aviation Company, owned the ladder. But, giving that inference its full effect, Western was no more than a gratuitous lender of a chattel. Plaintiff had to take whatever risk there may have been of the defective condition of the ladder, if it was open and obvious. And if defects are not open and obvious, liability will not be imposed unless there is proof that the owner of the instrumentality knew or should have known of such defects.

Nagle v. City of Long Beach, 113 Cal.App. 2d 669, 248 P.2d 799.

[3] The doctrine of res ipsa loquitur is not applicable under the facts in this case. LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665.

[4] And there is no evidence that would support the inference that the employee of Western who loaned the ladder to plaintiff was the ostensible agent of Whiteman.

The judgment and order are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 402

Mario P. DEAS, doing business as Electric Motor Shop, Plaintiff and Respondent,

v.

LIDO LUMBER COMPANY, a corporation, Defendant and Appellant.

Civ. 8554.

District Court of Appeal, Third District, California.

April 19, 1955.

Action, grounded on fraud and mistake, to have default judgment declared null and void and to recover proceeds of sale under judgment. The Superior Court, Mendocino County, Lilburn Gibson, J., denied corporate defendant's motion for change of venue, and defendant appealed. The District Court of Appeal, Schottky, J., held that action to have Mendocino County Superior Court judgment declared null and void and to recover proceeds of sale under such judgment was transitory, and defendant was entitled to have action transferred to county wherein defendant's principal place of business was located.

Order reversed with directions.

1. Venue ⇐21

The general rule is that a defendant is entitled to have actions tried in county of his residence and right of plaintiff to have action tried elsewhere is exceptional and must find its justification in terms of some statute, and it is plaintiff's duty to bring himself within some exception if he can.

2. Judgment ⇐443(1)

Equity has jurisdiction of actions for relief against fraudulently procured judgments.

3. Courts ⇐481

Fraudulent judgment obtained in one court may be annulled by other courts of general and equal jurisdiction.

4. Venue ⇐4, 46

Action, grounded on fraud and mistake, to have Mendocino County Superior Court judgment declared null and void and to recover proceeds of sale under such judgment was transitory, and corporate defendant was entitled to have action transferred to county wherein defendant's principal place of business was located. West's Ann.Code Civ.Proc. § 473.

Lawrence L. Light, Los Angeles, for appellant.

Robert L. Winslow, Willits, for respondent.

SCHOTTKY, Justice.

Plaintiff filed an action in Mendocino County to have a certain default judgment against him declared null and void and to recover the proceeds of the sale of a pickup truck which was sold under said judgment. Defendant corporation demurred and filed a notice of motion for change of venue to Los Angeles County where its principal place of business was. This appeal is from the order denying said motion.

The complaint alleges that on June 6, 1952, the appellant filed a claim and delivery action, No. 17857, against respondent in Mendocino County to obtain delivery of three electric motors; that on June 16, 1952, the summons and complaint in said action were served on respondent and the sheriff

took the described motors into his possession; that respondent is of the Cuban race and not well versed in the English language; that due to prior dealings with appellant, respondent understood appellant was claiming certain specific motors and that when the sheriff picked up the motors respondent thought the matter was disposed of and did not understand that appellant was also seeking damages in said action; and that such a situation was likely to deceive respondent.

The complaint alleges further that unknown to respondent his default for failure to appear in said action No. 17857 was entered on July 12, 1952; that on March 16, 1953, judgment by default was entered against respondent for $1,313.54; and that respondent had no knowledge of this until about April 28, 1953, when levy was made upon a truck owned by him; that appellant "willfully and with the intention to lull this plaintiff into a false sense of security deferred from taking further proceedings in this action after July 12, 1952," so that after six months respondent would lose his rights under Code of Civil Procedure, § 473, to have the default vacated; that had any knowledge of the default come to respondent during this period he would have diligently moved to vacate the default under Code of Civil Procedure, § 473; that respondent has a defense to the action brought by appellant, in that the damages granted to appellant are based upon depreciation of the equipment, and respondent alleges that no depreciation occurred in such amount or in any amount at all; that the levy on the pickup truck did not satisfy the judgment; and that unless restrained the appellant will have another execution issued and will levy on additional property of respondent, to his irreparable harm and damage.

The prayer of the complaint asks that the judgment in No. 17857 be vacated, that appellant be directed to pay the proceeds of the sale of the pickup truck to respondent and that appellant be forever enjoined from executing such judgment.

Appellant's affidavit in support of the motion for change of venue set forth that the principal place of business of defendant corporation was in Los Angeles County. No counter-affidavit was filed. In denying the motion the trial court stated: "If any attack is to be made upon this judgment it must be made in this Court and not in some other Court. As was said in the case of Brown v. Happy Valley Fruit Growers: 'Under a system where courts are given coordinate jurisdiction, one court will not interfere with the judgment of another court of coordinate jurisdiction except where the exigencies of the situation are so exceptional or pressing as to demand the summary intervention of the equity side of said court of coordinate jurisdiction.' 206 Cal. 515, 523, 274 P. 977."

Appellant contends that it was entitled to have the action transferred to the county of its residence and that the trial court erred in holding that an equitable action to set aside the judgment rendered in Mendocino County could only be determined in the county that rendered the judgment. Respondent has waived the filing of any brief.

The instant action being based on alleged fraud and mistake and praying for equitable relief is without doubt a personal and transitory action, and appellant would, of course, be entitled to have it transferred to the county of his residence unless the fact that the judgment sought to be declared void was rendered in Mendocino County required it to be tried in Mendocino County.

[1] The well settled rule is as stated in Goossen v. Clifton, 75 Cal.App.2d 44, at page 47, 170 P.2d 104, at page 107:

> "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence."

In Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977, the case upon which the trial court evidently based its decision on the motion, the plaintiff filed an action in Shasta County attacking on the ground of fraud a judgment which had

been obtained in Alameda County. Appellants who were residents of Alameda County made a motion for change of venue to Alameda County. They appealed from the order denying their motion, and the Supreme Court, in reversing the judgment, held that the action was personal and transitory and stated, 206 Cal. at page 521, 274 P. at page 979:

"The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.' Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209."

The court also made the statement quoted by the trial judge in ruling upon the motion in the instant case, and then stated, 206 Cal. at page 523, 274 P. at page 980:

"We are of the view that the proper place of trial of said cause was the county of Alameda upon both of the grounds considered herein; certainly upon the ground that the action was personal and transitory and none of the defendants resided in the county of Shasta."

It must be borne in mind that in the Brown case the county in which the judgment attacked was rendered was also the county of defendants' residence and that the general statement that one court will not interfere with the judgments of another court of coordinate jurisdiction can hardly be regarded as authority in support of the denial of appellant's motion in the instant case.

[2] The statement of the trial court that the instant action could not be transferred to Los Angeles County where the defendant resides because it was an action in equity for fraud which constituted an attack upon a judgment rendered in Mendocino County, is answered by the language of the court in Young v. Young Holdings Corporation, 27 Cal.App.2d 129, at pages 146–147, 80 P.2d 723, at page 733, as follows:

"The principal purpose of this action is to establish that defendants gained title to the property in question through fraud and deceit; that they hold the property in trust for the plaintiff and the intervenor; to compel defendants to execute the trust by reconveyance of the property to its rightful owners.

"The argument that this action should have been commenced in Kern county is answered by the provisions of section 392 of the Code of Civil Procedure, Herd v. Tuohy, 133 Cal. 55, 65 P. 139, and Kimball v. Tripp, 136 Cal. 631, 69 P. 428. In the Herd case it was said (page 140): 'As to the jurisdiction of the court, there can be no serious question. The superior court is vested by the constitution (article 6, § 5) with jurisdiction over "all cases in equity"; and cases of this kind—that is, for relief against judgments on the ground of fraud in their procurement—constitute a familiar and well-established head of equity jurisdiction. Freem. Judgm. § 484a; Daniell's Ch.Prac. 1584, 1585. Nor—with an exception to be noted presently—in this jurisdiction vested in any particular superior court or courts. Every superior court—with the exception alluded to—has jurisdiction of all equity cases that may be brought in it.'

"The exception noted is contained in section 392 of the Code of Civil Procedure. This section requires actions to quiet title to real property to be commenced in the county in which the property or any part of it is situated."

[3] The general rule is well expressed in the case of Bullard v. Zimmerman, 82 Mont. 434, 268 P. 512, at pages 516–517:

"California has, in this respect, constitutional and statutory provisions identical with ours, and, in just such a suit as this, one to annul, for fraud, a judgment, the Supreme Court of California has passed squarely upon this

question and has upheld jurisdiction, holding the suit may be brought in any county of the state, subject to transfer, regardless of where, in the state, the judgment attacked was rendered. Herd v. Tuohy, 133 Cal. 55, 65 P. 139. It is the general holding.

"The fact that a fraudulent judgment was obtained in one court does not deprive other courts of general and equal jurisdiction from exercising their equity powers to annul it. [Citing numerous authorities.] Citations might be greatly extended.

" 'There is no reason, under proper circumstances, why one court may not afford equitable relief against the judgments of other courts and they are constantly doing so.' 3 Freeman on Judgments (5th Ed.) 2450 and long list of cases cited.

" 'An independent suit, the object of which is to set aside a decree because of conspiracy and fraud resorted to and practiced in procuring the same, is not necessarily required to be brought in the court where said decree was rendered, but may be instituted in any court of competent jurisdiction.' Sayers v. Burkhardt, supra [4 Cir., 85 F. 246].

" 'It is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be shown to have been obtained by manifest fraud.' State ex rel. Phelan v. Engelmann, supra [86 Mo. 551].

"The cases cited by defendant O'Sullivan are cases in which one court sought to interfere with the process of another court of equal jurisdiction, in a live case, still at issue, with the litigation in progress, which may not be done. It is entirely different when a case is at an end, merged in a judgment, and suit is brought to annul the judgment on the ground of fraud. We hold that the court in which this suit was instituted had jurisdiction, and therefore so had the court to which it was transferred."

[4] We are convinced that both reason and authority justify the conclusion that the instant action is a transitory action and that appellant was entitled to have it transferred to Los Angeles County where its principal place of business is located, and that there is no requirement that it must be tried in the county where the judgment attacked on grounds of fraud and mistake was rendered. It follows that the trial court erred in denying appellant's motion to change the place of trial to Los Angeles County.

The order is reversed with directions to grant appellant's motion.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 433

Viola Mae MATHEWS et al., Plaintiffs and Appellants,

v.

John C. BRINTON and Aileen Brinton, sued herein as Margaret Brinton, husband and wife, Defendants and Respondents.

Civ. 5048.

District Court of Appeal, Fourth District, California.

April 19, 1955.

Action to quiet title to easement for right-of-way over defendants' land. The defendants filed a cross-complaint seeking to quiet their title as against plaintiffs. The Superior Court of Riverside County, John G. Gabbert, J., entered judgment in favor of defendants and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that evidence supported trial court's findings that plaintiffs did not have or did not claim an easement across defendants' land during any period of time, and that plaintiffs did not use road adversely but that such use as plaintiffs did make of road was permissive use.

Judgment affirmed.

1. Easements ⇐5

A prescriptive right to an easement for right-of-way over another's land may be acquired only by clear evidence of adverse use openly, notoriously and continuously asserted under claim of right for statutory period of five years, and with notice of which defendants and their predecessors could be charged.

2. Easements ⇐37

Question as to whether use of road over land of another was adverse or was permissive is one of fact for trial court.

3. Adverse Possession ⇐112
Easements ⇐36(1)

Burden of proving all essential elements of an adverse possession or prescriptive right is on party relying upon it.

4. Easements ⇐36(1), 37

Question as to effect of any presumption that use is under claim of right and adverse to owner of land, must be considered along with showing as to nature of use during prescriptive period, with all other facts of case, and is one of fact for trial court which must decide whether proven facts do or do not justify an inference showing required elements.

5. Easements ⇐36(3)

In action to quiet title to right-of-way over defendants' land, evidence supported trial court's findings that plaintiffs did not have or did not claim an easement across defendants' land during any period of time and that plaintiffs did not use road adversely but that such use as plaintiffs did make of road was permissive use.

6. Easements ⇐36(1)

Where, in action to quiet title to right of way over defendants' land, evidence disclosed permissive use of road by plaintiffs' predecessor, it could be inferred that predecessor's employees were included in the permission.

Alva D. McGuire, Riverside, for appellants.

Thompson & Colegate, H. M. Dougherty, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to an easement for a right of way over land owned by the defendants.

The Indians of the Morongo Tribe own the northeast quarter of a certain section of land in Riverside County. It is located six miles from the Morongo Reservation, and will be referred to as the Indian land. There was no house or other building on this land, which is hilly and covered with brush except for 40 acres which had been cleared. The land was used for pasturage at times, and some farming was done on the cleared portion.

The defendants, who are husband and wife, acquired the southeast quarter of this section in 1941. For convenience, the husband will at times be referred to as the defendant. There are county roads along the west and south sides of this section. For many years there has been a drive or roadway near the center of the defendants' quarter section, running northerly from the county road at the south up to the home and farm buildings, and thence northerly to a gate in the fence between this property and the Indian land.

For a year or two after 1941, John Morongo, who at intervals was spokesman for the Morongo Tribe, did some farming on the Indian land and he and other Indians who were working for him used this road across defendants' land. The defendant then leased the Indian land from John Morongo and used it until 1949. Between 1941 and 1946, the defendant also acquired the land to the east and to the north of the Indian land. Because of his lease, he was able to take his stock across the Indian land, and on to his land at the north. John Morongo died in 1949, and some of the plaintiffs then locked the gate between these two quarter sections thus preventing the defendant from crossing the Indian land in order to reach his land to the north. In November, 1949, the defendant bought the easterly 30 feet of the northwest quarter of this section, in order to have access to his land lying north of the Indian land. Since January, 1950, he has denied to the plaintiffs

the use of this roadway leading to his home and across his property.

In December, 1950, counsel for the plaintiffs wrote the defendant claiming that his purchase of the 30-foot strip was for the purpose of excluding the Indians from any means of reaching their land, and stating that unless the defendant granted them a right-of-way by which they could reach their property, suit would be commenced to restrain him from closing the road in question. On January 3, 1951, the defendant gave them a written easement granting to the Indians a right to pass over the north 30 feet of the 30-foot strip, along the west side of the Indian land, which he had purchased. However, this writing was not acknowledged. It appears that the purpose of this was to enable the Indians to use, so far as the defendant was concerned, a roadway leading from the county road at the west of this section and entering the Indian land at that point. The Southern California Edison Company, which had an easement for that road, had given the Indians written permission to use that road and the owner of the northwest quarter of this section also gave the Indians permission, orally, to use that road over his land. Being dissatisfied with the easement thus given them, this action was brought by "Viola Mae Mathews, Spokeswoman for the Morongo Tribe of Indians, for herself as well as for all other members of the tribe residing on the Morongo Indian Reservation."

The complaint alleged that for more than 50 years the Morongo Tribe of Indians have had and claimed an easement over and across the land of the defendants for the use of the road here in question; that their use of said easement during all of said period has "been open, notorious, visible and continuous, without protest, opposition or denial of right"; and that on January 5, 1950, the defendants wrongfully denied the members of the tribe further use of said road easement. In a separate cause of action damages were sought, based on the claim that the defendants had maliciously encircled the Indian land with the purpose of preventing them from entering said land. The defendants answered and filed a cross-complaint seeking to quiet their title as against the plaintiffs. The court found in all respects in favor of the defendants finding, among other things, that the defendants' refusal to allow the Indians to use the road since January 5, 1950, was not wrongful; that the Indians have not had or claimed an easement across defendants' land during the past period of 50 years or during any period of time; that they have not used the road adversely but such use as they have made of the road has been permissive use; and that they are not entitled to damages. As conclusions of law, it was found that the plaintiffs should take nothing from the defendants, and that the defendants should have judgment quieting their title in accordance with the allegations of their cross-complaint. Judgment was entered accordingly.

After hearing the plaintiffs' motion for a new trial, the court entered an order to the effect that a new trial would be granted unless the defendants granted a permanent right-of-way to the plaintiffs over and across the 30 x 30-foot square area covered by the written easement given to the Indians by the defendant on January 3, 1951. The defendants were given up to a certain date "to have the proper documents drawn for that purpose." Before that date arrived the plaintiffs, apparently declining the advantage tendered them by this order, appealed from the judgment. The defendants notified the court that they were willing to grant the right-of-way mentioned in this order.

The appellants' main contention is that the evidence is not sufficient to sustain the findings with respect to their use of this right-of-way over the past years. It is argued that the evidence shows that they used this easement for over 39 years; that their long continued use raises a presumption which supports their claim of right; that there was no competent evidence that their use was permissive at any time, since "there is no reason why John Morongo should have asked permission to use a roadway the Indians had been using for at least 31 years before that time"; that their title to such an easement had vested prior to the time the defendants acquired the southeast quarter of this section; that the respondent had

excluded the appellants from the only possible means of reaching their property; and that the grant of an easement given them by the defendant on January 3, 1951, was void since it was improperly executed.

A witness for the plaintiffs testified that the road across the Brinton property was "the only road we traveled to get onto our land", that he knew of no other road, and that neither Mr. Brinton nor anyone else who owned this land had ever told him that he should not use that road. He further testified that he used that road in 1911 to haul out some hay and a hay baler; that he was then working for John Morongo; that he did not work for Morongo at any later time; and that all the facts to which he testified took place in 1911. The widow of John Morongo testified that she first traveled this road in 1911 "when he (John Morongo) went to farming"; that at that time there was no other means by which the Indians could reach their land; that John Morongo farmed the Indian land "off and on from 1915 until about 1947"; that he farmed it on his own accord for himself; that she went over the road with him and "lots of times" by herself; that he used the road to haul his hay out and take stock in; that, aside from herself and her husband, "all the men that used to work for us went in there"; and that after 1940 her brother went in to haul out some hay. Another witness, when asked how long he had traveled that road, replied: "Since 1911, I guess, when I was working for Mr. Morongo." He also testified that he knew of no other road at that time on which to get to the Indian land. Viola Mae Mathews, the present spokesman for the Indians, testified that she had known the Indian land since 1919, that the land had been used for farming and from time to time for livestock grazing, and that the land had been used by the Indians since 1919. She further testified that she was not on this roadway, or had not seen anyone on this roadway between 1941 and 1951 "because John Morongo had that property leased in behalf of the Morongo Tribe. He and his farm hands traveled that road, the Indian employees." Another witness testified that he had used this road while working with a hay baler crew around 1923 and 1924, that he had gone over the road in 1948, and that Mr. Brinton had never said anything to him about using the road. Another witness testified that he had used the road in 1922 or 1923 when working for John Morongo, and had hauled some hay in 1944 or 1945 while in partnership with John Morongo.

The defendant testified that when he purchased his property he did not know that the Indians had used this roadway or had any reason to use it; that shortly after he acquired the property John Morongo told him that he wanted to go up there with his team to do some work, and asked permission to use this road; that he gave him permission to do so; that during the time John Morongo worked the Indian land he took others along with him to assist in the work, sometimes two sometimes more; and that John Morongo worked the Indian land under this permission for a year or two, and then he leased the land from John Morongo. A written lease dated December 8, 1944, and signed "John Morongo" was introduced in evidence. The defendant also testified that he then farmed or operated the Indian land until John Morongo's death in 1949; that when he purchased the property there were signs posted at the entrance from the public road to this roadway, and along the roadway, saying that this was private property; and that similar signs have been kept posted ever since.

[1–4] It is well settled that a prescriptive right to an easement of this kind may be acquired only by clear evidence of adverse use openly, notoriously and continuously asserted under a claim of right for the statutory period of five years, and with notice of which the defendants and their predecessors could be charged. Dooling v. Dabel, 82 Cal.App.2d 417, 186 P.2d 183; O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10. The question as to whether the use of such a road was adverse or was permissive is one of fact for the trial court. Carroll v. Agliano, 80 Cal.App.2d 46, 180 P.2d 747. The burden of proving all the essential elements of an adverse possession or prescriptive right is on the party relying upon it. Nelson v. Robinson, 47 Cal.App.2d 520, 118 P.2d 350. The question as to the effect of

any presumption that the use is under a claim of right and adverse to the owner of the land, must be considered along with the showing as to the nature of the use during the prescriptive period, with all other facts of the case, and is one of fact for the trial court which must decide whether the proven facts do or do not justify an inference showing the required elements. O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10.

[5, 6] Under the established rules, it must be held that the evidence supports the court's findings as to the essential facts relating to the existence or nonexistence of the right of the appellants to this claimed easement across the respondents' land. The evidence produced by the appellants was sketchy, at best, with little or no showing of continuous or uninterrupted use over the years. There was no substantial evidence indicating a hostile use of the road, under an adverse claim of right, as distinguished from the acceptance of an ordinary neighborly accommodation. The evidence indicated that the only farming done on the Indian land, and the only fairly continuous use of the roadway, between 1911 and 1941 was that done and made by John Morongo. Nearly all of the witnesses who testified to any use of the land during that period were his employees. The evidence indicates that there was a gate across this roadway between respondents' land and the Indian land for many years, and there is no evidence that any claim of right was ever openly or notoriously asserted. Morongo himself seems to have regarded his use of the roadway as permissive, since he asked permission of the new owners of the land when he desired to use the roadway after they took possession. The uncontradicted evidence is that John Morongo then used the roadway with permission of the respondents for two or three years, and until he leased the land to the respondents. It may reasonably be inferred that his employees were included in this permission. Except for one occasion, there is no evidence that the land was used by any of the plaintiffs during the period while the Indian land was leased by the respondents. Signs were posted for many years calling attention to the fact that this was private property. The evidence, with the inferences which may reasonably be drawn therefrom, fully supports the court's findings.

Whether or not the appellants had other means by which they could reach their land is not a controlling issue in this case. Not only does the evidence not disclose any duty resting upon the respondents to furnish a means of ingress and egress to the appellants, but the evidence discloses another means of ingress was available to them. Some contention is made that the trial court had no jurisdiction "to attempt to coerce the tribe into accepting an easement across defendants' 30 x 30-foot parcel," because the tribe had acquired a vested easement over the roadway in question, and because any such order would be an idle act since the permission of others would be required to give effective access to their land. The evidence is not sufficient to establish such a vested easement and the court's attempt to give the appellants some relief was not an idle act since, if carried out, it would enable them to use the permission given them by the other owners by crossing defendants' land at this point. In considering the equities of the case, upon which the appellants seem to rely, it may not be amiss to point out that when this appeal was argued this court suggested the desirability of a compromise, and deferred submission for sixty days for that purpose. During that period the respondents offered to grant to the appellants a right-of-way for a road along the west side of the southeast quarter of this section, leading directly from the county road at the south to the south line of the Indian land. This offer was rejected by the appellants, and this court was asked to decide the appeal on its merits.

The only other contention made is that the court erred in striking out two answers made by one witness, and in sustaining an objection to one question asked of the same witness. Two of these matters were immaterial, the third was not responsive to the question asked, and none of them could conceivably have affected the result.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

132 Cal.App.2d 387

Mary A. ROLINSON, Plaintiff and Appellant,

v.

Myron A. ROLINSON, as Executor of the Last Will and Estate of George H. Rolinson, deceased, Defendant and Respondent.

Civ. 20611.

District Court of Appeal, Second District, Division 3, California.

April 19, 1955.

Action by widow against husband's executor to quiet title to certain shares of stock. Executor cross-complained to recover stock or market value thereof. The Superior Court, Los Angeles County, Wallace L. Ware, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeals, Shinn, P. J., held that evidence sustained finding that no gift had been effected.

Judgment affirmed.

1. Appeal and Error ⇐989

District Court of Appeal cannot retry facts.

2. Evidence ⇐590, 594

Witnesses ⇐315

Trial court need not accept uncontradicted testimony, and may be justified in disbelieving witnesses in view of their interest in result of case, motives or manner of testifying.

3. Gifts ⇐18(1, 2)

To consummate a gift of personal property without consideration, it is necessary that there be an immediate surrender of article, together with all dominion and control over it, and if donor retains dominion and control until death, there is merely an unexecuted and unenforceable promise to make a future gift.

4. Gifts ⇐16

A promise to make a gift does not accomplish transfer of title so as to constitute promisee owner of property.

5. Appeal and Error ⇐1054(1)

Husband and Wife ⇐49½(8)

In widow's action against deceased husband's executor to establish alleged gift of certain shares of stock, admission of letter which husband had written at time of separation and estrangement and in which he referred to wife as a "gold digger" was improperly admitted, but its admission was not harmful where it appeared that trier of fact had attached no importance to this evidence of husband's previous state of mind.

6. Husband and Wife ⇐49½(8)

In widow's action against husband's executor to claim certain shares of stock as a gift from husband, evidence sustained finding that widow had not received title to the stock.

John W. Hill, Los Angeles, for appellant.

Carl B. Sturzenacker, Hollywood, and Walter Monarch, Los Angeles, for respondent.

SHINN, Presiding Justice.

The principal question on this appeal is whether there was sufficient evidence to support a finding that Mary A. Rolinson did not receive title to certain corporate stock by gift of her husband, George H. Rolinson, since deceased. Mrs. Rolinson brought suit against the defendant, Myron A. Rolinson, executor of the estate of the deceased, to quiet title to certain specifically described shares of stock. She alleged that the decedent made a gift of the stocks to her during his lifetime and that she is now owner of them and entitled to their possession. Defendant denied those claims and filed a cross-complaint seeking recovery of possession of the stock or their fair market value. The court found that plaintiff had no interest in the stocks, and gave judgment for defendant for possession for purposes of probate administration. From that judgment Mary A. Rolinson appeals.

The cross-complaint filed by the respondent and defendant contained four separate causes of action. The first was for cancellation of a joint tenancy deed of the real property of the decedent on which his home was situated, executed by him on September 10, 1952, in favor of himself and the appellant. It was alleged the deed was procured

through fraud, when deceased did not possess sufficient mental capacity to make a valid transfer. The court entered judgment for the appellant on this count. The second cause of action was for recovery of a Packard automobile that was transferred to appellant on the same date. Judgment was for the appellant on this count. The third cause of action, with which this appeal is concerned, was for recovery of the stocks in question, and for the recovery of certain articles of household furniture which the appellant had in her possession. Judgment was for the appellant as to the furniture, and for respondent as to the stock. The fourth cause was for money had and received by the appellant for the use of respondent. Judgment was for the appellant on this count. Appellant therefore appeals only from that portion of the judgment on the third cause of action awarding possession and title to the stock to the respondent.

The main issue is whether a valid inter vivos gift of the stock was made on September 28, 1952, four days before decedent's death on October 2, 1952.

George Rolinson and appellant were married November 21, 1950. Deceased was then 74 years of age and appellant was 54. After about seven months of marriage, appellant moved into another bedroom in decedent's house, and moved out of the house in June of 1952. The parties remained separated until an alleged reconciliation shortly before the death of George. June 23, 1952, Mary filed a separate maintenance action against George and July 12th was awarded $125 a month support pendente lite. July 24th an order to show cause re contempt was issued against the husband, returnable August 11th.

George made a will on July 7, 1952, disinheriting Mary. Late in August he was stricken with the illness that ultimately resulted in his death. He had been suffering from a heart ailment. On September 6th Mary returned to her husband and stayed with him until his death. Appellant testified that George said: "It was a lonely time of my life when you were gone." She also testified that he was not argumentative and belligerent after the reconciliation, that both were very sorry for what they had done, and George was free with his money where previously he had provided very little.

The return of appellant was followed shortly by the placing of the house in joint tenancy, and the transfer of the automobile to her. On September 28th the alleged gift of the stock took place. George was sitting up in his bed, and appellant, appellant's sister, a Mrs. Eckert, and Mr. Robert Green were visiting. Appellant and Mr. Green, however, were the only ones present at the time of the gift. Mrs. Eckert had stepped out for about a half hour to go to the drugstore.

[1] Appellant contends that the uncontradicted testimony of herself and Green shows a valid gift of the stock and that the court was required to so find. This court cannot retry the facts. Green, it seems, was not a disinterested witness. He had a special interest in appellant's sister, Mrs. Eckert, who was sometimes known as Mrs. Green. Appellant and Green testified that George told appellant to "go get the box with the stocks in them," referring to a tin box usually kept in a closet. She brought the box to him, at which time he took the certificates, looked them over, and said: "Mary, I want you to have these. These are yours." Then he closed the box and told her to put it back where she had gotten it, which she did. He did not endorse the stock to Mary, but said "he was going to have things changed in a few days." No reference was made to the remaining contents of the box which consisted of some pipes and jewelry, and certain papers, including a worthless bond, which were voluntarily turned over to the estate. Appellant testified that she knew endorsement was required to transfer title to the stocks. At a meeting immediately after decedent's funeral, in conversations with relatives after the death of George, Mary asserted no claim to the stocks and said that everything of value would be turned over to the estate.

The court either disbelieved the testimony of appellant and Green or believed that George did not intend by his acts and words to make a gift of the stocks to appellant.

[2] It is not the law that a trial court must accept as true the testimony of witnesses that is uncontradicted. Their interest in the result of the case, their motives and the manner in which they testify may be such as to justify the court in disbelieving their testimony. Giannini v. Bank of America, 101 Cal.App.2d 805, 226 P.2d 712; Odenthal v. Lee, 113 Cal.App.2d 666, 248 P.2d 937. In several respects which need not be enumerated the testimony of appellant and Green was subject to suspicion and it was obviously tainted by their motives and their interest in the result. The court would have been justified in disbelieving them. Upon the other hand, if the court had believed that they testified truthfully it still would not appear as a matter of law that the alleged donor had an intent to make a gift of the stock.

[3, 4] In Morehead v. Turner, 41 Cal. App.2d 414, 106 P.2d 969, 973, it was said: "It is a uniform rule that to consummate a gift of personal property without consideration, under sections 1146–1148 of the Civil Code, it is necessary that there shall be an immediate surrender of the article which is the subject of the gift, together with all dominion and control over it. If dominion and control over the gift is retained by the donor until his death, it becomes merely an unexecuted and unenforceable promise to make a future gift. Beebe v. Coffin, 153 Cal. 174, 94 P. 766". This is the settled law. A promise to make a gift does not accomplish a transfer of title so as to constitute the promisee the owner of the property. Burke v. Bank of America etc. Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; Hart v. Ketchum, 121 Cal. 426, 53 P. 931; Beebe v. Coffin, supra, 153 Cal. 174, 94 P. 766. There was evidence from which the court could properly determine that at most George intended to transfer the stock to Mary at a future date.

[5, 6] In a letter dated July 29, 1952, George wrote his brother in Ohio that he would be unable to join his brother for the fiftieth anniversary celebration of a particular club, in which letter he referred to appellant as a "gold digger." This letter was received in evidence over objection of appellant. The letter should not have been received in evidence. The state of mind of George at a time when he was separated and estranged from his wife had no relevancy to the state of his mind some months later, after they had become reconciled. The fact that he had referred to his wife as a "gold digger" was without value as evidence of the fact in issue. Estate of Anderson, 185 Cal. 700, 718, 198 P. 407; Estate of Higley, 64 Cal.App. 664, 222 P. 626. But the error was harmless. The court believed that George willingly placed the home in joint tenancy and gave appellant the automobile and the articles of personal property. Thus the court impliedly determined that whatever poor opinion he held of her during the separation had been replaced by a belief that she was worthy of these gratuities. It is clear that the court attached no importance to the evidence of his previous state of mind. The record presents no deprivation of a fair trial and obviously the judgment reflects no miscarriage of justice.

The judgment is affirmed.

PARKER, WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 419

COUNTY OF SACRAMENTO, Petitioner,

v.

James H. HASTINGS, as Auditor of the County of Sacramento, State of California, and Ray G. Houston, as Treasurer of the County of Sacramento, State of California, Respondents.

Civ. 8830.

District Court of Appeal, Third District, California.

April 19, 1955.

The County of Sacramento filed a petition for writ of mandate to compel County Auditor to issue and pay a number of warrants for certain employees of the County Engineer's Office. The District Court of

Appeal, Schottky, J., held that where there was no good reason why petition should not be filed in Superior Court, and there was no such emergency as would justify District Court of Appeal in exercising its original jurisdiction, petition would be denied without prejudice to right of County to file similar petition in Superior Court.

Application denied.

1. Courts ⇐207(4)

If petition for writ of mandate can lawfully be made in Superior Court, it should not be filed in District Court of Appeal, unless there is some good reason why it should not be filed in Superior Court.

2. Courts ⇐207(4)

Where there was no good reason why petition for writ of mandate to compel county auditor to issue and pay certain warrants was not presented to Superior Court instead of to the District Court of Appeal originally, and there was not such an emergency as would justify District Court of Appeal in exercising its original jurisdiction, petition would be denied without prejudice to right to file similar petition in Superior Court.

3. Courts ⇐207(4)

It is not the policy of the District Court of Appeal to encourage institution of original mandamus proceedings in the District Court of Appeal, when such proceedings could as well have been instituted in the Superior Court of the county where the controversy arose.

J. Francis O'Shea, Dist. Atty., John B. Heinrich, Supervising Deputy Dist. Atty., Hugh A. Evans, Deputy Dist. Atty., Sacramento, for petitioner.

Robert W. Cole, Public Defender & Floyd Gibbert, Asst. Public Defender, Sacramento, for respondent.

SCHOTTKY, Justice.

The county of Sacramento, by and through its County Executive, has filed in this court a petition for writ of mandate to compel respondent County Auditor to issue and pay a number of warrants for certain employees of the County Engineer's office. It is alleged that said employees were required to and did perform certain standby and extra work to meet any and all emergencies that might arise in an unforeseen manner, and which would be emergencies within and affecting any one of the sewer, water, and/or storm drain districts in the county of Sacramento; that said services were performed under and authorized by Ordinance No. 482 of the county of Sacramento; and the petition alleges further that respondent County Auditor has refused to issue said warrants. The petition alleges as the reason for filing the petition in this court that the public interest requires a speedy determination of the matter.

Respondent County Auditor has filed an opposition to said petition in which he contends that the petition should have been filed in the Superior Court, and further that the claims are illegal because said Ordinance No. 482 authorizing them is contrary to the provisions of the charter of the county of Sacramento.

[1, 2] The rules with reference to original proceedings in reviewing courts require: "(1) If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court." It was never intended that such applications should be filed in an appellate court unless there was some good reason why it should not be filed in the superior court, and we are unable to find in the instant proceeding any such emergency as would justify this court in exercising its original jurisdiction. There is no good reason why this matter should not be presented to the Superior Court of Sacramento County. Said court, by reason of its being located in the state capital, has frequent occasion to hear applications for writs against public officials. If it be contended that there might be additional delay because of an appeal being taken, we quote the following language of Mr. Chief Justice Gibson in Phelan v. Su-

perior Court, 35 Cal.2d 363, at page 370, 217 P.2d 951, at page 955:

> "Where, however, as here, there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case."

[3] It is not the policy of this court to encourage the institution of original proceedings in this court when such proceedings could as well have been instituted in the superior court of the county where the controversy arose.

The application for writ of mandate is denied without prejudice to the right of petitioner to file a similar petition in the superior court.

VAN DYKE, P. J., and PEEK, J., concur.

INTERNATIONAL AIRPORTS, Inc., a California corporation, Plaintiff-Respondent,

v.

Charles C. FINN and George C. Finn, Defendants-Appellants.

INTERNATIONAL AIRPORTS, Inc., a California corporation, Plaintiff-Respondent,

v.

Charles C. FINN and George C. Finn, Defendants-Appellants.

Civ. 20076.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Consolidated actions were brought for claim and delivery and to foreclose a chattel mortgage on defendants' airplane, on which plaintiff had performed work, and which defendants had wrongfully taken from possession of plaintiff. The Superior Court of Los Angeles County, Charles J. Griffin, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J., held that where defendants were obligated by contract to repay plaintiff a $15,000 cash loan and cost of labor and materials for repair of defendants' airplane by plaintiff, and defendants, by wrongful removal of airplane from plaintiff's possession, deprived plaintiff of its statutory lien and chattel, which was security for cash loan, plaintiff was entitled to prosecute actions of claim and delivery and for foreclosure of chattel mortgage.

Judgment affirmed.

1. Replevin ⇐8(2)

Action in claim and delivery may be maintained by one who has a qualified interest in property, which is the subject of the litigation, provided that he has a right to its possession.

2. Replevin ⇐8(5)

One who holds property by virtue of a lien may maintain an action in claim and delivery to recover it, if it is wrongfully taken from him.

3. Bailment ⇐18(4)

Where waiver by defendant on its statutory lien against aircraft of plaintiffs for labor performed and materials furnished by plaintiff in improving the aircraft was not absolute, but was expressly made conditional on execution by defendants of note and chattel mortgage, and defendants never executed such note and chattel mortgage, plaintiff did not waive its statutory lien rights in the aircraft. West's Ann.Code Civ.Proc. § 1208.61.

4. Bailment ⇐5

Chattel Mortgages ⇐249

Where delivery of airplane by defendants to plaintiff was required to be made pursuant to provisions of lease before lease became effective after plaintiff performed repair work on airplane, and repair work contemplated by contract was not completed at time defendants took possession of airplane without consent of plaintiff, delivery of airplane for purpose of lease never took

place, and plaintiff was not precluded from foreclosing chattel mortgage given by defendants, on ground that plaintiff had defaulted under lease.

5. Bailment ⇐25

Chattel Mortgages ⇐249

Where defendants were obligated by contract to repay plaintiff a $15,000 cash loan and cost of labor and materials for repair of defendants' airplane by plaintiff, and defendants, by wrongful removal of airplane from plaintiff's possession, deprived plaintiff of its statutory lien and chattel, which was security for cash loan, plaintiff was entitled to prosecute actions of claim and delivery and for foreclosure of chattel mortgage.

6. Evidence ⇐546

It is for trial court to determine, in exercise of sound discretion, competency and qualification of an expert witness to give his opinion in evidence.

7. Appeal and Error ⇐971(2)

Ruling of trial court, in exercise of its discretion, with respect to competency and qualification of an expert witness to give his opinion in evidence, will not be disturbed on appeal unless a manifest abuse of that discretion is shown.

8. Evidence ⇐546

Where witness had been in the United States Air Force as a pilot and as a design and development officer, but he had never operated a commercial repair shop or performed any conversion or licensing work on certain type of airplane, owned by him and his brother, other than some work on their own airplane, trial court did not abuse its discretion in refusing to qualify witness as an expert witness in the field of aircraft repair.

George C. Finn and Charles C. Finn, Hollywood, in pro. per.

A. J. Blackman, Los Angeles, for respondent.

DRAPEAU, Justice.

Defendants owned a Curtiss-Wright C–46 aircraft which they wanted to operate commercially. Plaintiff agreed to do the work required to license the plane for that purpose. Pursuant to an agreement executed by the parties on August 31, 1951, plaintiff lent defendants $15,000. To secure this loan defendants executed a promissory note and a chattel mortgage.

The agreement provided that the required work was to be completed within 90 days after delivery of the plane, defendants to furnish certain necessary items on demand from plaintiff: seats, tail assembly and other fittings; licensing and operating specifications and hull insurance.

It was also agreed that plaintiff should lend defendants additional funds up to $15,000, if required to complete their obligations under the contract. This sum to be added to the preceding loan and new papers executed for the total loan.

Defendants were required by the agreement to pay for the work on an actual cost basis of time, material, reasonable overhead and profit, the total not to exceed $29,500. And such amount was to be added to the preceding loan or loans and a new note and chattel mortgage executed to cover the total sum.

The total amount was to be amortized and paid in 18 equal monthly installments, commencing upon payment by plaintiff of the initial rental required by a lease of the airplane dated August 31, 1951. Succeeding monthly installments under the agreement were to be offset and deducted from succeeding rental payments.

Defendants were privileged to pay to plaintiff the entire balance at any time. And in the event of termination or cancellation of the lease, plaintiff extended to defendants a moratorium on their payments on the note for a period of 120 days or, if sooner, until said plane were sold or released.

Defendants granted to plaintiff "first refusal to purchase said aircraft at the same price and terms as are offered by any other bona fide intended purchaser."

The lease, above referred to, was executed concurrently with the agreement. It ran for a term of 18 months after actual delivery of the plane to plaintiff; such

date to be not later than 90 days after the plane was delivered to plaintiff for performance of the work contemplated by the agreement. The rental for use of the aircraft was $5,000 per month which was subject to offset of defendants' payments on the note and chattel mortgage.

Defendants delivered the aircraft to plaintiff about October 19, 1951. Much of the work performed was done between November 16 and December 20, 1951. On the latter date, work was stopped by plaintiff for failure of defendants to deliver licensing specifications when demanded. Work was resumed sometime in March of 1952. About April 14th, defendants told plaintiff they could not deliver the seats and other equipment or the licensing specifications; and requested that plaintiff put the plane in bare flyable condition. Accordingly, plaintiff commenced additional work on the plane to put it in that condition under an agreement drawn up for that purpose. However, about April 18th, defendants brought in their own crews, utilizing the hangar and the shops of plaintiff, and proceeded to do the work themselves.

On May 25, 1952, the aircraft was in plaintiff's hangar. That day, a man driving a truck came onto the field and unloaded some radios. "He opened the gate, let in a truck, a surplus arms carrier, with the Finns and three other men." The plane was towed a distance of 80 to 100 feet to the west side of the hangar, and the engines started. It was then taxied to the north end of the runway where it was parked on the ground. The six men returned to the truck and drove out the gate. A few days later the plane took off, headed north.

Shortly thereafter, plaintiff brought the instant actions against defendants for claim and delivery and for foreclosure of the chattel mortgage of August 31, 1951.

The two suits were consolidated for trial. The defendants were not represented by counsel but presented their own case in propria persona.

At the conclusion of a three-day trial, the court found: That the reasonable value of the work performed and the materials bestowed on the plane by plaintiff amounted to $10,014.43; that no promissory note secured by a chattel mortgage on the aircraft was ever executed to secure the value of said work and materials, as provided by the agreement of August 31st or the supplement thereto; and that plaintiff claimed a lien on the plane for the value of the work and material so furnished.

Also, that defendants without right and "by trick, device, force and duress" took the plane from plaintiff's possession and without its consent.

Further, that plaintiff was not in default under the contract or the lease and that defendants were in default.

From the facts found, the court concluded that plaintiff was entitled to:

1. A judgment against defendants for the possession of the plane or in the alternative the sum of $10,014.43;

2. A lien against the aircraft to secure the said sum of $10,014.43;

3. Enforce and foreclose the chattel mortgage of August 31, 1951, upon the plane covered thereby, and to have the plane sold and the proceeds applied upon the payment of the $15,000 evidenced by the promissory note. And also upon attorneys' fees of $750.

From the judgment which followed, defendants appeal.

It is first contended that no lien can be imposed upon the aircraft. This for the reason that the supplement to the agreement executed early in September of 1951 expressly provides:

"10. International hereby waives all statutory liens, and the benefit of any statutory liens in regard to the work, labor, improvements or storage of said aircraft, upon execution by the Finns of a promissory note and chattel mortgage in the amounts provided hereunder, which promissory note and chattel mortgage the Finns agree to execute as herein provided. International agrees that such mortgage and the manner of payment herein shall constitute its sole rights in this regard."

Section 1 of the Aircraft Lien Act, Act 153d, Deering's General Laws, Stats.1949,

ch. 654 which was in effect when the instant documents were executed, reads:

"Every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair or safekeeping of, any aircraft * * subject to the limitations set forth hereinafter."

This section was added to the Code of Civil Procedure in 1953 as section number 1208.61.

[1, 2] Also, as stated in 10 Cal.Jur.2d 505, sec. 8, citing Douglass v. McFarland, 92 Cal. 656, 28 P. 687:

"An action in claim and delivery may be maintained by one who has a qualified interest in the property which is the subject of the litigation, providing he has a right to its possession * * *. Accordingly, one who holds property by virtue of a lien may maintain an action to recover it if it is wrongfully taken from him * * *".

[3] It is true, as appellants urge, that the supplemental agreement provided for a waiver of respondent's statutory lien against the aircraft for labor performed and materials furnished in improving it. However, the waiver was not absolute. It was expressly made conditional "upon execution by the Finns of a promissory note and chattel mortgage."

Appellants do not contend that they ever performed the conditions required to effect the waiver. Moreover, it is clear from the record that the note and mortgage which they did execute was for $15,000 *cash* lent to them on August 31, 1951. It was not for work and improvements subsequently bestowed on the aircraft by respondent. These latter items remained subject to the lien until it was waived in the manner provided, to-wit: by execution of the additional note and chattel mortgage.

This was never done; hence there was no waiver of respondent's statutory lien rights on the aircraft.

Appellants next assert that the plane was delivered to respondent for the sole purpose of leasing it to respondent, the repairs being incidental to the lease. And that payment on the note secured by the chattel mortgage was dependent upon performance of the lease by respondent. As a result, respondent having defaulted under the lease, the chattel mortgage cannot be foreclosed.

Nothing in the terms of the agreement, the chattel mortgage or the lease substantiates this position. Moreover, before the lease became effective, delivery of the plane was required to be made to respondent, pursuant to the following provisions of the lease:

"2. *Term.* This lease shall be for a term of eighteen (18) months from and after the 'delivery date', which is hereby defined as the date when said aircraft is actually delivered to Lessee pursuant to this lease. Said date shall be not later than ninety (90) days after delivery of said aircraft to Lessee for the performance of certain work thereon pursuant to a contract executed concurrently herewith; however, said 90 days shall be extended by such time as is necessary for Lessee to complete the performance of said contract on its part, provided such additional time is not necessitated by any fault of Lessee. Upon the performance of said contract on its part by Lessee, it shall be Lessee's duty to accept delivery of said aircraft, and Lessor's duty to tender such delivery."

[4] It is clearly shown by the evidence, hereinabove recited, that the work contemplated by the contract was not completed at the time appellants took possession of the plane without the consent of respondent. Therefore, delivery of the aircraft for the purposes of the lease never took place.

As related above, respondent was unable to complete and license the aircraft as provided in the agreement because of appellants' failure to provide the items therein specified. Thereafter, appellants requested respondent to put the aircraft into "bare flyable" condition so that it could be used to fly a cargo of tomatoes from Mexico; that they had made arrangements to underwrite a loan at a Los Angeles bank, and that they would pay respondent before the plane left.

On April 18, 1952, appellants stopped this arrangement, brought in their own crew and worked on the plane themselves utilizing respondent's shop equipment. About May 15th, appellants requested permission of respondent to take the plane outside of the hangar to run up the engines and "shake it down." After discussion, respondent granted this request on May 18th. On that day and on each of the two succeeding days, appellants delivered to respondents a letter in which they acknowledged respondent's possession of the plane, and also promised to "redeliver this aircraft to your possession" not later than a certain hour therein stated. In the letter of May 20th, the time of redelivery was extended to eleven o'clock P.M. of May 21st.

At 4:30 in the afternoon of that day, appellants left the plane to get an inspector of aeronautics to check the engines. They returned without the inspector and were met by two Treasury agents. The latter and George Finn walked to the Lockheed Air Terminal lobby to talk. When appellants returned to respondent's hangar an hour later, they found that "the airplane had been taken from around the south end of the hangar, where we had been running it up, outside on the runway to the north end of the hangar, and wedged in between the buildings."

Appellants here urge that because they had temporary possession of the aircraft until eleven o'clock that night, it was unlawfully taken from them by respondent.

The main issue in the claim and delivery action is whether respondent had possession of the aircraft and was entitled to its possession on May 25, 1952, when it was seized by appellants. The question of temporary custody of the plane on a previous day was not in issue. Moreover, the letters granting such temporary custody specifically acknowledged respondent's possession of the aircraft.

On the facts disclosed by the record, appellants were obligated by contract to repay to respondent the $15,000 cash loan, as well as the cost of labor and material bestowed on their aircraft. By their wrongful removal of the plane from respondent's possession, appellants deprived it of its statutory lien and the chattel which was security for the cash loan.

[5] In the circumstances, respondent was entitled to prosecute the instant actions of claim and delivery and foreclosure of the mortgage.

Respondent posted a surety bond for $40,000 in the claim and delivery action. On motion of appellants to increase the bond, the court, among other things, ordered them to deliver the plane to respondent at Burbank or at Bakersfield. At the same time, respondent was ordered to file an additional surety bond for $30,000 *within five days after delivery of the plane.*

In their reply brief, appellants urge for the first time that because of its failure to post the additional bond within the time stated, respondent has no right to possession of the plane. In answer to this, the evidence is undisputed that respondent has never received delivery of the plane from appellants.

It is finally contended that the trial court erred in not qualifying George Finn as an expert witness. In order to prove the amount of labor and material bestowed on the aircraft, respondent introduced in evidence a large number of work orders which were made as the work progressed. Appellants took exception to these and stated they wished to show that they had been subjected to overcharges.

In attempting to qualify as an expert witness in the field of aircraft repair, appellant George Finn stated certain qualifications acquired in the United States Air Force as a pilot and as a design and development officer.

The witness admitted that he had never operated a commercial repair shop or performed any conversion or licensing work on a C–46 aircraft, other than some work on his own plane.

[6–8] And as stated in Huffman v. Lindquist, 37 Cal.2d 465, 476–477, 234 P.2d 34, 41, 29 A.L.R.2d 485: "* * * It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert wit-

ness to give his opinion in evidence (Mirich v. Balsinger, 53 Cal.App.2d 103, 114, 127 P.2d 639), and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown."

An examination of the entire record discloses that appellants were afforded a fair and impartial trial on the issues joined by the pleadings. And, although laymen, they displayed a high degree of skill in presenting their defenses.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 279

Victor MULA, Plaintiff and Appellant,

v.

Oscar W. MEYER, Defendant and Respondent.

Civ. 16268.

District Court of Appeal, First District, Division 1, California.

April 15, 1955.

Action by subcontractor's employee against general contractor for injuries sustained when, due to general contractor's alleged failure to install safety devices required by law, employee fell into hole left in floor for fire place. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment on verdict for general contractor, and employee appealed. The District Court of Appeal, Peters, P. J., held that defense of contributory negligence was available to contractor.

Judgment affirmed.

1. Master and Servant ⇐228(1)
Negligence ⇐101

Statutes, which provide that, in action by employee for injuries sustained in course of employment allegedly because of employer's want of ordinary or reasonable care, slight contributory negligence shall not bar recovery if employer's negligence was gross, applies only to the employer-employee relationship and not to an invitor-invitee relationship. Labor Code, §§ 2801, 3201 et seq.

2. Negligence ⇐80

In action by subcontractor's employee against general contractor for injuries sustained when, due to general contractor's alleged failure to install safety devices required by law, employee fell into hole left in floor for fire place, defense of contributory negligence was available to contractor. Labor Code, §§ 2801, 3201 et seq.

3. Negligence ⇐6, 139(1)

Violation of safety orders constitutes negligence per se so that jury must be instructed that, if violation is found, jury must find defendant guilty of negligence as matter of law. Labor Code, §§ 2801, 3201 et seq.

4. Negligence ⇐80

Fact that a defendant is negligent as a matter of law does not make him absolutely liable since defendant may have any one of several defenses, such as claim that plaintiff's negligence contributed concurrently and proximately to the accident. Labor Code, §§ 2801, 3201 et seq.

5. Negligence ⇐6, 80

Safety orders established standard of conduct to measure defendant's negligence, but, when violation of such order causes injury to member of protected class, such member's personal injury action is not a statutory action arising out of violation of safety orders but is a common law action for tort in which defendant's standard of conduct is fixed by statute, and, therefore, defendant is not absolutely liable, and contributory negligence may be a defense. Labor Code, §§ 2801, 3201 et seq.

6. Appeal and Error ⇐216(2)

Even if, in personal injury action, plaintiff was entitled to a qualifying instruction, plaintiff, who had failed to offer any such instruction, was precluded from raising, for first time upon appeal, court's failure to give such an instruction.

7. Trial ⇐256(1)

Where instruction is correct so far as it goes, party seeking qualification thereof or limitation thereon has duty to request a more specific instruction.

8. Appeal and Error ⇐216(2)

Ordinarily, before appellant may complain of lack of an instruction, he must have made a request that the charge be made more specific, or ask for a qualifying instruction.

9. Negligence ⇐138(1), 141(3)
Trial ⇐243

In action by subcontractor's employee against general contractor for injuries sustained when, due to general contractor's alleged failure to install safety devices required by law, employee fell into hole left in floor for fire place, instructions given on violation of safety orders, assumption of risk, and contributory negligence were not conflicting and did not mislead jury. Labor Code, §§ 2801, 3201 et seq.

10. Negligence ⇐141(4)

In action by subcontractor's employee against general contractor for injuries sustained, when due to general contractor's alleged failure to install safety devices required by law, employee fell into hole left in floor for fire place, giving of "obvious danger" instruction that contractor was not insurer of employee's safety nor liable for injury resulting from an obvious danger or from one that could have been observed had employee exercised ordinary care was proper, in view of fact that employee was an invitee and admittedly knew of opening in floor and it was unfenced. Labor Code, §§ 2801, 3201 et seq.

11. Negligence ⇐32(1)

To extent that duty of self-protection rests upon an invitee, invitor's duty is reduced.

12. Negligence ⇐80

Defense of contributory negligence is applicable in negligence action arising from invitor-invitee relationship.

M. Henry Robidoux, Arvin O. Robb, San Jose, for appellant.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, for respondent.

PETERS, Presiding Justice.

Plaintiff, Victor Mula, an employee of a subcontractor, appeals from an adverse judgment rendered in an action brought by him against defendant Oscar W. Meyer, the general contractor, for damages for personal injuries plaintiff received while working on the job, it being claimed that such injuries were proximately caused by the failure of defendant to install a safety device required by law.

The defendant, on October 2, 1950, as general contractor, was engaged in the construction of a house. Plaintiff was working on that house as an employee of the heating contractor. On the date of the accident the rough flooring in the living room and den of the house had been installed. In a corner of the living room and extending into the den was a triangularly-shaped hole approximately 6½′ x 5′ x 5′, intended for the fireplace structure which had not yet been installed. Plaintiff, on the morning in question, was instructed by his foreman to install the required heating registers. A register is first covered with paper and then nailed into place in the hole that has been prepared for it by the carpenters. Plaintiff testified that he prepared a register to be installed in the north wall of the living room, and to do so had to clear away a lot of debris that covered the living room floor. The testimony of defendant's witnesses was that the living room floor had been swept before plaintiff arrived, and was clean. When plaintiff arrived on the job, and while preparing the register for installation, he apparently saw the fireplace opening. His precise testimony is that "I might have noticed it going in. * * * I might have saw it. * * * I guess I saw the opening." (R.T. 21.) He also testified that the opening was not then covered and had no railing around it, "it was just an open hole." (R.T. 21.) Plaintiff's foreman, who had brought plaintiff to the job, was not present when the accident occurred, but returned to the house several hours later. He testified that at that time there

was no railing around the fireplace hole. On the other hand, the foreman for defendant testified that until the morning of the accident the hole had been covered with planks, and also had a 2" x 4" railing around it, but that the very morning of the accident before plaintiff started work the planks had been removed for the convenience of the masons who were to construct the chimney and fireplaces. He also testified that the hole was to accommodate a double fireplace, one in the living room and one in the den, with a single brick chimney containing separate flues for each fireplace. This witness was positive that the railing was in place at the time of and after the accident.

Plaintiff testified that, after preparing the register, he found a saw horse in the room, placed it parallel to the wall near the open hole, and stood on the saw horse while nailing the register to the studs where it was supposed to be installed. He stated that after completing this operation, he "stepped off of the saw horse and made a couple of turns around to sight the south wall" (R.T. 24) because he was under the impression that there might be another register required in the living room. He turned a full circle, took another step to the right, and fell into the fireplace hole. He suffered serious injuries.

The foreman for defendant testified that immediately after the accident he rushed over to the fireplace hole; that he saw plaintiff lying in the basement; that the railing around the hole was still intact; and that the saw horse was turned upside down over that portion of the hole that was in the den.

As part of his case plaintiff introduced into evidence sections 1571 and 1561 of the Construction Safety Orders of the Division of Industrial Safety. Section 1571 requires that any hole cut in a floor shall be covered with planks or fenced on all sides with a railing. Section 1561 prescribes the specifications of the lumber that must be used for such railings.

The jury was instructed on theories of negligence, on the doctrine of negligence *per se* as it applied to defendant, and on contributory negligence. It brought in a verdict for defendant. Plaintiff appeals from the judgment entered on that verdict.

The major contention of appellant seems to be that, under the facts and the law, his contributory negligence, if any, was not a defense to the action, and that it was error of a most prejudicial nature to have instructed on the doctrine at all. It is argued that, as a matter of public policy, the provisions of the Industrial Safety Act were passed for the benefit of all workmen on the job, and that the beneficent purposes of these provisions cannot be defeated by the defense that the worker for whose benefit they were passed was contributively negligent. There are some decisions that hold that contributory negligence is not a defense in actions based upon violation of a statute enacted for the protection of a particular class of persons who are incapable of protecting themselves. See cases collected in annotation 171 A.L.R. 894, 895. This is the view of the Restatement of Torts. Section 483 provides that: "If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute."

This rule is generally applied in interpreting statutes passed for the protection of children, insane persons, or patrons of bars, etc. But even as to the limited class included within this exception to the general rule, the overwhelming weight of authority is that contributory negligence is a defense. In the annotation referred to above, at page 897, many cases are cited to support the statement that: "Generally speaking, however, the great majority of the courts have taken the broader view that unless expressly precluded by statute, the contributory negligence of the plaintiff is as good a defense to an action based on the violation of a statute as to an action for common-law negligence * * *. This conclusion has been reached even in cases where the violation of the statute was regarded as negligence *per se*."

Appellant argues, however, that California by statute has adopted the rule of the Restatement in reference to the violation of safety measures passed for the protection of employees. He refers to section 2801 of the Labor Code, which provides:

"§ 2801. In any action to recover damages for a personal injury sustained within this State by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, * * * the fact that such employee has been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"It shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any law enacted for the safety of employees contributed to such employee's injury. * * *"

[1, 2] This section was first enacted in 1911 as part of the so-called Roseberry Act. Stats. of 1911, Chap. 399, §§ 1 and 2, p. 796. When the Workmen's Compensation Acts were adopted in 1913 and 1917 this provision of the Roseberry Act was preserved to govern those few situations in which the employee may still sue his employer. But the section, by express language, applies only to the employer-employee relationship, and has no application to an action such as the instant one by an invitee against the invitor. As to that relationship, the defense of contributory negligence exists even though defendant's liability is predicated upon violation of a safety order. Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32; Dunn v. Pacific Gas & Electric Co., 43 Cal.2d 265, 272 P.2d 745.

[3, 4] Appellant argues that a violation of a safety order constitutes negligence *per se*, and then apparently argues that in such a case liability is absolute. Appellant has misconceived the legal effect of a violation of a safety order or statute. It is undoubtedly true that the safety orders here involved were enacted for the protection of the class of which appellant is a member. This being so, a violation of the safety orders constituted negligence *per se*. Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777. In other words, in such a case the jury must be instructed that if a violation is found the jury must find the defendant guilty of negligence as a matter of law. Here the jury was so instructed. But because the defendant was negligent as a matter of law does not determine that he is absolutely liable. He may have any one of several defenses. He may be able to prove that, although he was negligent, plaintiff too acted negligently so as to contribute concurrently and proximately to the accident. See Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801. The argument that, because respondent was guilty of negligence *per se*, the defense of contributory negligence has been eliminated, simply confuses negligence as a matter of law with the doctrine of absolute liability. The California cases cited by appellant merely hold that in cases of violation of a safety regulation the defendant cannot defend on the ground that the plaintiff for whose protection the regulation was passed assumed the risk. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17; Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32. But both cases properly recognized that the issue of contributory negligence was one of fact for the judge or jury.

[5] The appellant also seeks to deprive the respondent of the defense of contributory negligence by the argument that, under the facts, as a matter of law, his own negligence was not and could not be a proximate cause of the accident. The argument seems to be that respondent was in control of the premises and of their condition of safety; that the safety orders imposed a standard of care; that if that standard

of care was violated, such violation, as a matter of law, was the proximate cause. It is argued that it was foreseeable that some workman might fall through the opening; that respondent was in the better position to prevent the occurrence; and that in such circumstances respondent should be liable. This is simply another way of arguing that defendant is absolutely liable.

Appellant misconceives the purpose and effect of the safety orders. They establish a standard of conduct to measure the negligence of the defendant and upon which the injured party may rely. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931. But when the safety order is violated and one of the protected class is injured and sues, his action is not a statutory one arising out of the violation of the safety orders, but is a common law action for tort, in which the defendant's standard of conduct is fixed by the statute. In such a situation all of the California cases hold that contributory negligence may be a defense.

It should also be mentioned that this concept that the action is statutory in nature has been first advanced in the appellate court. Throughout the pleadings and trial the action was treated as one for a common law tort. No instruction was offered by appellant that the action was statutory and liability absolute, but in fact the appellant offered, and the court gave, instructions to the effect that the safety orders established a standard of care of defendant and constituted negligence *per se*.

The next argument of appellant is that, while the instructions on negligence and contributory negligence were correct as far as they went, it was error to not qualify the definition of contributory negligence to relate to the circumstances of this case. Instead, the jury, after having been given proper instructions on contributory negligence and proximate cause, was told that: "One who is in a place where he is exposed to danger must exercise his faculties for his own protection, and if he approaches a place which he knows is one of danger, he must take reasonable precautions to avoid being injured." It is contended that the amount of care that a workingman must exercise is affected by the attention given by him to his work, and that the jury should have been instructed that in determining the degree of care to be exercised by the workingman, this factor should be considered. In other words, appellant contends that he was entitled to a qualifying instruction to the effect that in the present case the respondent's duty of care by virtue of his attention to his work and by virue of the statute was less than that of appellant who was in charge of the premises and violated the safety order.

[6–8] Undoubtedly there are several cases holding that "where a person must work in a position of possible danger the amount of care which he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case." Ostertag v. Bethlehem etc. Corp., 65 Cal.App.2d 795, 801, 151 P.2d 647, 650, and cases cited therein. There is also sound authority to the effect that momentary forgetfulness of a known danger does not necessarily constitute contributory negligence as a matter of law. Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32, and cases there cited. It may be assumed that under the rules announced in these cases, appellant would have been entitled to a qualifying instruction had such instruction been requested. But appellant offered no such qualifying instruction. He is, therefore, precluded from raising, for the first time on appeal, the failure to give such an instruction. As was said in Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 629, 39 P.2d 209, 212: "* * * the instruction was correct so far as it went; and, if it failed to state a proper qualification or limitation, it was the defendant's duty to request a more specific instruction." In Ornales v. Wigger, 35 Cal.2d 474, 478, 218 P.2d 531, 534, the rule was stated as follows: "Ordinarily, before an appellant may complain of the lack of an instruction, he

must have made a request that the charge be made more specific, or ask for qualifying instructions." The same rule was stated in Baldridge v. Cunningham, 31 Cal.App.2d 128, 132, 87 P.2d 369, 371, in the following language: "If defendant Cunningham desired a further elaboration upon the instruction relative to the *quantum* of evidence necessary to establish justification or excuse, and thereby rebut the presumption of negligence arising from a violation of the California Vehicle Code, it was her duty to propose the further instruction which she desired and request the court to give it. This she did not do." See also Kuehn v. Lowthian, 124 Cal.App.2d 867, 269 P.2d 666; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Western States Gas & Elec. Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735. The failure to offer the qualifying instruction precludes the point being made for the first time on appeal.

[9] The last major contention of appellant is that the instructions on violation of the safety orders, assumption of risk and contributory negligence were conflicting and misled the jury. There is no merit to the point.

The court instructed that the respondent had to use reasonable care to keep the premises in a reasonably safe condition for the use of employees of subcontractors, but that the respondent was not an insurer of the appellant's safety nor liable for injury resulting from an obvious danger or one that could have been observed had appellant exercised ordinary care; that certain orders of the Division of Industrial Safety were designed to protect human life; that the courts in recognition of the underlying public policy and the inability of employees to protect themselves do not permit an employee of a subcontractor to assume the risk of injury by waiving the duty imposed upon the respondent by the order, even though the employee of the subcontractor had express knowledge of it; and that orders of the Division of Industrial Safety established a minimum standard of safety. The safety regulations here involved were read to the jury and it was told that if it found that respondent did not comply with the provisions of these orders, he was negligent *per se*.

It is appellant's thought that the instruction that respondent could not be held liable "for injury to the employees of subcontractors resulting from a danger which was obvious or should have been observed in the exercise of reasonable care," conflicts with the instruction that appellant did not assume the risk.

[10, 11] The "obvious danger" instruction was a correct one. Appellant was admittedly an invitee. Admittedly he knew of the opening in the floor and that it was unfenced. To the extent that the duty of self-protection rests upon an invitee, the duty of the invitor is reduced. There are many cases holding that an invitee cannot recover for injuries caused by an obvious defect. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Brown v. San Francisco Ball Club, 99 Cal.App.2d 484, 222 P.2d 19; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 157 P.2d 57.

[12] The law recognizes that the defenses of assumption of risk and contributory negligence are separate and distinct. Here the trial court properly ruled out the doctrine of assumption of risk, but permitted the jury to consider the defense of contributory negligence. This is in accord with the law applicable to the invitor-invitee relationship.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

132 Cal.App.2d 380

Lloyd POTTER, Plaintiff-Appellant,

v.

Ezra RICHARDS et al., Defendants.

Inglewood General Hospital, Respondent.

Civ. A. No. 20445.

District Court of Appeal, Second District, Division 2, California.

April 19, 1955.

Rehearing Denied May 16, 1955.

Hearing Denied June 16, 1955.

Action to recover damages for wrongful death and personal injuries. The Superior Court, Los Angeles County, Jesse J. Frampton, J., sustained demurrers to the fifth amended complaint and entered judgment of dismissal. On plaintiff's appeal, the District Court of Appeal, McComb, J., held that the complaint insufficiently alleged negligence on part of defendant hospital.

Affirmed.

1. Negligence ⇐111(1)

In action for negligence it is sufficient if complaint alleges what was done negligently.

2. Hospitals ⇐8

Husband's complaint for wrongful death of his wife insufficiently alleged negligence on part of hospital.

3. Pleading ⇐225(2)

Where several successive amended complaints have been vulnerable to demurrer on same ground, trial court may reasonably conclude that complaint is incapable of being amended to state cause of action and does not abuse its discretion in sustaining a demurrer to fifth amended complaint without leave to amend.

4. Appeal and Error ⇐103

An appeal does not lie from an order striking out certain portions of a complaint.

5. Appeal and Error ⇐103

An appeal does not lie from an order denying a motion for leave to file an amended complaint.

6. Appeal and Error ⇐113(1)

An appeal does not lie from an order of the trial court denying a motion to vacate judgment.

7. Appeal and Error ⇐113(1)

An appeal does not lie from an order denying a motion to vacate an order sustaining demurrer without leave to amend.

8. Appeal and Error ⇐102

An appeal does not lie from an order sustaining a demurrer without leave to amend.

Edward B. Freed, Los Angeles, for appellant.

Reed & Kirtland, Robert C. Packard and Henry E. Kappler, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of dismissal as to defendant Inglewood General Hospital, predicated upon the sustaining without leave to amend of demurrers, both general and special, to the fifth amended complaint in an action to recover damages for wrongful death and personal injuries, plaintiff appeals.*

The fifth amended complaint is a plethora of words, a marvel of redundancy and a masterpiece of prolixity.

Analyzing the pleading, it discloses the following:

Paragraph I: Contains merely a general allegation of residence of the parties.

Paragraph II: Embraces the usual allegations respecting persons sued by fictitious names.

Paragraph III: It is alleged that the defendants Dr. Richards and the Inglewood General Hospital were acting in concert with each other and by and for themselves alone.

Paragraph IV: That the defendant James Beatty, a minor, was the issue of the marriage between plaintiff and the decedent, but that he is no longer an heir

* There are also attempted appeals from a number of non-appealable rulings and orders.

of the decedent since he has been adopted by other persons.

Paragraph V: This paragraph, over two pages in length, appears in general to contain the following allegations:

(a) That on or about June 1st the plaintiff with his wife, who was then believed to be pregnant, retained Dr. Ezra Richards, pursuant to an oral contract, to render medical care and treatment to the decedent;

(b) That plaintiff and his deceased wife, for a fee, agreed with the doctor that he would diagnose her then condition; that he would make continued diagnoses of her condition during pregnancy, continuous diagnoses of her condition in the post partum period until her discharge; that he would take a personal history, family history, a physiological and biological analyses of the decedent at that time and until such time as she should have regained the physical condition which she had prior to her pregnancy and he would obtain all information and analysis relative to care and treatment in consequence of previous pregnancies, if any, miscarriages, if any, medical history; that he would render periodic physical examinations during the progressive steps of pregnancy, periodic physical examinations after delivery of the child and during such period of time until she regained the same physiological and biological status that had existed prior to her pregnancy; that he would maintain and improve her health during the course of her pregnancy and return her health to a condition at least as good as prior to the pregnancy; that he would render total care of her as an individual during all of the foregoing times and would deliver the child, obtain and retain an adequately staffed and prepared hospital; that the hospital should be adequately prepared for any emergency which they knew or should have known might reasonably arise; that the hospital would perform in accordance with the doctor's direction, the care and treatment of the decedent during the onset of labor, during labor and the post partum care after delivery, involving the opening of the mouth of the uterus to full capacity, or if necessary, the performance of a caesarian section, together with renderin care and treatment in the event of an emer gency. It is further alleged that the plain tiff and his deceased wife agreed with th doctor that he should take such steps a were proper to deliver the child, includin the severance of the cord and the deliver of the placenta and to take personal car and supervision of the decedent for tha period known medically as one of imminen danger to the mother, within an hour t two hours after delivery of the child, t call and consult with outside physician that might be necessary if an emergenc arose, to retain, care for and treat th mother during the post partum period an to care for and treat the mother durin the balance of the post partum period unti the body returned to a normal, non-pregnan state.

Paragraph VI: It is herein alleged that thereafter and until the death of the decedent on January 22, 1952, the plaintiff was under the total, uninterrupted and continuous care of the doctor and of his selected hospital, the Inglewood General Hospital.

Paragraph VII: Paragraph VII merely alleges that the defendant Dr. Richards recommended that the decedent be placed in the care and custody of the Inglewood General Hospital as a part and parcel of his care and treatment of the decedent.

Paragraph VIII: In this paragraph it is alleged that the decedent, pursuant to the doctor's direction, placed herself in the custody and control and became a patient in the Inglewood General Hospital and that she did thereafter at all times remain in the care, custody and control, jointly and severally, of the hospital and Dr. Richards.

Paragraph IX: Paragraph IX appears to be an attempt on the part of pleader to set forth the manner in which it is claimed that Dr. Richards was negligent in and about the care and treatment of the deceased wife. No effort will be made to analyze these lengthy allegations, since they do not pertain to respondent Inglewood General Hospital.

Paragraph X: Paragraph X relates solely to the conduct of the respondent Richards and the causal connection between

the alleged negligence of Richards and the death of the decedent.

Paragraph XI: Paragraph XI is the critical paragraph in so far as the respondent hospital is concerned. It represents appellants belabored and ineffectual effort to comply with liberal rules of pleading negligence, which have long been followed by our appellate courts. The very length of this paragraph demonstrates that plaintiff actually is merely giving lip service to the settled rules; he could easily plead his cause of action in a single short paragraph, if he in fact had any cause of action to plead.

It is alleged that the hospital was negligent and careless in that:

1. It was inadequately staffed as to personnel;

2. It is inadequately prepared as to facilities and supplies for the care and treatment of decedent or for any emergency that might and did arise in connection with the care and treatment of the decedent during her labor and during the time of delivery and during the post partum period immediately succeeding delivery and until the time of her death.

Paragraph XII alleges that the Inglewood General Hospital was a private institution, acting for and on behalf of themselves and the defendant Richards.

Paragraph XIII: Plaintiff has been deprived of the services, society, comfort, etc. of the decedent, to his damage in the sum of $35,000.

Paragraph XIV: Plaintiff has been deprived of the earning capacity of his wife and asks damage in that respect in the sum of $75,000.

Paragraph XV: That the defendants knew or should have known that if they were negligent or careless, the decedent could die and that if such a result occurred, the plaintiff, as husband, would suffer from shock, emotional upset, etc. That in truth and in fact the decedent did so die and by reason thereof the plaintiff became sick and required medical care and attention, all to his damage in the sum of $10,000.

Paragraphs XVI and XVII: That the defendants knew or should have known that if they were negligent and that if a death would result therefrom to the mother of the child, that the father would be unable to care for and look after the child; that plaintiff was unable to look after and care for the child and that by reason thereof the child has been adopted and that the plaintiff has by reason thereof suffered the loss of earnings of the child, all to his damage in the sum of $25,000.

Paragraph XVIII: Plaintiff has become liable for and paid burial expenses in the sum of $1,076.12.

To this pleading defendants interposed a general and special demurrer.

Questions: First: *Did the complaint state a cause of action?*

[1, 2] *No.* The rule is settled that in an action for negligence it is sufficient if the complaint alleges what was done negligently. (Dunn v. Dufficy, 194 Cal. 383, 387 [5], 228 P. 1029.)

In the instant case a reading of the allegations of the complaint which we have summarized above fails to disclose the allegation of any fact or facts which were negligently performed or omitted to be performed which were the proximate cause of the death of plaintiff's wife. All that is alleged in the way of facts relative to the death of plaintiff's wife is that it is alleged sometime after she entered the hospital she passed away. There is no fact or facts showing the proximate cause of her death.

Clearly such allegations are not sufficient to state a cause of action.

As to the purported second cause of action, that plaintiff became sick as a result of the death of his wife, this may all be assumed to be true, but in the absence of an allegation of fact or facts showing that defendants negligently caused the death of plaintiff's wife, there is no causal connection between any act of defendants and plaintiff's illness. Hence, he has failed to state a cause of action on this theory.

It would serve no useful purpose to review in detail the special demurrers filed by defendants. Suffice it to say that the

grounds thereof were well taken and the trial court properly sustained both the general and special demurrers.

Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029 and Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1, relied on by plaintiff, are each factually distinguishable from the allegations in the questioned pleading. In each of the cited cases facts were alleged showing the negligent acts charged against defendants.

Second: *Did the trial court err in sustaining the demurrers to the fifth amended complaint without leave to amend?*

[3] *No.* Where several successive amended complaints have been vulnerable to demurrer on the same ground, as in the instant case, the trial court may reasonably conclude that the complaint is incapable of being amended to state a cause of action and does not abuse its discretion in sustaining a demurrer to the fifth amended complaint without leave to amend. (Ruinello v. Murray, 36 Cal.2d 687, 690 [5], 227 P.2d 251.)

Third: *Are appeals from (a) an order striking a portion of an amended complaint; (b) an order of the trial court made in open court sustaining defendants' demurrer to an amended complaint and by which the court denied plaintiff's oral motion for permission to file an amended complaint; (c) an order of the trial court denying plaintiff's motions to vacate the judgment, vacate the order sustaining the demurrer without leave to amend, and denying the motion to file a proposed sixth amended complaint; and (d) a minute order sustaining the demurrer without leave to amend, appealable orders?*

[4] *No.* (a) An appeal does not lie from an order striking out certain portions of a complaint. (Bryant v. Kelly, 203 Cal. 721, 722 [1], 265 P. 817; Cecil v. Gallo, 57 Cal.App.2d 145 [1], 134 P.2d 497.)

[5] (b) An appeal does not lie from an order denying a motion for leave to file an amended complaint. (Pacific Indemnity Co. v. Harper, 14 Cal.2d 379, 387, 94 P.2d 586, 124 A.L.R. 1169. Cf. Marx v. McKinney, 23 Cal.2d 439, 443 [4], 144 P.2d 353.)

[6, 7] (c) An appeal does not lie from an order of the trial court denying motions to vacate the judgment, vacate the order sustaining the demurrer without leave to amend, and denying a motion to file an amended complaint. (Bixby v. California Trust Co., 33 Cal.2d 495, 499 [5], 202 P.2d 1018; Pacific Indemnity v. Harper, supra, 14 Cal.2d 387, 94 P.2d 586.)

[8] (d) An appeal does not lie from an order sustaining a demurrer without leave to amend. (Steiner v. Darby, 88 Cal. App.2d 481, 498 [9], 199 P.2d 429, hearing denied by the Supreme Court.)

The judgment is affirmed and the purported appeals by plaintiff from the various orders set forth above are dismissed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 305

In the Matter of the ESTATE of Alfred G. BLAIR, also known as A. G. Blair, Deceased.

Phoebe L. BONNEN, Contestant-Appellant,

v.

Alfred Granville BLAIR, Jr., Individually, and as Guardian ad litem of Lee Blair, Dicky Blair and Carolyn Ruoff, Petitioner-Respondent,

Naomi Blair Ruoff, Respondent.

Civ. 20635.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Hearing Denied June 16, 1955.

Action for decree determining heirship and interest in deceased's estate. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment adverse to contestant, and contestant appealed. The District Court of Appeal, Doran, J., held that, under will devising estate to testator's wife, who was to have and use all income therefrom and principal if

necessary, with remainder of property and income to testator's sister-in-law and daughter, equally, for life, the later beneficiaries were not entitled to consume the principal, and question of possible violation by charitable institution, which was remainderman, of statutes limiting gifts to such remainderman would be reserved until termination of life estates.

Affirmed.

See also 126 Cal.App.2d 759, 272 P.2d 866.

1. Wills ⇐462

Where will was clear and unambiguous, it was not necessary to resort to rule that, in construing will, court may supply omitted words.

2. Wills ⇐616(1), 704

Under will devising estate to testator's wife, who was to have and use all income therefrom and principal if necessary, with remainder of property and income to testator's sister-in-law and daughter, equally, for life, the later beneficiaries were not entitled to consume the principal, and question of possible violation by charitable institution, which was remainderman, of statutes limiting gifts to such remainderman would be reserved until termination of life estates. Probate Code, § 41.

Roy B. Woolsey, Los Angeles, for appellant.

Leon U. Everhart, Pasadena, and Edward Payson Hart, Los Angeles, for respondents.

DORAN, Justice.

The action is for a decree determining heirship and interests in the estate of deceased.

Petitioner Alfred Granville Blair alleges that, "under the terms of the Will of Alfred G. Blair, the American Bible Society, a charitable institution, will receive the entire corpus of said estate after the life tenancies of Phoebe L. Bonnen, Naomi Blair Ruoff and Carolyn Ruoff. That, under the terms of the Will of Alfred G. Blair, said American Bible Society will receive in excess of one-third of the said decedent's estate and, therefore is violative of the provisions of Section 41 of the Probate Code. Insofar as said Will provides for distribution of the decedent's estate in excess of one-third thereof to the American Bible Society, your petitioner is entitled to distribution as to one-half of said excess."

In answer to the petition, Phoebe L. Bonnen alleges that, "answering party is to receive one-half of the property in said estate either in fee or for life with the power to consume, and Naomi Blair Ruoff receives the other half of the estate upon like terms. By reason thereof the American Bible Society will not receive in excess of one-third of said decedent's estate, and, therefore, the bequest referred to in said Petition is not violative of the provisions of Section 41 of the Probate Code. Furthermore, insofar as said Will provides for the distribution of any excess over and above one-third of the estate to the American Bible Society, if any, said Alfred Granville Blair would not be entitled thereto, but this answering party would be entitled thereto by reason of the fact that the gift over after her life estate would be void."

Following the hearing the court decreed, "that, pursuant to the Last Will and Testament of decedent, Phoebe L. Bonnen and Naomi Blair Ruoff are entitled to receive whatever remained of the property of the estate of decedent upon the termination of the life estate of Susan Ann Blair, as life tenants, and to receive and consume the income therefrom, equally, for and during their lifetimes; that upon the death of either of them the other one of them is entitled to receive the share of such deceased life tenant in the property of said decedent constituting the principal of their said life estate as life tenant, and to receive and consume the income from the whole of said life estate for and during the remainder of her lifetime; that said life tenants Phoebe L. Bonnen and Naomi Blair Ruoff are not, and either of them is, entitled to consume any part of the principal of the estate of the decedent which may be distributed to them as life tenants; and

that said life estates began on May 21, 1951, the date of the death of Susan Ann Blair, the surviving and subsequently deceased wife of the decedent.

"It Is Further Ordered, Adjudged and Decreed by the Court that jurisdiction to determine the amount to be awarded to American Bible Society and the possible violation of Section 41 of the Probate Code is hereby reserved until the termination of the life estates of Phoebe L. Bonnen and Naomi Blair Ruoff as provided in the Will of decedent.

"It Is Further Ordered, Adjudged and Decreed by the Court that all other issues raised in or by said Petition, said Answer or by law are reserved for further hearing and determination in the manner and at the time or times provided by law, and jurisdiction to do so is hereby reserved."

It is contended by appellant that "clearly, his will expressly gives appellant and the daughter of decedent the right to consume or at least expressly gives the same rights as given to the widow including her implied right to consume".

It is also contended that, "Appellant and the daughter of decedent have a right to consume the principal of their life estate by clear and necessary implication."

The will provides for four life estates. The wife of deceased received the first, appellant herein the second.

To the contrary, respondent argues that, "To us it seems irrational to argue that the testator intended to limit his invalid wife to invasion only if necessary and at the same time intended to enable the second life tenants to deal with the whole of the estate coming to them at their pleasure and to use it all and that the testator in spite of this latter intention, went to the trouble to work out and set down the elaborate structure and meticulous detail of the second, third and fourth life estates and alternate remainders of property previously disposed of."

[1] The issue involved is one of interpretation and construction. The will is clear and unambiguous and it is unnecessary to resort to the rule, as argued by appellant, that, "In construing a will a court may supply omitted words and gifts have been made by implication".

[2] Decedent's estate was devised to the wife, "she to have and use all of the income therefrom and the principal if necessary * * * and whatever remains of my said property and the income therefrom to my sister-in-law, Phoebe L. Bonnen, and my daughter, Naomi Blair Ruoff, equally, for life, and upon the death of either to the other for life". There is nothing in the will that suggests that later beneficiaries may "consume" the principal.

The court's order and decree is supported by the record and the law.

Affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 308

UNITED AIR LINES, Inc., a corporation, Plaintiff and Appellant,

v.

WESTERN AIR LINES, Inc., a corporation, Defendant and Respondent.

Civ. 20654.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

As Modified on Denial of Rehearing May 16, 1955.

Hearing Denied June 16, 1955.

Action by lessee of aircraft to recover from lessor amount due for repairs made to aircraft. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., gave judgment for lessee of amount of repairs less amount of bonus from insurer that lessor lost because of accident to aircraft. Lessee appealed. The District Court of Appeal, White, P. J., held that provision of lease that lessee agrees to indemnify lessor against any and all expense, loss or damage caused by or arising out of possession or operation of aircraft, did not entitle lessor to recover from lessee lost "no claim bonus", where, for lessor's convenience, lessee had

agreed to allow lessor's hull insurance to continue on the aircraft and to pay amount of premium to lessor.

Judgment reversed and cause remanded with directions.

1. Appeal and Error ⇐878(6)

Where lessor did not appeal from judgment, District Court of Appeal did not consider its contention that trial court erred in denying its affirmative defenses of estoppel and accord and satisfaction.

2. Bailment ⇐32

Provision of lease of aircraft that lessee agreed to indemnify lessor against any and all expense, loss or damage caused by possession or operation by lessee of aircraft, did not entitle lessor to recover from lessee amount of "no claim bonus" from lessor's insurer lost because of accident to airplane while in lessee's possession, where, for lessor's convenience, lessee had agreed to allow lessor's hull insurance to continue on aircraft and to pay amount of premiums to lessor. West's Ann.Civ.Code, §§ 1636, 1648, 1650.

Trippet, Newcomber, Yoakum & Thomas, F. B. Yoakum, Jr., Los Angeles, for appellant.

Guthrie, Darling & Shattuck, Hugh W. Darling, Donald K. Hall, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff, United Air Lines, Inc., hereafter for convenience referred to as "United", has appealed from a judgment in its favor for $442.73. By its complaint, as amended during the trial, it sought to recover $8,026.43 from defendant, Western Air Lines, Inc., hereafter referred to as "Western".

In May, 1947, Western leased to United one of Western's planes. On December 4, 1947, while the plane was in the possession of United, it was damaged. United immediately notified Western, and Western's former insurance underwriter, of the damage and repaired the plane at its own cost. In accordance with the lease, the airplane was returned to Western on December 26, 1947. It was then in the same condition as when delivered by Western to United in May. For the use of the plane during that time, United paid to Western as daily rental and hourly overhaul charges the sum of $115,640.15.

The lease agreement was in writing and included the following provisions:

"7. (a) United agrees to indemnify and save Western harmless against any and all expense, loss or damage caused by or arising out of, in whole or in part, the possession or operation by United of said aircraft and any engines or equipment leased or supplied hereunder, not caused by Western's negligence.

"(b) United shall be responsible and shall reimburse Western for any and all damage to said aircraft and any engines, propellers, parts, accessories and radio equipment installed therein or attached thereto or supplied to United hereunder while the same are in United's possession, not caused by Western's negligence.

"(c) If said aircraft when in the possession of United is destroyed or is so damaged that the estimated cost of repair or restoration of said aircraft exceeds the value of said aircraft at the date of such damage or destruction, then in that event Western shall promptly transfer and assign to United all of Western's right, title and interest, free and clear of all liens and encumbrances, in said aircraft. In return therefor, United shall pay to Western the full value of said aircraft, which is agreed to be the sum of $325,000.00.

"(d) In the event of any damage to said aircraft not constituting destruction or such damage as is covered in subparagraph (c) of this paragraph, United shall continue to be responsible for the payments for the use of said aircraft during the period in which said aircraft is being repaired by United in addition to being responsible for all costs of said repair.

"(e) United shall in no way be responsible for said aircraft while it is in the possession of Western, and Western shall be responsible for its own negligence, irrespec-

tive of which party hereto has possession of said aircraft.

"8. During the time that United shall have in its possession the aircraft leased hereunder, it shall maintain in full force and effect at its own expense insurance policies written by responsible insurance companies insuring and covering Western and United as their interest may appear against liability for loss, injury, damage or claims arising out of, or in connection with injuries to, or deaths of, passengers, injuries to, or deaths of, third persons, and damage to, or destruction of property, caused or arising out of the operation of said aircraft, such insurance to be maintained by United in the following amounts and with the following limits:

> "Passenger Liability Insurance—$75,000 for each passenger, with a limit of $2,000,000 for any one accident;
> Public Liability Insurance—$50,000 for each person, with a limit of $1,000,000 for any one accident;
> Property Damage Insurance—$500,000 for any one accident;
> Excess Liability Insurance—$2,000,000 per accident to be applicable jointly to all three of the above-said risks.
> *Hull insurance acceptable to War Assets Administration and United will be procured by Western and paid for by United.*" (Emphasis added.)

Paragraphs 7 and 8 of the lease agreement have been quoted in full in order to examine in context the portions thereof relied upon by the respective parties.

When the lease was signed, the Hull insurance of Western's fleet was carried by Springfield Fire & Marine Insurance Company. The policy insured the leased plane for $350,000 with $25,000 deductible, leaving the maximum collectible hull insurance for total loss $325,000, which is the same amount United agreed in paragraph 7(c) to pay to Western in event the airplane was destroyed. War Assets Administration was then mortgagee of the plane and had approved the Springfield policy. To avoid the red tape incident to securing its approval of another policy, it was agreed that the leased plane should continue to be insured under the Springfield policy as a part of Western's fleet; that Western would bill United monthly for its portion of the premium and United would pay Western therefor as billed. For the term of the lease, United paid to Western hull insurance premiums totaling $7,959.73.

After advising Western and the Springfield policy underwriters of the accident on December 4th, United next wrote to Western under date of December 12th tentatively estimating the amount of damage "in the neighborhood of $40,000.00" and stating, "It is our understanding from the lease we negotiated with your company for this airplane that Western Air Lines maintains crash insurance which would be applicable to this loss. This lease also indicates that the cost of this insurance is charged to United Air Lines on a monthly basis".

On December 5th, Western wrote to the underwriters of the Lloyds policy advising them of the accident, quoting paragraphs 7 and 8 of the lease agreement, and stating "* * * it was decided that the hull insurance would be carried under our policy with United reimbursing us for the premium."

Western by letter dated December 13th acknowledged receipt of a copy of United's letter of the 4th to its former underwriters, and stated that the Springfield policy "expired on November 1, 1947, and effective that date the coverage was placed with Lloyds of London". In said letter of the 13th, Western also stated that "the airplane is valued at $275,000 for insurance purposes and the policy contains a deductible clause of 5% of the insured value for claims for loss or damage occurring while the airplane is in flight". This is followed by information concerning "a retrospective rate credit", also referred to herein as a "no claim bonus", in the event no losses occur during the policy year, the statement that "As a matter of procedure we will file claims as they arise and in the event that claims for the year are less than the credit to which we would be entitled if the losses had not accrued we will repay the insurance company the amount paid to us in claims and take the retrospective credit." The letter closes with the following paragraph:

"We suggest therefore that United Air Lines pay us the entire amount of the cost of the repairs, less 5% of $275,000, with the understanding that if our experience aside from this accident is such that we are not entitled to the retrospective rate credit we will reimburse you in the amount by which the amount you have paid to us exceeds the amount fixed by the deductible provisions of our new policy".

On December 22nd, United answered Western's letter of the 13th, in part, as follows: "* * * *We think the best way to handle this is for you to reimburse United Air Lines in the amount over and above your deductible and then follow your own wishes as to whether or not you care to report this loss to Lloyds. This handling will still allow you to obtain any credit that might be due and also will enable United Air Lines to be reimbursed more promptly*". (Emphasis added.)

According to the uncontroverted testimony of Mr. Sullivan, secretary of Western, who handled all its dealings with United regarding the leased plane and United's insurance claim, no information regarding the change of insurance coverage was given to United by Western until December 12, 1947 (8 days after the accident); the premiums of 3.956% on the Springfield policy and 5% plus federal tax on the Lloyd's policy had been paid by United monthly as billed; he, Sullivan, knew from December 12, 1947 that United was expecting Western to process its insurance claim; he knew from December 22, 1947, that United was repairing the airplane at its own expense and would advise Western as to the cost of repairs so that United's insurance claim could be processed by Western; United's invoice for $8,026.43 was received about August 9, 1948; and on August 23, 1948, Western wrote United as follows:

"On the assumption that our experience between now and November 1, 1948 will be as good as it has been since November 1, 1947, and in view of the fact that, if that assumption be correct, *payment of your Invoice Number 8-242 at this time would give rise to a claim recoverable from United under the provisions of subparagraphs (a) and (b) of Article 7 of the lease agreement covering the leasing of this airplane,* we will hold your invoice until such time as our experience has actually been determined." (Emphasis added.)

Mr. Sullivan, of Western, also testified that the invoice was returned to United about March 1, 1949; that there was no question "as to thecorrectness of the amount shown in the invoice"; that the paragraph last above quoted was a statement of Western's reason for not filing United's claim with the insurance company; and further testified as follows:

"Q. In other words, you declined to file the claim because of your contention that if you had done so you would have been deprived of your no claim bonus with a resultant loss to you and your further contention that if this had happened you would have been entitled to go back and recover it from United by virtue of the indemnity agreement? A. Yes, that was the reason we did not file the claim.

"Q. And that is also the reason why you didn't pay the invoice? A. That is right.

"Q. You don't know of any other reasons why the claim was not filed or the invoice not paid by you? A. No, sir."

Mr. John Spencer, Manager of the Lloyds Department of Swett & Crawford, West Coast representative of Lloyds of London, a witness called by Western, testified that Western's letter of December 5, 1947 "was sufficient notice of the claim" arising out of United's accident; and that Western "could have collected the claim as a claim up until the time they requested the no claim bonus", on or about February 29, 1949.

The record before us on the instant appeal discloses no controversy as to any of the foregoing facts. Also, without conflict, the record shows that Western's losses above deductibles (exclusive of United's claim) amounted to $23,255.24; its no claim bonus was $30,147.02; and that consequently Western's collectible losses (including United's claim for $8,026.43) actually exceeded the no claim bonus by $864.65. From

$864.65, the court subtracted $421.92, the amount Western had paid to United when its invoice was returned, and awarded judgment for United for the difference, $442.73.

From the record as a whole, it is apparent that the trial court concluded, as we have concluded, that United was entitled to the amount of its claim, as invoiced to Western, for $8,026.43; and the trial court further found and concluded that Western was entitled to an offset of $7,161.78 "which represents the net difference between the amount of no claim bonus received under said policy and the total amount of insurance claims Western could have presented and claimed on said insurance policy arising out of damage incurred by Western on aircraft other than the damage on the airplane caused by United" and that Western was "entitled to be reimbursed and indemnified by United for such loss and damage pursuant to the provisions of * * * paragraph 7(a) * * *"; and such damage and loss to Western was caused by, or arose out of, and by reason of "the possession or operation by United of the airplane and not caused by Western's negligence."

[1] No appeal from the judgment having been taken by Western, we will not here consider its arguments regarding its affirmative defenses of estoppel and accord and satisfaction, which were found to be untrue by the trial court.

Therefore, as stated in United's opening brief, the judgment should be affirmed if the trial court's interpretation of the indemnity clause in paragraph 7(a) of the lease is correct. And, if the trial court erred in deciding that Western was entitled to offset said sum of $7,161.78 under the provisions of said paragraph 7(a), then the judgment for United should be reversed with directions that the amount thereof be changed from $442.73 to the difference between United's collectible claim of $8,026.43 and $421.92, the amount theretofore paid by Western, to-wit $7,604.51.

The real question, therefore, is: Under the provisions of paragraph 7(a) of the lease agreement hereinbefore quoted, is United obligated to indemnify Western against loss of all or part of a no claim bonus, to which Western would be entitled in the event no claims were made under the hull insurance on its fleet during the year specified in a policy negotiated by Western with Lloyds, without the knowledge of United, and almost five months after the making of the lease agreement?

Respondent, in support of the court's conclusion that Western was entitled to the offset of $7161.78 under said paragraph 7(a), cites Alberts v. American Casualty Co., 88 Cal.App.2d 891, 900, 200 P.2d 37, 42, and quotes: "The contract is to be liberally construed in favor of the indemnitee * * *, all fair doubts are to be resolved in favor of the indemnitee * * * and a construction permitting recovery is favored * * *." Completely ignored by respondent are the words immediately following and a part of the same sentence from which it has quoted the above, to-wit: "* * * *but the undertaking of the indemnitor may not be extended by construction or implication beyond the terms of the contract.* (Citing authority.)" (Emphasis added.)

Indemnity agreements, like other contracts, "must be so interpreted as to give effect to the mutual intention of the parties as it existed *at the time of contracting,* so far as the same is ascertainable and lawful." Civil Code, § 1636. (Emphasis added.)

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that *the parties intended to contract.*" Civil Code, § 1648. (Emphasis added.)

"Particular clauses of a contract are subordinate to its general intent". Civil Code, § 1650.

The contract which gave rise to the instant action is not an insurance policy, to be construed against an insurance company which prepared and printed a policy in language difficult for an assured to read and understand. The agreement to be construed on the appeal now engaging our attention is a lease. Its terms were admittedly arrived at by negotiation between two parties equally familiar with the air transport business. As originally drawn the hull insurance (as is provided regarding liability in-

surance) was to be procured by United; but, at the suggestion of Western and in order to avoid red tape with War Assets Administration, that provision was changed to read: "Hull insurance acceptable to War Assets Administration and United shall be procured by Western and paid for by United"; and United agreed that the then existing Springfield policy was "acceptable" to it.

As pointed out by Western, United could not have collected its claim for $8,026.43 under the terms of the Springfield policy, and has lost nothing because of Western's substitution of the Lloyds policy for the Springfield policy, except the increase in premium paid by United to Western. From this, Western argues United should not be allowed to collect its present loss under the Lloyd's policy.

However, the lease agreement should receive the same interpretation in the instant action as it would receive under other conditions. For instance, if Western had had no losses and United's loss had been $43,000, under the trial court's interpretation United then would have been obligated to expend $43,000 of its own money to repair the plane before returning it to Western, and could have collected nothing on the hull insurance because the "no claims bonus" and the deductible exceeded the cost of repair. Under those circumstances Western's change of insurance would have cost United $18,000 in addition to the increased premium; and, if the crash had destroyed the plane, United's loss because of Western's change of insurance could have included the $75,000 decrease in maximum coverage in addition to the $30,000 no claim bonus and the increased premium. Consequently, it is clear that the differences in the rights of the parties under the Springfield and Lloyds policies are in no way determinative of the question now engaging our attention.

A reading of paragraphs 7 and 8 together and in connection with the remainder of the lease agreement indicates that paragraph 7, as a whole, is intended to indemnify Western against "any and all expense, loss or damage caused by or arising out of * * * the possession or operation by United of said aircraft * * *." Sub-paragraphs (b), (c) and (d) set forth the extent of United's obligation to Western in the event of damage to the airplane itself. Paragraph 8 requires United to "maintain in full force and effect at its own expense insurance policies" covering liability to passengers and the public for personal injuries and property damage, and to reimburse Western for the premium on hull insurance on the leased plane. There is no indication of an intent that insurance on the leased plane should be conditioned upon Western's other loss experience, or in any other way different from the insurance on the other planes belonging to Western.

[2] Undoubtedly, paragraph 7(a) was intended to cover the other items of expected "expense, loss or damage caused by or arising out of * * * the possession or operation" of the leased airplane, particularly the items to be covered by the first four policies of insurance required by paragraph 8, to-wit, liability to passengers and the public for personal injuries and property damage. There is no provision here that United shall hold Western harmless for its loss of any "no claim bonus" or "retrospective rate credit" under the terms of a policy to be issued in the future. Nor is there any need to imply such an intent in order that sub-paragraph 7(a) shall have effect. Its meaning is clear when it is considered with the remainder of the agreement.

Paragraphs 7(b) and (c) are clear and specific as to United's liability to Western under the circumstances which gave rise to the instant action. United shall "reimburse Western for any and all damage to said aircraft and any engines, propellers, parts, accessories and radio equipment * * *" and "* * * be responsible for the payments for the use of said aircraft during the period in which said aircraft is being repaired by United in addition to being responsible for all costs of said repair".

The judgment is reversed and the cause remanded with directions to the court below to enter judgment in favor of plaintiff for the sum of $7,604.51 with interest at seven percent from February 21, 1949.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 328

PASADENA INVESTMENT CO., a corporation, Plaintiff and Appellant,

v.

PEERLESS CASUALTY COMPANY, a corporation, Defendant and Respondent.

Civ. 20729.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Hearing Denied June 16, 1955.

Action on a forgery bond. From adverse judgment of the Superior Court, Los Angeles County, James G. Whyte, J., the plaintiff appealed. The District Court of Appeal, White, P. J., held that invoices sold and assigned to plaintiff by third persons, who executed and represented that invoices were valid indebtednesses, and receipts signed by another person representing that he had received services covered by invoices, were not "forgeries", even though no such indebtednesses existed and therefore insurance company was not liable on forgery bond.

Judgment affirmed.

1. Forgery ⇐1, 16

Crime of forgery consists either in false making or alteration of a document without authority or uttering of such document with intent to defraud. Pen.Code, § 470.

2. Insurance ⇐430

Invoices sold and assigned to plaintiff by third persons, who executed and represented that invoices were valid indebtednesses, and receipts signed by another person representing that he had received services covered by invoices, were not "forgeries", even though no such indebtednesses existed and therefore plaintiff's insurer was not liable on forgery bond. Pen.Code, § 470.

See publication Words and Phrases, for other judicial constructions and definitions of "Forgeries".

McLaughlin & Casey, James A. McLaughlin, Los Angeles, for appellant.

Anderson, McPharlin & Conners, William J. Conners, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment for defendant, which was entered after a demurrer to the complaint had been sustained and no amended complaint had been filed. The sole issue to be decided by this court is whether or not the allegations of the complaint state a cause of action against defendant under a forgery bond issued by it.

For convenience in reference, we will hereinafter refer to plaintiff as "Pasadena" and to defendant as "Peerless".

The bond issued by Peerless to Pasadena indemnified Pasadena against "any loss * * * through having, in good faith and in the ordinary course of business * * purchased or otherwise acquired, * * * or given any value, extended any credit * * * on the faith of, or otherwise acted upon any * * * securities, obligations or other written instruments which prove to have been forged, counterfeited, raised or otherwise altered, * * *"

The loss for which Pasadena seeks to recover is alleged to have occurred as follows: Carl and Margaret Nilsson, doing business under the name of E. A. Haveles Mfg. Co., "sold and assigned to plaintiff certain purported accounts receivable and purported indebtednesses"; at the time of such sale and assignment they represented to Pasadena that certain invoices from them to the House of Linden Toys, aggregating $4,405.41, "evidenced bona fide valid indebtednesses from House of Linden Toys to E. A. Haveles Mfg. Co. and that the indebtednesses shown on each of said invoices were due, owing and unpaid". Carl and Margaret Nilssen delivered to plaintiff at the time plaintiff purchased each of said indebtednesses and accounts a written receipt signed by Victor Linden, wherein and whereby Victor Linden stated and represented in writing that he had received the services covered by the said invoices. "That each of the said invoices and receipts described hereinabove were false, fictitious and forged in that they did not

represent any bona fide indebtedness" because such services "were not in fact rendered or furnished at all". Carl and Margaret Nilsson and Victor Linden knew that said invoices and receipts were "false, fictitious and forged and knew that they did not represent any valid or bona fide indebtedness". At the time Pasadena purchased each of the said invoices Pasadena "believed the same were genuine and that they represented the indebtednesses respectively shown" and Pasadena then also believed that the three purported receipts signed by Victor Linden were bona fide and genuine and that the services described therein had been rendered to him. Pasadena would not have purchased said invoices if it had not so believed. The invoices and receipts represented no indebtedness and Pasadena is damaged in the sum of $4,405.41.

Respondent urges that none of the invoices or receipts which gave rise to the instant action was "forged, counterfeited, raised or otherwise altered"; that each was signed by the person who appeared to have signed the same; that each is in the same condition in which it was when signed; and that each of said instruments is exactly what the signer intended to sign.

Appellant, on the other hand, relies upon the decision in People v. Thorn, 138 Cal. App. 714, quotes from page 726, 33 P.2d 5, thereof, and states: "The case is directly in point in that it sustains the fact that a document, although purporting to be a receipt or a shipping document, is nevertheless a forgery when in fact, no merchandise has been shipped or delivered." However, the facts in the cited case were not analogous to those in the instant action. In People v. Thorn, supra, the defendant, as had the Nilssons in the instant action, had sold accounts receivable evidenced by false invoices of his own company. Whereas, the Nilssons attached to the invoices in the instant action receipts actually signed by the person invoiced, defendant Thorn attached to the invoices sold by him "what *purported to be* a memorandum copy of a bill of lading of the Bayside Steamship Company" (emphasis added) in the handwriting of his employee and prepared under his direction. The question for decision in People v. Thorn, supra, was whether forged shipping receipts could be the "basis of forgery charges" under Section 470 of the Penal Code, and not whether such receipts were forgeries.

The real question to be decided on the appeal now engaging our attention was settled by the Supreme Court of California in 1896. In People v. Bendit, 111 Cal. 274, 43 P. 901, 31 L.R.A. 831, without authority, defendant collected an account owed by one company to another and receipted for the cash by writing the company name with his own thereunder. At page 276 of 111 Cal., at page 901 of 43 P., the court said:

"It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely *purports to be the writing of another.* The falsity must be in the writing itself,—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not."

[1] As stated in People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068, "The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of *such* a document with the intent to defraud".

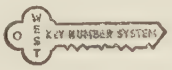
[2] The invoices and receipts, alleged by the complaint in the instant action to have been forged, appear from the other allegations of the complaint to have been made by the parties purporting to have made them. They are not forgeries. Such invoices and receipts not being forgeries, the alleged acts of the Nilssons in using them to evidence accounts receivable sold by them to Pasadena do not constitute forgeries.

Our decision that said invoices and receipts were not forgeries, makes it unnecessary for us to consider the other questions discussed in the briefs on this appeal.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



132 Cal.App.2d 396

Walter R. MURPHY, Plaintiff-Respondent,

v.

Nick NIELSEN, Defendant-Appellant.

Civ. 8485.

District Court of Appeal, Third District, California.

April 19, 1955.

Action by lessee of pasture lands for damages for alleged trespass by defendant's cattle. The Superior Court, El Dorado County, Thomas Maul, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence of reasonable value of the range, per head per season, total number of sheep that range would have sustained, and value of feed on range per acre was insufficient to support determination of damages.

Judgment reversed.

1. Trespass ⇐50

Measure of damages in action for trespass on pasture is reasonable rental value of pasturage destroyed.

2. Evidence ⇐158(15)

In action by lessee of pasturage to recover damages for alleged trespass by defendant's cattle, lessee's oral testimony concerning provisions of written grazing permits issued to him was not best evidence and was improperly admitted. West's Ann.Code Civ.Proc. § 1855.

3. Evidence ⇐136(3)

Where copies of writing are shown to exist, and are available, it is error to allow oral evidence as to their contents.

4. Animals ⇐100(4)

In action by lessee of pasturage for damages for trespass by defendant's cattle, lessee could properly testify as to amount of rent paid and that this was a reasonable rental.

5. Animals ⇐100(8)

Where it appeared, in action by lessee of pastures for damages for trespass by defendant's cattle, that between lessee's sheep and defendant's cattle, plus a few other cattle, all feed was eaten off entire range, defendant was chargeable with all pasturage over and above that consumed by lessee's sheep, with consideration for that consumed by other cattle.

6. Evidence ⇐596(1)

Plaintiff must prove his case by a preponderance of evidence.

7. Animals ⇐100(4)

In action by lessee of pastures for damages for alleged trespass by defendant's cattle, evidence of reasonable value of range, per head per season, total number of sheep that range would have sustained, and value of feed on range per acre was insufficient to support determination of damages.

Russell F. Milham, Placerville, Peter Mannino, Sacramento, for appellant.

Blewett, Blewett & Macy, Stockton, Emmett J. Foley, Placerville, for respondent.

FINLEY, Judge pro tem.

This appeal is from a judgment in favor of plaintiff in an action for damages for trespass upon real property. The only question urged by appellant in his opening brief is whether the trial court followed the correct rule in fixing the amount of damage awarded for the trespass. In his closing brief appellant also makes point of the fact that, in violation of the best evidence rule, the court permitted plaintiff,

over defendant's objection, to give oral testimony concerning the terms of certain written grazing permits issued to him.

Plaintiff leased several thousand acres of grazing land in El Dorado County during the years 1948 and 1949 for the purpose of summer range for sheep. A portion of the land was leased from the federal government—the balance from private owners. The substance of the evidence offered by plaintiff regarding the trespass is that during these years from 4 to 130, and at times many more, head of defendant's cattle were seen grazing on this range. There was also testimony that cattle belonging to others than defendant were seen grazing on this leased land, but by far the major portion belonged to defendant. Plaintiff testified that during the year 1948 he paid to the lessees a total rental of $1,255, and for the year 1949 the sum of $1,345; that the grazing season was generally for a four-month period, from June 15 to September 15; that he grazed 1,666 sheep in 1948 and 1,650 sheep in 1949; and that he took his band out early in both years because the pasture was eaten off. Over objection of defense counsel, based on the best evidence rule, plaintiff was allowed to testify that under his leases in writing, he was authorized to graze a maximum of 2,000 sheep annually on the government land and 1,000 sheep annually on the privately-owned land. Although he admitted that the grass was good and of normal growth in June and July of both years, plaintiff testified that he did not graze the maximum number of sheep allowed because he did not feel that the land could hold any more. He estimated that defendant's cattle had eaten about one-fourth of the feed on the lower range, also known as the Cody range, and stated that in both years his sheep did not reach the growth expected as he was forced to take them off early. It developed, however, that in 1949 plaintiff had gone into receivership and did not himself take the sheep out.

Defendant offered no evidence, and at the end of plaintiff's case, a motion for nonsuit was denied. The case was then submitted to the court sitting without a jury, and subsequently judgment was rendered in favor of plaintiff and against defendant in the sum of $1,152.41 plus costs. The court found that if the cattle of defendant had not trespassed upon the grazing land leased by plaintiff in the years 1948 and 1949 and destroyed the grass thereon, there would have been sufficient feed for the grazing of 3,000 sheep in each year, and that by reason of such trespass, plaintiff had been damaged in the amount of $557.61 in 1948 and $604.80 in 1949. These amounts were computed by dividing the amount of the rental paid for each year by 3,000, the quotient representing the cost per sheep per year to plaintiff under the terms of the alleged rental agreement. This figure was found by the trial court to be $.418 per head for 1948 and $.448 per head for 1949. The court then subtracted the number of sheep actually grazed during each year from 3,000 and multiplied the difference by the cost per head for that particular year. As a specific example, taking the year 1948, the court subtracted 1,666, the number of sheep actually grazed that year, from 3,000, the number allegedly permitted under the grazing leases, giving a difference of 1,334 sheep which the court concluded plaintiff was unable to graze in 1948 by reason of defendant's trespass. This difference, 1,334, was then multiplied by $.418 which would have been the actual cost per head for 1948 had plaintiff grazed the 3,000 sheep orally testified to by him as permitted under the alleged rental agreement for that year. The result, $557.61, was found to be the actual damage sustained by plaintiff on account of defendant's trespass in 1948. A similar calculation was made for 1949, but the two figures, when added together, total $1,162.41 instead of $1,152.41 which is the figure set forth in the conclusions of law and judgment, an apparent error in addition.

Appellant contends that the trial court not only failed to follow the proper rule for measuring damages to pasturage, as set forth in the case of Miller & Lux, Inc., v. Pinelli, 84 Cal.App. 42, 257 P. 573, but as well applied the rule to a factual situation unwarranted and unsupported by the evidence.

[1] Respondent replies that the court properly followed the general rule set forth in Miller & Lux, Inc., v. Pinelli, supra, namely that the measure of damages is the reasonable rental value of the pasturage destroyed by the trespass of defendant's cattle, and that although a different method of computing the reasonable rental value was used by the trial court herein, there was no error since the method of computation necessarily depends upon the facts of the particular case.

Both parties, as well as the trial court, seemed agreed that Miller & Lux, Inc., v. Pinelli outlines the rule in California for the ascertainment of damages due to the destruction of pasture. See also Staub v. Muller, 7 Cal.2d 221, 228, 60 P.2d 283; Maddalena v. LeDuc, 29 Cal.App.2d 211, 212, 84 P.2d 254; Wolfsen v. Hathaway, 32 Cal.2d 632, 644, 198 P.2d 1. In Miller & Lux, Inc., v. Pinelli, supra, plaintiff sought an injunction restraining defendants from permitting their stock to trespass upon his land and for damages for the prior trespass. Plaintiff was awarded damages in the sum of $1,000 and from that award alone the defendants appealed. On appeal the court was called upon to, and did, discuss the question: "Is the rental value of pasture land a proper measure of damages for the destruction of grass, caused by trespassing stock?" [84 Cal. App. 42, 257 P. 575.] Therein at page 47 of 84 Cal.App., at page 575 of 257 P. the court said:

> "The customary method of estimating the value of pasturage in a stock country is to determine the number of head of stock per acre which the ordinary natural growth of grass will sustain. Well-considered cases have held that it is a reasonable rule to estimate damages for the use or destruction of pasturage, *from evidence of the reasonable rental value of such grazing land per month or season, per acre, according to the number of head of stock to be pastured thereon.*" (Emphasis added.)

After noting that damages for the destruction of pasture land "could not be established by the mere conclusion of a witness as to a lump sum which he estimates as damages, without giving the facts upon which his conclusion is based", the court, 84 Cal.App. at page 51; 257 P. at page 577, concluded that:

> "* * * [T]he measure of damages for the appropriation or destruction of pasturage, which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes."

[2] In his opening brief appellant states that the question of the proper measure of damages is "the only pertinent question to be resolved." The fact is mentioned, however, that the court, over an objection by appellant that such was not the best evidence, permitted respondent to give oral testimony concerning the provisions of the written grazing permits issued to him. See Code of Civil Procedure, Sec. 1855. This point is stressed with more concern in appellant's closing brief, and it is obvious that even though in general the provisions of those permits are collateral to the issues here, where the trial court used the substance of respondent's oral testimony as one of the essential elements in fixing the amount of damages awarded we must hold that such testimony is not the best evidence, is improperly in the record and should have been stricken by the trial court. Wilson v. Atchison, etc., Ry. Co., 6 Cal. App.2d 735, 45 P.2d 372. Respondent was on the stand under direct examination. Following is the question by respondent's attorney and the answer by respondent:

> "By Mr. Foley: Q. And just how do you arrive at the rental value for the land that you lease from the government?
>
> "A. Well the only way I think I can—you see, my permit with the government entitles me to two thousand head, and I am entitled to a thousand head on private land.
>
> "Mr. Milham: I move that be stricken from the record as not the best evidence, and I want to see it."

[3] The court not only failed to grant appellant's motion to strike this statement on the ground that it was not the best evidence, but in addition permitted respondent's counsel, over appellant's objection, to further question respondent concerning the number of sheep he was allowed to graze under these written permits. Respondent admitted that copies of these permits were available and could be produced by him if required. Copies are the best evidence next to the originals themselves, and where copies are shown to exist, and are available, it is error to allow oral evidence as to their contents. Ford v. Cunningham, 87 Cal. 209, 25 P. 403.

[4] Even though the grazing permits had been introduced into evidence and the figure of 3,000 therefore properly before the court, still this would not, standing by itself, constitute proof that the range was adequate to support 3,000 sheep. On the question of range capacity the record is silent and it would not follow that because the permits authorized the grazing of 3,000 sheep for the season that the feed would be adequate to sustain that number. Respondent testified to the amount of rental paid by him for the permits and he also testified that this was a reasonable rental. This he was entitled to do. There is testimony that, aside from the few cattle of other owners seen on the Cody range, the cattle of appellant consumed all of the feed thereon over and above what was eaten by the respondent's sheep.

[5] We can see no error in the *method* used by the court in computing damages. The testimony is to the effect that between respondent's sheep and appellant's cattle, plus the few cattle belonging to others, all of the feed was eaten off of the entire range. If this be true then the trial court was warranted in concluding that appellant should be charged with all pasturage over and above that consumed by respondent's sheep, giving of course whatever consideration is warranted to the testimony concerning the cattle of others on the range. This would not be altered by the fact that appellant's cattle trespassed on the Cody range alone. Had there been some proof of the maximum capacity of the total range considered as a unit, this, together with the testimony that all the grass had been eaten off would have justified the trial court in charging appellant for so much of the grass as was not consumed by respondent's sheep and what cattle there were belonging to others. This would be so regardless of how many sheep respondent grazed for he had paid for the grass and even though he had not pastured a single sheep on it he would still be entitled to compensation for the value of all food consumed by trespassing cattle. The fact deserves mention that at one point respondent testified that appellant's cattle consumed only about one-fourth of the feed on the Cody range. But this testimony merely created a conflict to be resolved by the trier of fact.

[6, 7] It is elementary that a plaintiff must prove his case by a preponderance of the evidence. Here plaintiff produced competent evidence to support findings that in 1948 he paid $1,255 for and grazed 1,666 sheep, and that in 1949 he paid $1,345 for and grazed 1,650 sheep on certain ranges leased by him and that the sums paid by him as rental were reasonable; that from 4 to 130 head of appellant's cattle trespassed on the Cody range all during these seasons and that toward the end of each season the feed was gone. There is lacking the necessary proof of: (1) The reasonable value per head per season of such range land for sheep or cattle; (2) The total number of sheep that the range would have sustained for the seasons involved so that the unit value actually paid per head of sheep per season could have been calculated; or (3) Any testimony as to the value of the feed or of the range per acre.

Inasmuch as the trial court erroneously admitted and considered parol evidence of the number of sheep permitted on the range under respondent's written permits and erroneously assumed this figure to be the measure of the total amount of feed available on the range and based its calculations and judgment thereon, the action must be remanded for further proceedings.

The judgment is, therefore, reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

132 Cal.App.2d 407

Margaruite Butler MacGREGOR, doing business under the firm name and style of Professionals' Credit Service, Plaintiff-Appellant,

v.

Frank KAWAOKA and John I. Carlson, Defendants-Respondents.

Civ. 8573.

District Court of Appeal, Third District, California.

April 19, 1955.

Action on note by payee's assignee against maker and accommodation maker. The Superior Court, Sonoma County, Charles J. McGoldrick, J., entered judgment adverse to assignee and assignee appealed. The District Court of Appeal, Van Dyke, P. J., held that trial court committed reversible error in refusing to permit assignee to call the accommodation maker as a witness under the statute relating to examination of party by adverse party as if under cross-examination.

Judgment reversed.

1. Appeal and Error ⇐770(1)

On an appeal from judgment adverse to plaintiff, where clerk of District Court of Appeals, pursuant to rules on appeal, notified the parties that the appeal would be submitted for decision on the record and plaintiff's opening brief unless defendant's brief was filed, but no such brief was filed, District Court of Appeals must accept as true, statement of facts in plaintiff's opening brief. Rules on Appeal, rule 17(b).

2. Witnesses ⇐276

The purpose of statute permitting party to examine adverse party as if under cross-examination is to enable a party to call his adversary and elicit his testimony without making him his own witness, and statute is remedial in character and should be liberally construed in order to accomplish its purpose. West's Ann.Code Civ. Proc. § 2055.

3. Witnesses ⇐276

Any relevant matter in issue in case is within scope of examination of witness called under statute permitting party to examine adverse party as if under cross-examination. West's Ann.Code Civ.Proc. § 2055.

4. Trial ⇐45(1)

Under statute permitting party to examine adverse party as if under cross-examination, the examination of parties is often exploratory and it would be unreasonable to require offer of proof under such circumstances. West's Ann.Code Civ.Proc. § 2055.

5. Trial ⇐59(1)

In action on note by payee's assignee against maker and accommodation maker, assignee could call accommodation maker as witness under statute relating to examination of party by adverse party as if under cross-examination, whenever it was material to assignee's case and whenever assignee desired before close of case, and assignee could interrogate accommodation maker fully concerning such maker's defense that note had been paid, and when such right was exercised it did not concern a matter within statute controlling order of proof. West's Ann.Code Civ.Proc. §§ 2042, 2055.

L. G. Hitchcock, Santa Rosa, for appellant.

Daniel K. York, Napa, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of the defendants in an action brought upon a $6,000 promissory note which the trial court found was entirely discharged by payments admittedly made by respondent Kawaoka to the payee, but which were applied by it against Kawaoka's indebtedness upon an open book account. Respondent Carlson was an accommodation maker. It appears that on July 11, 1951 Kawaoka owed plaintiff's assignor a sum in excess of $20,000 for merchandise purchased upon credit. Prior to that date the assignor had urged upon Kawaoka that he find some way to reduce the balance of this book account and suggested that he obtain an accommodation maker to execute a promissory note with him payable to the

assignor for at least a part of the total sum owing. Kawaoka testified that he agreed to do this if an understanding could be had that payments thereafter made would all be applied to the retirement of the note and not credited to the open account. He said that he informed the assignor he would not be able to get an accommodation maker unless it could be so stipulated and that the assignor then agreed that such would be the understanding and that all payments made to him by Kawaoka would be credited upon the note until it was discharged. After the note was delivered it appears without dispute that sums in excess of $10,000 were paid in to the assignor by Kawaoka, but no payments were credited upon the note. Had the understanding as Kawaoka testified to it been kept the note would have been discharged. This testimony of Kawaoka was corroborated by a witness who was present during a conversation between Kawaoka and the assignor and who said that such an understanding was arrived at between the two men. The trial court found that the note had been paid and the foregoing testimony substantially supports that finding.

[1] The sole point presented for reversal is that the trial court erred in sustaining an objection made by Carlson's attorney when appellant's counsel called Carlson as a witness under Section 2055 of the Code of Civil Procedure. In the course of that ruling the court announced that said section was not applicable and afforded no reason why Carlson could be called and subjected to cross-examination as an adverse witness thereunder. The record is unsatisfactory. The reporter's transcript contains nothing that refers to the foregoing incident, but the clerk's transcript does contain a memorandum opinion rendered by the trial court when denying a motion for new trial based upon the same asserted error. The matter was fully discussed in appellant's opening brief. It appears that no offer of proof was made as to what Carlson might testify to if called and questioned. Respondent filed no brief. The Clerk of this Court, pursuant to Rule 17(b), notified the parties that the case would be submitted for decision on the record and on appellant's opening brief unless respondent's brief was filed, but no such brief was forthcoming. The matter was regularly placed on the calendar and is ready for decision and this Court feels it has no course open to it except to accept as true the statement of facts in appellant's opening brief, in conformity with said Rule 17(b).

[2–5] The ruling of the trial court constitutes reversible error. Lawless v. Calaway, 24 Cal.2d 81, 89–91, 147 P.2d 604. Therein our Supreme Court, in a case where the trial court had sustained objections to questions addressed to the adverse party called under said section, which questions called for expert testimony on his part, held that such a ruling was reversible error, and in discussing the matter declared that Section 2055 of the Code of Civil Procedure was enacted to enable a party to call his adversary and elicit his testimony without making him his own witness; that it was remedial in character and should be liberally construed in order to accomplish its purpose; that any relevant matter in issue in the case is within the scope of examination of witnesses called pursuant to its provisions. The court quoted approvingly from the opinion in Langford v. Issenhuth, 28 S.D. 451, 134 N.W. 889, 892, wherein that court said in respect of a similar statute that under it examination must be given the widest and freest scope; that the whole case could be fully and minutely investigated; that the main purpose of the statute was to permit an adverse party to be called to prove or to be questioned about facts material to the case of the party calling him, whether to prove a single material fact or a number of material facts, or even the whole case; that the facts as to which a party calling such a witness might desire to examine him were wholly within the party's discretion. Our Supreme Court further declared that the usual rule that a party objecting to the exclusion of evidence must make an offer of proof in order to show prejudicial error had no application, and the court disapproved certain cases decided in the District Courts of Appeal holding to the con-

trary. The court said [24 Cal.2d 81, 147 P.2d 609]: "Further, the examination of a party under section 2055 is often exploratory and it would be unreasonable to require an offer of proof under such circumstances." We think it was the clear right of the appellant under said code section to call Mr. Carlson to the stand and, without making him her witness, interrogate him fully concerning his defense that the note had been paid. It has been suggested that the matter was one lying within the realm of order of proof and that under Section 2042 of the Code of Civil Procedure the trial court could forbid the questioning for the reason that appellant had not called Carlson to the stand as part of her case in chief. The contention cannot be sustained. We are not concerned here with the order of proof, but with the substantive right given the appellant by statute. Whenever it was material to her case or whenever she desired before the close of the case to call Carlson as an adverse witness it was her privilege under the statute to do so.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

132 Cal.App.2d 335

The PEOPLE of the State of California, Plaintiff-Respondent,

v.

Ernest RODRIGUEZ, Defendant-Appellant.

Cr. 5257.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Hearing Denied May 18, 1955.

Defendant was convicted of owning or having in his possession or under his control .32 caliber pistol capable of being concealed upon the person and having barrel less than 12 inches long. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

Doran, J., dissented.

1. Criminal Law ⇐741(1), 742(1)

Jury is exclusive judge of credibility of witnesses and judge of effect and value of evidence addressed to it, except where evidence is declared by law to be conclusive proof of fact to which it relates. West's Ann.Code Civ.Proc. §§ 1847, 2061.

2. Criminal Law ⇐1159(1)

An appellate tribunal is not authorized to retry a cause. West's Ann.Code Civ. Proc. §§ 1847, 2061.

3. Criminal Law ⇐1159(2)

Duty of district court of appeal begins and ends with determination whether there is in record evidence, contradictory or not, of sufficient substantiality to warrant conclusion arrived at by duly constituted arbiter of the facts. West's Ann.Code Civ. Proc. §§ 1847, 2061.

4. Criminal Law ⇐409

In prosecution for owning or having in possession or under control a .32 caliber pistol capable of being concealed upon the person and having barrel less than 12 inches long, evidence was sufficient to render admissible testimony of defendant's free and voluntary extra-judicial statements admitting ownership of the gun. Penal Code, § 12021.

5. Weapons ⇐17(4)

Evidence was sufficient to sustain conviction for owning or having in possession or under control a .32 caliber pistol capable of being concealed upon the person and having barrel less than 12 inches long. Penal Code, § 12021.

6. Weapons ⇐17(4)

In prosecution for owning or having in possession or under control a .32 caliber pistol capable of being concealed upon the person and having a barrel less than 12 inches long, evidence was sufficient to es-

tablish that barrel was less than 12 inches long. Penal Code, § 12021.

Crispus A. Wright, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Jay L. Shavelson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of violation of Section 12021 of the Penal Code, in that on or about February 2, 1954, he owned or had in his possession or under his control a .32 caliber pistol capable of being concealed upon the person and having a barrel less than 12 inches in length, defendant having been previously convicted of grand theft, a felony, on November 30, 1944, in the Superior Court of Los Angeles County.

Following entry of a not guilty plea the cause proceeded to trial before a jury resulting in a verdict finding defendant guilty as charged in the information. Motion for a new trial was denied.

From the judgment and the order denying his motion for a new trial defendant prosecutes this appeal.

As to the factual background surrounding this prosecution, the record reflects that at about 1 o'clock on the morning of February 2, 1954, police officers rang the doorbell and were admitted into the premises at 1186 East 56th Street, Los Angeles. The door was opened by Mrs. Lois Rodriguez, former wife of defendant. She was asked regarding defendant's whereabouts and replied that he was not there. A few seconds later, defendant was seen within the house in the process of dressing himself. The lights in the house and other circumstances were such as to lead an arresting officer to assume that defendant had been in bed when the officers entered the house. At this time, defendant had on trousers and a shirt but no coat.

Defendant was immediately arrested and taken out to a police car, where he sat for about 20 minutes. During this period, the house was searched and an officer found a man's coat in a closet. In a pocket of this coat was an automatic pistol, loaded with "live" ammunition. The officer also found an envelope addressed to "Mr. E. Rodriquez" in a bureau drawer.

On February 4, 1954, two days after his arrest, defendant made a free and voluntary statement to H. W. Saeger, a police officer, who testified to this statement as follows:

"Q. Will you relate the conversation as pertains to this particular charge?

"A. Yes. At the aforementioned time, I had the People's Exhibit number 2 (the overcoat in which the pistol was found) before me wrapped up in a brown piece of paper and Mr. Rodriquez sat on one side of the desk and I sat on the other side.

"I unwrapped the People's Exhibit number 2 and put it before Mr. Rodriquez and I asked Mr. Rodriquez, I says, 'Is this your overcoat?'

"And he looked at it and says, 'Yes, it is.' That, 'I've had it for some time,' shortly after he got out of Terminal Island, which was in July of 1953.

"Then I asked Mr. Rodriquez if he lived at the address, 1186 East 56th Street.

"He stated that he had lived at this address since before Christmas and he had lived there with his wife and his kids, and that he got the gun that we have from a young lady on East Fifth Street by the name of Nancy, and that he was—who was a hyp, by the way—

* * * * * *

"A. And that he had gotten this gun from this Nancy on East Fifth Street on Sunday or the day before he was arrested on this current charge and that he was to pay her $9 for the gun but did not and instead got some narcotics for her.

"That he stated that he had placed the gun in this particular overcoat himself so that the kids wouldn't get to it, and that the reason he got the gun was for his wife's protection as there was some talk going around down—

* * * * * *

"A. There (was) some talk going around, talk he had quite a bit of money in the house. For that reason he got the gun to protect his wife. That was the sum and substance of the conversation I had with Mr. Rodriquez."

Testifying in behalf of defendant, Mrs. Rodriguez stated that she was divorced from defendant and that he had not been living with her at 1186 East 56th Street as of the date of arrest. She stated that the gun belonged to her and that the coat in which it was found was her uncle's and had been borrowed from him to wrap up the baby. She further testified that the envelope addressed to "Mr. E. Rodriquez" had been sent to her young son, Ernest Rodriguez.

On cross-examination, Mrs. Rodriguez admitted that she was pregnant and that defendant was the father of her unborn child. Her testimony took place on May 25, 1954. She testified that she had moved into the house at 1186 East 56th Street on December 24, 1953, and that defendant had never lived with her at that address.

Mrs. Rodriguez's father testified that he had lived with Mrs. Rodriguez at 1186 East 56th Street until January 31, 1954, three days before the arrest, and that defendant had not been living at this address at that time.

Defendant's aunt testified that the former lived with her at another address but further stated that he slept out some nights.

Mrs. Rodriguez's uncle testified that the coat in which the gun had been found belonged to him and had been loaned to Mrs. Rodriguez to wrap up the baby.

Defendant testified that he had lived with his aunt as of the date of arrest and that his disarray at time of arrest was due to the fact that he was just leaving the bathroom. He denied having made the statements testified to by Officer Seager and stated that this officer had tried to induce him to inform on other criminals for the Police Department and that he had refused. He testified that the gun had been offered to him for sale but that he had refused to purchase it, referring the sellers to his wife who needed a gun for protection.

In rebuttal, Officer Eldridge of the Los Angeles Police Department testified that he talked with Mrs. Rodriguez the day following defendant's arrest; that on this occasion she told him that defendant had been staying with her every night and that if he had another home, she did not know about it. She also told Officer Eldridge that the coat in which the gun had been found belonged to defendant.

[1–5] Appellant's first contention is that the evidence is insufficient to sustain the judgment of conviction. In this case, as is usual in cases presented on appeal, the evidence is in conflict. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. As has often been repeated, the legislature has ordained that the jury are the exclusive judges of the credibility of witnesses, Code Civ.Proc. § 1847, and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive proof of the fact to which it relates, Code Civ.Proc. § 2061. Therefore, an appellate tribunal is not authorized to retry a cause. Our duty begins and ends with the determination as to whether there is in the record evidence, contradicted or uncontradicted, of sufficient substantiality to warrant the conclusion arrived at by the duly constituted arbiter of the facts. Guided by these rules, the conclusion is inevitable that the evidence herein was sufficient in the first instance, to render admissible the testimony of appellant's free and voluntary extrajudicial statements admitting ownership of the gun, People v. Wilde, 82 Cal.App.2d 879, 187 P.2d 825; People v. Knox, 112 Cal. App.2d 339, 246 P.2d 81; People v. Bedoy, 80 Cal.App. 783, 786, 252 P. 1061; People v. Rogers, 112 Cal.App. 615, 618–619, 297 P. 924. And when appellant's admissions are considered in conjunction with the other evidence herein narrated, there was ample proof of his guilt.

[6] Finally, it is urged by appellant that no evidence was presented to sustain the allegation in the information as to the length of the barrel of the weapon in

question. This contention is without merit. The pistol itself which was introduced into evidence as an exhibit was of course the best evidence of the size of its barrel. Added to this was other evidence from which it could reasonably be inferred that the size of the pistol was as alleged in the information, viz., the gun was apparently small enough to be concealed in a coat pocket. The gun was described as an "automatic", and it is common knowledge that an "automatic" is a small weapon, much less than 12 inches in length. Mrs. Rodriguez testified she kept the pistol in the pocket of her own coat. Her father testified he had seen her with a "little automatic", and that it resembled the gun in question. And, as heretofore stated, the weapon was exhibited to the jury, and no claim is made that proper instructions were not given the jury covering the requisite size of the pistol to constitute the offense charged.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DRAPEAU, J., concurs.

DORAN, J., dissents.

132 Cal.App.2d 288

Blanche E. ROBIN and Ruth A. Mendelsohn, as co-executrices of the Estate of Louis Minick, Deceased, Plaintiffs and Respondents,

v.

Forrest SMITH, Defendant and Appellant.

Civ. 20530.

District Court of Appeal, Second District, Division 2, California.

April 15, 1955.

Action was brought on alleged book account of deceased. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Fox, J., held that where, under system of bookkeeping used by deceased, no accounts receivable were set up in his books, and records showed merely disbursements by decedent to defendant, decedent's books did not constitute a "book account," as contemplated by law, and that no recovery could be had in action on alleged book account.

Judgment reversed.

1. Account, Action on ⇐17

An account is a "book account" whether kept in one book or several, so long as the account is a permanent record and constitutes a system of bookkeeping as distinguished from mere private memoranda.

See publication Words and Phrases, for other judicial constructions and definitions of "Book Account".

2. Account, Action on ⇐17

The liberalized rule of evidence relating to admissibility of business records under the Uniform Business Records Act does not modify substantive law as to elements of a book account. West's Ann. Code Civ.Proc. § 1953f.

3. Account, Action on ⇐17

An account is a "book account" when it contains a sufficiently complete statement of debits and credits of transactions involved to supply evidence from which it can be reasonably determined what amount is due to claimant.

4. Account, Action on ⇐17

A "book account" may consist of a single entry reflecting the establishment of an account between the parties.

5. Account, Action on ⇐18

Where, under system of bookkeeping used by deceased, no accounts receivable were set up in his books, and records showed merely disbursements by decedent to defendant, decedent's books did not constitute a "book account," as contemplated by law, and no recovery could be had in action on alleged book account. West's Ann.Code Civ.Proc. § 1953f.

6. Account, Action on ⇐17

Existence of a book account is not established by extrinsic reference to auditor's working papers which do not form part of bookkeeping system.

7. Account, Action on ⇐17

Record of transaction creating an account between parties must appear from account books of owner of demand in such form as will show that an account was actually being kept.

8. Evidence ⇐265(3)

In action on alleged book account, which never existed, admission by defendant that he had borrowed certain sum of money could not be used to supply, or as a substitute for, the alleged book account.

9. Appeal and Error ⇐1011(1)

Rule that reviewing court will not reverse judgment where crucial findings are based on conflicting evidence, was not applicable on appeal from judgment in favor of plaintiffs in action on book account which never existed.

Pines & Walsh, Los Angeles, for appellant.

Gilbert Klein, Los Angeles, for respondents.

FOX, Justice.

Plaintiffs, as co-executrices of the Estate of Louis Minick, sued defendant on a book account.[1] Defendant appeals from an adverse judgment. The sole question is whether the evidence established the existence of a book account.

Decedent was engaged in the dairy and ice cream business. He was the sole proprietor of Minick's Dairy Farm. It is the books of this enterprise that are here involved.

Plaintiffs' amended complaint alleges that within four years defendant became indebted to the deceased Louis Minick in the sum of $5,766.78 upon a book account, reflecting such balance as owing to decedent by reason of money loaned to defendant.

Plaintiffs introduced four exhibits which purportedly comprise the asserted book account. Exhibit 1 consists of pages 14 through 16 inclusive taken from the books of decedent's company. They are collectively captioned "Record of Disbursements for August 1949" and contain over sixty entries relating to sums given by check to various individuals and corporations. Among these items is a check drawn to defendant's order on August 23, 1949, for $1,660.81. No other data with reference to this disbursement appears except that it was chargeable to decedent's personal account. Several other items also are thus charged, including a check made out to the Collector of Internal Revenue. Other disbursements recorded include checks to the Southern California Edison Co., Linen Service Co., H. L. Byram, Tax Collector of Los Angeles County, etc. Plaintiffs' Exhibit 2 is a sheet from the company books, one side of which is entitled "Record of Checks Drawn On ——— month of January 1950 No. 1" This discloses a check drawn to defendant's order in the amount of $5,000, chargeable also to decedent's personal account. The rest of the sheet lists about 30 other checks drawn in favor of miscellaneous payees from January through March of 1950, including one to the Collector of Internal Revenue.

Exhibits 3 and 4 are general ledger sheets entitled "Louis Minick—Investment." Exhibit 3 contains 24 entries covering the year 1949. The entry for August 31st shows a total of $9,621.42 listed under the "charges" column. This total includes the check of August 23, 1949, for $1,660.81 in favor of defendant, and among other items, the check issued on August 11, 1949, to the Collector of Internal Revenue to apply on Minick's personal income taxes. Exhibit 4 simply records a charge of $5,000 against Minick's investment account for January, 1950, and apparently represents the $5,000 check issued to defendant al-

1. The original complaint, filed March 4, 1953, also included a count for money loaned, and an account stated. These counts were omitted in the amended complaint.

though his name does not appear thereon. This item is but one notation in a column of figures representing various transactions of an undisclosed nature with other parties.

On Exhibits 1 and 2, defendant's name appears only as the person in whose favor the respective checks mentioned above were drawn. There is no specific account between decedent or his company and defendant. There is nothing in the exhibits which identifies the nature of the transaction beyond that of a disbursement by check. There is no figure on the sheets in evidence which corresponds to the amount of the judgment. Likewise, there are no figures from which a balance may be struck and the amount of the judgment derived. In fact, the books do not reveal any credits to defendant and are utterly silent as to what the disbursements represent. So far as appears from the books, no charges are shown against defendant—the only charges posted being against decedent's investment account for certain checks drawn against his business. In this connection, the books place upon an equal footing—as mere disbursements—the checks drawn in favor of defendant and the Collector of Internal Revenue, the Southern California Edison Co., and the tax collector of Los Angeles County.

[1–4] It is at once manifest that while defendant's name appears as the payee of two checks among a miscellaneous agglomeration of names set down in a business record, there is absolutely no showing of any book account between the parties as that term is understood in legal parlance. At the outset we may state certain truisms. "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." Egan v. Bishop, 8 Cal.App.2d 119, 122, 47 P.2d 500, 502. With the addition of section 1953f of the Code of Civil Procedure in 1941 as part of the Uniform Business Records Act, many of the strict foundational requirements of the common law were relaxed to facilitate the admission into evidence of certain records kept in the regular course of business. Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1; Thompson v. Machado, 78 Cal.App.2d 870, 873, 178 P.2d 838. But this liberalized rule of evidence relating to the admissibility of business records did not, of course, modify the substantive law as to the elements of a book account. Tabata v. Murane, 76 Cal.App.2d 887, 891, 174 P.2d 684. The nature of a book account is well defined in Tillson v. Peters, 41 Cal.App.2d 671, 678, 107 P.2d 434, 438, as follows: "A book account may be deemed to furnish the foundation for a suit in assumpsit, within the limitation of time prescribed by section 337 of the Code of Civil Procedure, only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." The court further points out that "The term 'account', as it is used in the statute, clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant." A book account may, of course, consist of a single entry reflecting the establishment of an account between the parties. Bailey v. Hoffman, 99 Cal.App. 347, 278 P. 498.

[5–7] Tested by these principles, it is plain that the entries in decedent's books do not constitute a book account as contemplated by the law. On this point decedent's bookkeeper testified that "In my books of account I have no account with Forrest Smith." He further stated that while in certain cases accounts were set up on separate sheets to show money due decedent's dairy business, there was no such sheet in the general ledger for defendant. Plaintiffs concede that under the system of bookkeeping used by decedent no accounts receivable were set up in his books. They assert, however, that the entries referred

to were classified as accounts receivable in the auditor's working papers which were prepared semi-annually. But the existence of a book account is not established by extrinsic reference to "working papers" of an auditor prepared semi-annually which are neither introduced in evidence nor form a part of the creditor's bookkeeping system as such. The record of the transaction creating the account between the parties must appear from the account books of the owner of the demand in such form as will show an account was actually being kept. Such was not the case here. The entries appearing on plaintiffs' exhibits consist only of disbursments—two—neither of which is charged to defendant, nor is there any entry suggesting an indebtedness was thereby created. There is, in fact, no specific account in these books between decedent and defendant. No credits are disclosed yet the judgment is substantially less than the total of the two disbursements. No figures are recorded which "supply evidence from which it can be reasonably determined what amount," if any, is due decedent's estate. In truth, there are no figures in the books from which the amount of the judgment can be derived.

Boehmke v. Westfall, 106 Cal.App. 754, 289 P. 920, is of no comfort to plaintiffs. In that case all the elements here lacking appear plainly in the book account between the plaintiff daughter and defendant mother, which clearly reflect the maintenance of an account between the parties in which the amount owing is readily ascertainable.

[8] In an attempt to fortify their position, plaintiffs point out that defendant testified on cross-examination that he borrowed $5,000 from Minick in January, 1950, and had not repaid it. This admission cannot be used to supply, or as a substitute for, an alleged book account between the parties that never existed. Defendant was called upon to meet the charge that he was indebted to Minick on a book account, and not upon any other cause of action. Tabata v. Murane, 76 Cal.App.2d 887, 892, 174 P.2d 684. Such an admission would have been relevant and material in an action for money loaned, but, as pointed out in the footnote, the count for money loaned which was in the original complaint, was omitted from the amended complaint. The undoubted reason for eliminating that count was the obvious fact that it was vulnerable to the two year statute of limitation. By proceeding on a book account plaintiffs had the benefit of a four year statute of limitation. But in order to avail themselves of this extended period of limitation, they must prove the cause of action to which it relates, viz., a book account. This they have failed to do, and they cannot bring themselves within the extended period by proving an indebtedness which would have been barred under the count they had abandoned. Cleveland v. Inter-City Parcel Service, 22 Cal.App.2d 574, 579–581, 72 P.2d 179. The comment of the court in the Tabata case, supra, is here apposite. It was there pointed out that "Plaintiff's cause of action was not for money loaned. If he failed to prove a book account he could not recover upon some other cause of action." 76 Cal.App.2d at page 892, 174 P.2d at page 687.

[9] Plaintiffs rely upon the established rule that a reviewing court will not reverse a judgment where crucial findings are based on conflicting evidence. That rule, however, is not applicable here for there is an entire absence of any account between decedent and defendant.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

132 Cal.App.2d 440

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur J. SPRING and Steve Vernon Rhinehart, Defendants,

Arthur J. Spring, Appellant.

Cr. 2592.

District Court of Appeal, Third District, California.

April 20, 1955.

Prosecution for robbery and for assault by means of force likely to produce great bodily harm. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment against both defendants on both counts. One defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1159(2)

The court on appeal will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

2. Criminal Law ⇐1160

It is function of jury in the first instance, and of trial court after verdict, to determine what facts are established by evidence, and before verdict which had been approved by trial court, can be set aside on appeal upon ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.

3. Criminal Law ⇐562

The determination of a charge in a criminal case involves proof of two distinct propositions, first, that the offense charged was committed, and second, that it was perpetrated by the person or persons accused thereof.

4. Criminal Law ⇐1144(13), 1159(2)

District court of appeal must assume in favor of verdict the existence of every fact which the jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict, and if circumstances reasonably justify verdict, opinion of reviewing court that these circumstances might also be reconciled with the innocence of the accused will not warrant interference with determination of jury.

5. Assault and Battery ⇐92

Robbery ⇐24(1)

Evidence was sufficient to support conviction of robbery and of assault by means of force likely to produce great bodily injury.

John E. Nelson, Ukiah, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant and his co-defendant, Steve Vernon Rhinehart, were charged by information with the crime of robbery and also with the crime of assault by means of force likely to produce great bodily injury. The jury found them guilty on both counts, appellant's motion for a new trial was denied, and appellant has appealed from the judgment of conviction and the order denying his motion for a new trial.

[1–4] The only ground urged by appellant for a reversal of the judgment and order is that the evidence is insufficient to support his conviction. Before discussing this contention we deem it appropriate to quote the following language of our Supreme Court in People v. Newland, 15 Cal. 2d 678, at page 681, 104 P.2d 778 at page 779:

"The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first

instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. [Citing cases.] "

Bearing in mind this familiar rule we shall give a brief summary of the evidence.

On June 2, 1954, Mr. Leslie Hutson, the victim of the robbery and assault, came to the town of Willits, Mendocino County, for the purpose of purchasing redwood logs for his business. He was accompanied by a friend, one John Templeton. During the afternoon of June 2nd Mr. Hutson and Mr. Templeton went to a bar in Willits. While there, Mr. Hutson became engaged in conversation with the appellant, Arthur J. Spring, and one Steve Rhinehart. During the course of the conversation either appellant or Rhinehart stated to Mr. Hutson that they knew where he could purchase the type of logs he was looking for. Mr. Hutson's companion, Mr. Templeton, left the bar and did not return. Mr. Hutson then left in the company of appellant and Rhinehart. The three of them drove to a bar known as Shangri La, located about seven or eight miles from Willits. The three went into the bar and each obtained a bottle of beer. They took the bottles of beer with them and drove a short distance to a point where they turned off the road. The three men alighted from the car and walked up a hill and after going a short way Mr. Hutson became winded and sat down on a log. Mr. Hutson asked, "How much further is it up to where that stuff is?" One of the men replied, "Just a little ways," and at that moment Mr. Hutson received a blow on the back of his head, a second blow followed, and he was pushed off the log. Appellant then jerked Mr. Hutson's belt off, tore his shirt and took the money out of his pants pocket, a railroad watch and a jackknife. Rhinehart removed the money from his shirt pocket, consisting of approximately $290. During all of this time the victim, Mr. Hutson, was conscious and begged his assailants not to beat him any more.

Immediately after appellant and Rhinehart left, Mr. Hutson passed out and remained unconscious for an indefinite period. When he awoke, it was still daylight. He managed to reach the road, where he flagged down a car, and was taken to the Willits Police Station where he reported the incident.

Mr. Hutson testified at the trial and positively identified both appellant and Rhinehart, and Mrs. Harvey, the owner of the Shangri La, testified that appellant was one of the two men who were in her bar with Hutson and purchased the beer, and that all three men left together.

Appellant testified in his own behalf and denied that he left Willits on the afternoon or evening in question or that he was one of the two men who assaulted and robbed Hutson. Defendant Rhinehart was the only other defense witness and he testified that appellant was not one of the men who left the bar in Willits with Hutson and himself.

Appellant attacks the evidence as being insufficient in that it does not adequately identify appellant as one who participated in the assault and robbery. He points to various discrepancies in the testimony of the People's witnesses and to conflicts in the testimony of various witnesses. He argues that the testimony of Hutson and of

Mrs. Harvey should be disregarded as unworthy of belief.

[5] There is no merit in these contentions of appellant. There was nothing inherently improbable in the testimony of Hutson or Mrs. Harvey and their credibility and the weight to be given to their testimony were matters for the determination of the jury. The record shows that appellant's counsel made a vigorous argument to the jury and pointed out all of these asserted discrepancies, and we must assume that the jury considered the weight of the identification and other testimony. No doubt the same argument was made to the trial court upon appellant's motion for a new trial. Appellant's arguments were properly addressed to the jury and the trial court but are unavailing on appeal as we cannot say that the record fails to support the conclusion of the jury that appellant was one of the two men who assaulted and robbed Hutson.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 343

In the Matter of the ESTATE of Charlotte S. SMYTHE, Deceased.

Neal D. IRELAND, Petitioner and Respondent,

Ruth Smyth, Beneficiary and Respondent,

v.

PACIFIC HOME, and Church of the Messiah, Contestants and Appellants.

Civ. 20690.

District Court of Appeal, Second District, Division 3, California.

April 18, 1955.

In an estate proceeding, the Superior Court, Los Angeles County, Roy L. Herndon, J., entered decree giving entire estate in fee to prime beneficiary named in will and other named beneficiaries appealed. The District Court of Appeal, Vallée, J., held that where will gave testator's entire estate to prime beneficiary during her lifetime, as she might need or see fit to use it, and if upon testator's death, any of estate remained, such remainder to be divided equally through prime beneficiary's will between corporation and church, will did not give prime beneficiary fee simple estate, but gave all property of testator to prime beneficiary for life with power of consumption as she might need or see fit to use it, together with mandatory power of appointment to be exercised by her will of remainder to other designated beneficiaries.

Reversed.

1. Wills ⇐439, 470

All other rules yield to rule that intention of testator is polar star that must guide in interpretation of will, and question is to be dealt with by reading will as a whole and determining intent therefrom. Probate Code, § 101.

2. Life Estates ⇐1

A "life estate" is an estate whose duration is limited to life of person holding it or some other person.

See publication Words and Phrases, for other judicial constructions and definitions of "Life Estate".

3. Wills ⇐614(1)

It is not essential to giving of life estate that it be expressly declared to be such, nor that term life estate shall be used, but intention can as well be manifested by other words, referring to estate conveyed and describing its characteristics, and if by that means intention to vest life estate only is shown, it will be as effectual as if it were expressly so stated.

4. Wills ⇐601(2)

Where will devises estate in fee, gift over of what is left or not disposed of by first taker is void.

5. Wills ⇐614(2)

The rule, called the "power rule", that where estate is devised in fee, gift over of

what is left or not disposed of by first taker is void, has no application if estate of first taker is life estate.

See publication Words and Phrases, for other judicial constructions and definitions of "Power Rule".

6. Life Estates ⇐1

Life estate with power to use and consume part or all of principal for specified purposes and limitation over of remainder on termination of life estate is valid.

7. Life Estates ⇐3

Power of absolute disposition, annexed to life estate, does not enlarge that estate into estate in fee.

8. Life Estates ⇐3

Where estate for life with remainder over is given with power of disposition in fee of remainder annexed, limitation for life of first taker will control and life estate will not be enlarged to fee notwithstanding power of life tenant to dispose of fee.

9. Wills ⇐601(2), 614(2)

If first taker designated by will is given fee simple estate, devise over is inoperative, but if first taker is given life estate with power of disposition, devise over is effective.

10. Wills ⇐601(2), 614(2), 616(1)

Validity of devise over is dependent on character of estate vesting in first taker, and if estate is given for life an added power of disposition does not enlarge estate into fee simple.

11. Wills ⇐616(4)

Where bequest or devise is made in ordinary language, without words of inheritance or perpetuity, but in terms standing alone to carry absolute or fee interest, and followed by a limitation over of the property not disposed of by first taker, first taker takes life estate only with power of disposal.

12. Wills ⇐616(4)

Will limitation over of such property as is left undisposed of at death of first taker is regarded as not contemplating absolute power of disposition.

13. Wills ⇐616(1)

Fact that qualified or limited power of disposal as for use is expressly vested in first taker by will shows intention that he is given less than fee.

14. Wills ⇐616(1)

Express vesting of power of disposition in first taker by will shows intention that he was not intended to have fee.

15. Wills ⇐614(2)

Circumstance that gift over covers all property not disposed of by first taker designated in will by act inter vivos shows intention to give life estate only.

16. Wills ⇐616(4)

Power to designate disposition of any of testator's estate that remained at time of death of beneficiary, which did not authorize appointment by her beyond class designated in will, did not enlarge or add anything to life estate given such beneficiary.

17. Wills ⇐692(4)

Power to will property to certain specifically named persons is special or particular and not general or discretionary.

18. Wills ⇐692(4)

Power to will property to certain specifically named persons with respect to remainder is coupled with mandatory duty to exercise it.

19. Powers ⇐35

Special and mandatory power is obligatory on donee and is raised in equity as trust or power in trust, and execution of that power may be enforced in equity in same way as trust.

20. Powers ⇐39

Unless donor has provided for gift in default of appointment, if donee fails to exercise power, objects of power will share equally in gift provided that donor has not evidenced contrary intention.

21. Trusts ⇐287

Object of court in exercising powers in trust designated by will is to carry out intention of testator.

22. Wills ⇐616(1)

One to whom property is bequeathed or devised for use during life may not impair principal, and word "use" standing alone indicates use without impairment of corpus.

23. Wills ⇐616(1), 692(4)

Where will gave testator's entire estate to prime beneficiary during her lifetime, as she might need or see fit to use it, and if upon testator's death, any of estate remained, such remainder to be divided equally through prime beneficiary's will between corporation and church, will did not give prime beneficiary fee simple estate, but gave all property of testator to prime beneficiary for life with power of consumption as she might need or see fit to use it, together with mandatory power of appointment to be exercised by her will of remainder to other designated beneficiaries.

Roland Maxwell, Paul H. Marston, and Richard W. Olson, Pasadena, for appellants.

Wendell P. Hubbard, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from the decree of distribution in the estate of Charlotte S. Smythe, who died testate. The problem is the proper interpretation of the dispositive paragraph of her will.

The provision of the will in question reads:

> "All that I possess I give and bequeath to this same Ruth Smyth for her during her life time, as she may need or see fit to use. If, upon her death, any of my estate remains, it is my will that such remainder be divided equally through her will between Pacific Home a California Corporation in Los Angeles, where I now reside, and the Church of the Messiah, of which I am now a Member."

The court decreed that the estate be distributed to Ruth Smyth in fee, unconditionally, without restriction or limitation. Pacific Home and Church of the Messiah appeal. They contend the will bequeathed and devised an estate for life to Ruth Smyth with a right of use, and the remainder to them. Ruth Smyth contends she took a fee-simple estate in all property of the testatrix, that the disposition to her is absolute, and that the attempted disposition to appellants is inconsistent with the absolute disposition and is therefore void.

[1] It is trite to say that the intention of the testator is the polar star that must guide in the interpretation of a will to which all other rules must yield. Probate Code, § 101; Estate of Salmonski, 38 Cal.2d 199, 209, 238 P.2d 966. The question is to be dealt with by reading the will as a whole and determining the intent therefrom. Estate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607.

[2, 3] A life estate is an estate whose duration is limited to the life of the person holding it or some other person. 16 Cal. Jur. 366, § 2. "It is not an essential requisite to the giving of a life estate, that it be expressly declared to be such, nor that the term 'life estate' shall be used. The intention can as well be manifested by other words, referring to the estate conveyed and describing its characteristics, and if, by that means, the intention to vest a life estate only is shown, it will be as effectual as if it were expressly so stated." Burnett v. Piercy, 149 Cal. 178, 192, 86 P. 603, 608.

[4–8] Where an estate is devised in fee, a gift over of what is left or not disposed of by the first taker is void. This rule, called the power rule, has no application if the estate of the first taker is a life estate. See cases collected 17 A.L.R.2d 38. A life estate with power to use and consume part or all of the principal for specified purposes and a limitation over of the remainder on termination of the life estate has long been recognized in this state. Lord v. Atchison, 12 Cal.2d 681, 686, 87 P.2d 346. Such power of absolute disposition, annexed to a life estate, does not enlarge that estate into an estate in fee. Adams v. Prather, 176 Cal. 33, 167 P. 867; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247. The rule in this state, in accord with the majority view, is that where an estate for life with remainder over is given with a power of disposition in fee of the remainder annexed, the limitation for the life of the first taker will control and the life estate will not be enlarged to a fee notwithstanding the power of the life tenant to dispose of the fee.

Morffew v. San Francisco & S. R. Co., 107 Cal. 587, 40 P. 810; Luscomb v. Fintzelberg, supra, 162 Cal. 433, 123 P. 247.

In Hardy v. Mayhew, 158 Cal. 95, 110 P. 113, 114, the decree distributed the property to Mayhew " 'for his use, during his natural life, and on his death the unused portion of said sum to' " children and a grandchild. The court said, 158 Cal. at pages 99–103, 110 P. at pages 115–116:

"Herein was clearly a distribution to Judge Mayhew of a life estate simply, an estate limited by express terms to his natural life, with the power of disposing of the principal, even to the extent of entirely consuming it, in such ways as might be consistent with his 'use' thereof, and a distribution of the remainder to plaintiff and the three children in equal shares.

"* * * The distinction between the case of an intended gift of an absolute title to one with an attempted gift over of simply 'what remains unexpended' by the donee at the time of his death, where the gift over is void because in derogation of the absolute fee given the first taker, and the case of a gift of a life estate with a power of disposition for a particular purpose only, with an express gift over of what remains unused for such purpose, is recognized by all the authorities. The cases supporting our conclusion are numerous, and a few of these may properly be referred to. * * * In Burleigh v. Clough, 52 N.H. 267, 13 Am.Rep. 23, the gift was of all the estate to the wife to her use and disposal during her natural life, and what is remaining at her decease, undisposed of by her to others named. It was held that the wife took only a life estate, with power to dispose of such of the property, even to the extent of the whole, as her needs, her comfort, or her gratification should demand, and that the provision as to a gift over created a *vested* remainder. * * * In Eubank v. Smiley, 130 Ind. 393, 29 N.E. 919, a gift to the wife of all the husband's property 'to do with and dispose of after my decease as she may think best' and at decease of the wife, the *real estate* to be equally divided among my heirs, was held to give only a life estate in the real estate. * * * It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, where, taking the whole instrument together, it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption. As expressly indicated in some of the decisions referred to above, the interest of the remainderman expressly designated, in this case Chas. P. Mayhew, Frank J. Mayhew, Mary E. Phipps, and plaintiff, was a vested remainder. Neither the person in whom nor the event upon which it was limited to take effect was in any degree uncertain. Civ.Code, §§ 693 to 695." See also Luscomb v. Fintzelberg, supra, 162 Cal. 433, 441, 123 P. 247.

The court in Estate of Tooley, 170 Cal. 164, 149 P. 574, construed this will:

"I give all my property at my death to my daughter Logan Mattie Tooley.

"If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother."

It was held that on the death of the daughter, leaving neither husband nor children, the estate passed to the sisters and brother of the testatrix and hence was not subject to the testamentary disposition of the daughter.

In Adams v. Prather, 176 Cal. 33, at pages 37, 40, 167 P. 534, at page 536, the court said:

"While the first dispositive clause of the will, namely, 'I give all the property of which I die possessed to my husband Thomas Prather, * * *' is clear and, taken alone, admits of no con-

struction other than that an absolute disposal of her estate to him was intended, the second dispositive clause, to wit, 'Upon the death of my husband the said Thomas Prather one-half of the unexpended portion of my estate bequeathed to my husband to be given to my niece Julia Adams, * * * the other one-half to be given to the surviving daughters of my brother Edson F. Adams in equal shares,' is equally clear and distinct. Estate of Tooley, 170 Cal. 164, 149 P. 574, Ann.Cas. 1917B, 516. Hence, unless irreconcilable with the first clause, it should be construed in relation therewith. Read in connection with the first clause, it is clear that in using the words, 'unexpended portion of *my estate,*' she had reference to that portion of *her estate* which should remain unconsumed by her husband at his death, and this part of her estate so remaining was, by the terms of the will, addressed, not to her husband as legatee, but to the executor of her will, 'to be given' in the manner provided by law to her nieces. * * * The intention of Julia P. A. Prather as expressed in her will was to give her estate to her husband for his unrestricted use and consumption during the term of his natural life, with power to control, manage, exchange, sell, and dispose of the same, limited, however, in the exercise of such power to the purpose for which the property was given him, viz. his use and consumption thereof. While as to the property, persons dealing with him in good faith would be entitled to protection as fully and to like extent as though he were absolute owner in fee thereof, *he could not, as of right in his lifetime, give it away or make it the subject of testamentary disposition at his death.*"

In Colburn v. Burlingame, 190 Cal. 697, at page 698, 214 P. 226, at page 227, 27 A.L.R. 1374, the provisions of the will as stated by the court were these:

"'I give, devise and bequeath to my beloved wife Leora I. Colburn the entire handling and control of any and all of my real estate and any and all my personal property of any and every name nature or kind—wheresoever situate—to have and to hold, occupy or use the whole or any part thereof in such manner as may in her judgment seem best for her own individual benefit and support without any hindrance on the part of any person or persons wholly confiding in and believing my beloved wife will not allow said property to depreciate or go to waste.'

"The third paragraph then gives the estate to the mother of the deceased and the mother of the defendant in the event of the latter's death. She, however, has survived them, which brings into operation the fourth paragraph of the will, which is as follows:

"'It is my wish and will and I do so direct that in case of the decease of my mother Mrs. Eliza A. Colburn and the mother of my beloved wife Mrs. P. M. Westbrook and my beloved wife Leora I. Colburn shall yet be living, then and in such case I give, devise and bequeath any and all my real estate and any and all personal property of any and every name nature or kind wheresoever situate at the time of the decease of my beloved wife Leora I. Colburn. To my brothers then living and to my beloved wife's sister Mrs. Dora L. Nehrbass jointly and severally the remainder of my estate share and share alike.'"

The court held, 190 Cal. at page 700, 214 P. at page 228:

"That the provision made for the defendant [the wife] by said will constituted a life estate, although with power to consume the principal of the estate, we have no doubt. By paragraph 2 the entire estate is given over to her to be used for her individual benefit and support, and at her death the remainder, that is, the part of the estate unconsumed by her, is, by paragraph 4, given to the testator's brothers and sister-in-law."

The court then referred to and quoted from Hardy v. Mayhew, supra, 158 Cal.

95, 110 P. 113, and Allen v. Hirlinger, 219 Pa. 56, 67 A. 907, 123 Am.St.Rep. 617, 13 L.R.A.,N.S., 458, and concluded, 190 Cal. at page 702, 214 P. at page 228:

> "So, in the case at bar, the provisions of the fourth paragraph of the will, giving to the plaintiffs what is left of the estate upon the death of the defendant, make it quite clear that the testator intended to give to his wife only a life estate."

In Estate of Thompson, 62 Cal.App. 493, 217 P. 127, the testatrix gave her daughter two-thirds of all her estate, and provided that in case the daughter died without issue such estate as remained should go to others. The daughter died without issue. It was held that only a life estate was given, and that the remaindermen were entitled to the amount unexpended by the daughter during her lifetime.

The will in Estate of Mayne, 28 Cal.App. 2d 340, 82 P.2d 504, 505, read:

> "In case of my accidental departure of this life, I leave all my property to my husband, Frank K. Mayne.
>
> "To be carefully kept and finally divided equally between Frances and Walter—if any remains after Frank's passing on."

The superior court, sitting in probate, distributed the estate to the surviving husband for life, and on his death "the unused portion thereof" to Frances and Walter. On review it was contended that the will gave a fee-simple estate to the husband. It was held that it could not be doubted that what the testatrix intended was to give a life estate to her husband with remainder over to Frances and Walter

The will before the court in King v. Hawley, 113 Cal.App.2d 534, 248 P.2d 491, 493, read:

> "'I devise and bequeath all my property to my sister, Mrs. Ida M. Graves * * * and that she may use all the proceeds of my estate for her comfort and support; but that whatever may be left of my estate at her death shall go to James Woodward King of Sacramento, California, and to his heirs.'"

It was contended that the will devised a fee and not a life estate. The court held that there was vested in Ida Graves an estate for life with remainder over to King.[1]

[9–15] We deduce the following principles of law from the foregoing authorities. If the first taker is given a fee-simple estate it is obvious that a devise over is inoperative, but if the first taker is given a life estate with a power of disposition the devise over is effective. In other words, the validity of the devise over is dependent on the character of the estate vesting in the first taker, and if an estate is given for life an added power of disposition does not enlarge the estate into a fee simple. The rule gives effect to the intention of the testator and regards specific terms such as "for life," "during his or her natural life," etc., as showing the estate the testator intended to give. Where a bequest or devise is made in ordinary language, without words of inheritance or perpetuity, but in terms standing alone to carry the absolute or fee interest, and followed by a limitation over of the property not disposed of by the first taker, the first taker takes a life estate only with power of disposal. Cases collected 17 A.L.R.2d 135. A limitation

1. See also Estate of Rath, 10 Cal.2d 399, 404, 75 P.2d 509, 115 A.L.R. 836; Mitchell v. Bagot, 48 Cal.App.2d 281, 284, 119 P.2d 758; Estate of Bjors, 103 Cal.App. 2d 361, 371, 229 P.2d 468; Mead v. Welch, 9 Cir., 95 F.2d 617, 619; Johnson v. Johnson, 51 Ohio St. 446, 38 N.E. 61; Seaward v. Davis, 198 N.Y. 415, 91 N.E. 1107–1108; Chesnut v. Chesnut, 300 Pa. 146, 151 A. 339, 75 A.L.R. 66; In re Dickinson's Estate, 209 Pa. 59, 58 A. 120; Hambright's Appeal, 2 Grant's Cas., Pa., 320; Voncannon v. Hudson Belk Co. of Asheboro, N. C., 236 N.C. 709, 73 S.E.2d 875, 877; Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139, 143; Hutchinson's Estate v. Arnt, 210 Ind. 509, 1 N.E.2d 585, 4 N.E.2d 202, 108 A.L.R. 530; Forsey v. Luton, 39 Tenn. 183; Annotations, 36 A.L.R. 1177, 1180; 76 A.L.R. 1153; 17 A.L.R.2d 34; 9 Ann.Cas. 947; Ann.Cas.1912B, 424; Ann. Cas.1916D, 400; 39 Am.St.Rep. 73, 82.

over of such property as is left undisposed of at the death of the first taker is usually regarded as not contemplating an absolute power of disposition. Id., 59, 64. The fact that a qualified or limited power of disposal as for use is expressly vested in the first taker argues that he is given less than the fee. Mitchell v. Bagot, 48 Cal.App.2d 281, 119 P.2d 758. An express vesting of power of disposition in the first taker argues that he was not intended to have the fee. The circumstance that a gift over covers all property not disposed of by the first taker by act *inter vivos* argues that the intent was to give a life estate only. Cases collected 17 A.L.R.2d 83.

[16–21] The power of appointment given to Ruth Smyth does not authorize an appointment by her beyond the class designated in the will of decedent, i. e., beyond Pacific Home and Church of the Messiah. In re Johnson's Estate, 276 Pa. 291, 120 A. 128, 129. Nor does it enlarge or add anything to the life estate. Rest., Property, § 323, Comment b; Keays v. Blinn, 234 Ill. 121, 84 N.E. 628, 630, 14 Ann.Cas. 37; Collins v. Wickwire, 162 Mass. 143, 38 N.E. 365, 366; Long v. Waldraven, 113 N.C. 337, 18 S.E. 251 A power to will property to certain specifically named persons is special or particular and not general or discretionary. O'Neil v. Ross, 93 Cal.App. 306, 317, 277 P. 123. The power with respect to the remainder is coupled with a mandatory duty to exercise it. See 72 C.J.S., Powers, § 33, p. 430. The testatrix said: "it is my will that such remainder be divided equally through her [Ruth Smyth's] will" between appellants. A special and mandatory power is obligatory on the donee and is raised in equity as a trust or a power in trust, and the execution of that power may be enforced in equity in the same way as a trust. O'Neil v. Ross, supra, 318; 72 C.J.S., Powers, §§ 38, 55, pp. 435, 465. Unless the donor has provided for a gift in default of appointment, if the donee fails to exercise the power the objects of the power will share equally in the gift provided the donor has not evidenced a contrary intention. Burby on Real Property, 2d Ed., 608, § 329. Underhill says:

> "[T]he remedy in equity for the non-execution of a mandatory power which is equivalent to a power in trust is the same as for the enforcement of a trust. The execution of a power in which third persons are interested will be compelled in equity. And equity will not permit the negligence of the donee of such a power, his mistaken understanding of his duties, or his accidental failure to execute the power, to prejudice those who are to benefit by its exercise. The power will be regarded as a trust, and in case the donee has not performed his duty the court will perform it for him in order that the rights of the beneficiaries may be protected."

2 Underhill on the Law of Wills, 1170, § 802. The object of the court in exercising the power in trust is to carry out the intention of the testator. Idem.

[22] In the case at bar there is a clear intention on the part of the testatrix to bequeath and devise a life estate only together with a limitation over of what remains. The duration of the estate given to Ruth Smyth is stated. The first language gives the estate to her "for her during her life time, as she may need or see fit to use." This language is not inconsistent with a remainder to appellants. Standing alone, it does not carry an estate in fee to Ruth Smyth. She is not given an absolute power of disposition. Cases collected 17 A.L.R. 2d 34, 57. The language is sufficient to cut her interest down to a life estate. One to whom property is bequeathed or devised for use during life may not impair the principal, the word "use" standing alone indicating a use without impairment of the corpus. Hardy v. Mayhew, 158 Cal. 95, 110 P. 113; 16 Cal.Jur. 373, § 10. The gift over also serves to define the estate of Ruth Smyth as a life estate. The power of appointment is mandatory. The power to will what remains to appellants negatives the creation of a fee, for one does not dispose of property under a power if he is, in fact, the absolute owner of it. The words "If, upon her death, any of my estate remains, it is my will that such remainder be divided" between appellants limits the preceding

phraseology and also shows that it is not to be construed as an absolute, fee-simple estate.

There can be no question but that the testatrix intended to make some provision for appellants and the will must be construed with that fact in mind. The testatrix gave the estate to Ruth Smyth "during her life time." It is given to her "as she may need or see fit to use." She could not have the estate longer than she lived. After her death, if any of it remains unused it would necessarily go to somebody else. This contingency is provided for in the will by the statement that if, upon the death of Ruth Smyth, "any of my estate remains, it is my will that such remainder" go to appellants. This is an express limitation over of the balance which may remain unused at the time of the death of Ruth Smyth. It does not amount to a restriction on her use of the estate. If she consumes it all "as she may need or see fit to use" appellants get nothing. If she does not, they get what is left.

To construe the will as giving a fee to Ruth Smyth would be to say that the second sentence of the dispositive paragraph is wholly ineffectual, contrary to Probate Code, § 102, that a will is to be interpreted so as to give effect to every expression rather than so as to render any expression inoperative.

Respondent cites Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071; Estate of Farelly, 214 Cal. 199, 4 P.2d 948; Estate of Goldthwaite, 140 Cal.App. 551, 35 P.2d 1050; Estate of Cook, 58 Cal.App.2d 376, 136 P.2d 338, and Estate of Ferdun, 91 Cal.App.2d 622, 205 P.2d 456, in support of her contention that the will gave her a fee-simple estate. They are not analogous. Each of them construed a will in which an absolute bequest or devise was followed by language such as "I desire," "as I may suggest," "would like to have her have," "I would like," and similar language. It was held that the language was merely precatory and not dispositive. In Estate of Lawrence, 17 Cal.2d 1, at page 7, 108 P.2d 893, at page 896, it is said:

> "It has been stated frequently that when words of recommendation, request and the like are used in direct reference to the estate, they are *prima facie* testamentary and imperative and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor. All expressions indicative of his wish or will are commands."

Here the expression is a command. The testatrix said, "If, upon her death, any of my estate remains, *it is my will.*" (Italics added.)

[23] We hold that the will does not give Ruth Smyth a fee-simple estate; that it gives all of the property of the deceased to her for life with power of consumption "as she may need or see fit to use," together with a mandatory power of appointment to be exercised by her will of the remainder to appellants. Any other construction of the will would do violence to the manifest intention of the testatrix.

Reversed.

SHINN, P. J., concurs.

PARKER WOOD, J., did not participate.

132 Cal.App.2d 212

Rose GILBERT, Plaintiff and Appellant,

v.

PESSIN GROCERY COMPANY, a California corporation, doing business as Metrick Food Center, Defendant and Respondent.

Civ. 20494.

District Court of Appeal, Second District, Division 3, California.

April 11, 1955.

Rehearing Denied May 10, 1955.

Hearing Denied June 8, 1955.

Action for personal injuries to plaintiff as result of falling over cement island dividing defendant grocery company's parking lot. From a judgment of the Superior Court, Los Angeles County, Burdette J. Daniels, J., on a jury's verdict for defend-

ant, plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that exclusion of plaintiff's proffered evidence of similar prior accident on lot and refusal of plaintiff's requested instruction that if dangerous condition on property is created by owner's or his employees' negligence and invitee thereon suffers injury proximately caused thereby, owner is conclusively presumed to have known of condition from time of its creation, were errors effecting miscarriage of justice.

Judgment reversed.

1. Appeal and Error ⇐882(10)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, plaintiff's attorney's remark that he could see no way to lay foundation for admission of testimony as to previous similar accident on lot after sustaining of objections to his offer of proof that a woman had previously fallen over island, was not a consent to such ruling, but merely a confession expressing submission to, not agreement with, ruling.

2. Evidence ⇐318(4)

In action for personal injuries because of alleged dangerous condition of defendant's premises, evidence of report to defendant's responsible agent of other similar accidents on premises for purpose of proving notice to defendant of existence of such condition is not inadmissible as hearsay.

3. Negligence ⇐125

In action for injuries to invitee on defendant's premises, evidence of previous similar accident thereon under substantially same general circumstances is admissible as tending to show dangerous condition of place, cause of accident in issue, defendant's knowledge of such condition, and his negligence.

4. Negligence ⇐125

In action for injuries to invitee on defendant's premises, evidence of similar previous accidents thereon may serve as proof of existence of dangerous condition, thereof, cause of subject accident, defendant's knowledge or notice of such condition, and his negligence in permitting continuance thereof, but need not be probative in all such respects and is admissible if it fairly raises inference on one phase of case, such as dangerous condition, though insufficient to constitute proof on any of such other matters.

5. Negligence ⇐125

In action for personal injuries as alleged result of dangerous condition of defendant's premises, general test of admissibility of evidence of similar previous accident thereon is whether conditions under which the two accidents occurred were substantially same.

6. Negligence ⇐125

To permit admission of testimony as to accidents previous to that involved in personal injury suit, such accidents need not be shown to have occurred under precisely same circumstances as accident in question, but their similarity thereto in general character is sufficient.

7. Negligence ⇐125

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot after dark when none of floodlights on parking lot side of defendant's market building were burning, plaintiff, to lay foundation for admission of evidence of previous similar accident on lot as proof of dangerous condition thereof and notice to defendant of such condition, was not required to prove that woman involved in prior accident was physically normal, that such accident was caused by same thing which caused plaintiff's fall, and that climatic conditions were similar to those at time of accident in issue

8. Negligence ⇐125, 134(1)

In action for injuries sustained in accident due to alleged dangerous condition of defendant's premises, evidence of earlier accident at same place is admissible as tending to prove that condition was dangerous and that accident may have resulted from such condition or that one charged with duty of maintaining premises knew or should have known of condition, but such evidence should not be received, in absence of showing that physical condition of premises was substantially same at time of each accident, and where other factors enter into

case, such as injured person's conduct, evidence of results of other accidents is valueless, in absence of showing as to circumstances and conditions under which they occurred.

9. Negligence ⇐125

When similarity of accident involved in personal injury suit and previous accident, of which plaintiff proffers evidence, depends on conduct of actors in each accident, rather than condition of locale, general similarity rule requires matching of such elements to render such evidence admissible, but that is unnecessary when dangerous condition of premises on which both accidents occurred is sole fact in issue.

10. Negligence ⇐125

In action for injuries to woman falling over concrete island dividing defendant grocery company's parking lot after dark when none of floodlights on parking lot side of defendant's market building were burning, trial court erred in excluding defendant's former store manager's testimony, proffered by plaintiff, as to whether someone's previous fall over such island at night was reported to him, on ground that plaintiff's offer of proof that witness would testify that a woman fell over island at a time when one or more of floodlights were out, was insufficient foundation for admission of such testimony.

11. Negligence ⇐138(2)

In action for injuries to woman falling over island dividing defendant grocery company's parking lot, trial court did not err in giving jury instruction that general human experience justifies inference that one looking in direction of clearly visible object sees it and that when there is evidence that one looked toward, but did not see, something in plain sight, it follows that either some part of such evidence is untrue or that such person was negligently inattentive.

12. Evidence ⇐588

A court is not bound by witness' mere swearing, but swearing credibly concludes its judgment.

13. Negligence ⇐138(3)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot after dark, instruction to jury that general human experience justifies inference that one looking in direction of clearly visible object sees it and that when there is evidence that one looked, but did not see, something in plain sight, it follows that either some part of such evidence was untrue or that such person was negligently inattentive, was not erroneous as misleading because evidence showed that island was not plainly visible, in view of defendant's evidence that island and place of plaintiff's fall were amply illuminated.

14. Trial ⇐203(1)

Each side in action has right to have jury instructed on any theory of its case which finds substantial support in evidence, regardless of trial judge's acceptance of such theory.

15. Trial ⇐191(7)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, instruction to jury that general human experience justifies inference that one looking toward clearly visible object sees it and that when there is evidence that person looked toward, but did not see, something in plain sight, it follows that some part of such evidence is untrue or that such person was negligently inattentive, was not erroneous as assuming that island was clearly visible, but left jury to determine whether such hypothesis was established.

16. Trial ⇐244(4)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, instruction to jury that general human experience justifies inference that one looking toward clearly visible object sees it and that when there is evidence that person looked toward, but did not see, something in plain sight, it follows either that part of such evidence is untrue or that such person was negligently inattentive, did not unduly emphasize duty to look and see as covered by another instruction that owner of premises may assume that invitee thereon will perceive what would be obvious on ordinary use of his senses and that each may assume that the other has normal facul-

ties of sight and hearing and will exercise ordinary care.

17. Appeal and Error ⇐1064(4)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, giving of instructions to jury that defendant was not obliged to give plaintiff notice of possible danger from conditions readily apparent to eye, but could assume that plaintiff would see what would be obvious to her on ordinary use of her sight, and that amount of caution required varies according to nature of act, surrounding circumstances, and danger that should reasonably be apprehended, in conjunction with instruction as to inference that one looking toward clearly visible object sees it, was not error, prejudicial to plaintiff, as unduly emphasizing defendant's theory that island was in plain sight and plaintiff negligent in failing to see it.

18. Negligence ⇐141(3)

A requested instruction to jury that invitee, walking from her parked automobile in parking lot provided by retail store keeper to retail store, has right to assume that there are no obstructions or other dangerous agencies interfering with her reasonably safe travel thereon, was properly refused as defective in omitting qualification that invitee must be exercising care herself.

19. Trial ⇐260(8)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, trial court's refusal to give either of plaintiff's requested instructions to jury that storekeeper providing parking lot, used as passageway between parked automobiles and store, owes his customers duty to keep lot in reasonably safe condition for such use and to use ordinary care to avoid injuries to them, and that defendant owed its customers duty to keep lot in reasonably safe condition and use ordinary care to avoid injuries to them, was erroneous, though subject matter of such requested instructions was covered by general instruction.

20. Trial ⇐240, 260(8)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, plaintiff's requested instruction to jury that one entering retail store premises, including parking lot provided for prospective customers, to transact any business of store with owner thereof or his employee, does so at his implied, if not express, invitation, and that owner owes duty to exercise ordinary care not to expose such invitee to danger unnecessarily and to keep parking lot and means of ingress and egress between it and store in reasonably safe condition, was properly refused as in part argumentative and not a statement of law and fully covered by instruction given insofar as it correctly stated law.

21. Negligence ⇐121(1)

Where dangerous or defective condition of or on property is created by negligent conduct of owner thereof or his employee acting within scope of employment, and invitee on property thereafter suffers injury proximately caused by such condition, owner is conclusively presumed to have had knowledge thereof from time of its creation in invitee's action to recover damages for such injury.

22. Trial ⇐260(8)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot, instruction to jury that if there is danger attending entry on premises by invitee because of conditions not readily apparent to senses, but known to owner of premises or discoverable by him in exercise of ordinary care, he owes duty to give invitee reasonable warning of danger, did not adequately cover plaintiff's refused correct instruction that owner of property is conclusively presumed to have known of dangerous condition created thereon by his employee's negligence in invitee's action for injury proximately caused thereby, as given instruction omitted statement that owner is charged with knowledge of dangerous condition negligently created by his servant.

23. Negligence ⇐52

Knowledge of owner of premises of dangerous condition negligently created thereon by his servant imposes obligation on owner to give invitee on premises warn-

ing of such condition, unless danger is obvious.

24. Negligence ⇐138(2)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot after dark when none of floodlights on parking lot side of defendant's market building were burning, refusal of plaintiff's requested instruction to jury that owner of property, on which dangerous condition is created by his or his employee's negligence, is conclusively presumed to have known of such condition in invitee's action for injury proximately caused thereby, was erroneous, where evidence supported plaintiff's theory that installation of time clock in building to control operation of such lights was still in progress or just completed and that clock failed to turn lights on until after normal time, thus accounting for darkness at time of accident.

25. Appeal and Error ⇐1170(1)

An erroneous ruling of trial court constitutes miscarriage of justice within constitutional provision requiring reversal of judgment on jury's verdict in such case, if it cannot be said that, in absence of such error, a different verdict would have been improbable. West's Ann.Const. art. 6, § 4½.

26. Appeal and Error ⇐1170(7, 9)

In action for injuries to woman falling over cement island dividing defendant grocery company's parking lot after dark, errors in exclusion of plaintiff's proffered evidence of similar prior accident on lot and refusal of her requested instruction to jury that owner of property is conclusively presumed to have known of dangerous condition, created thereon by his or his employee's negligence, in invitee's action for injury proximately caused thereby, effected miscarriage of justice requiring reversal of judgment on verdict for defendant. West's Ann.Const. art. 6, § 4½.

Roger J. Pryor, Compton, for appellant.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Appeal from judgment upon verdict for defendant in personal injury action. Plaintiff does not question the sufficiency of the evidence to sustain the verdict, but claims prejudicial error in (1) excluding certain evidence of a prior accident and (2) giving certain instructions and refusing others.

On October 11, 1951, after dark, plaintiff Rose Gilbert drove into the parking lot behind defendant's market building which lot was maintained for the convenience of customers, and she was there as a prospective purchaser of some of defendant's goods, a business invitee. The parking lot was divided by a cement island or ledge which was about 6 inches high. This divider was the front line of numerous parking spaces marked off on the ground, some facing southeast and the others northwest. The market building occupied the east part of the property and the parking area the west portion. Plaintiff drove her car into a space to the west of the divider, which ran north and south. Her lights were on but she did not see the divider nor did her car strike it. She had never been there before and did not discover the existence of the divider or island until she stumbled over it and fell. When she drove up close to it and stopped with the front end of her car near the divider, there were cars parked to her right and left, but not immediately in front. She got out on the left side and her friend and companion, Mrs. Kathryn Stringer, alighted on the right. Mrs. Stringer was familiar with the parking lot and stepped over the divider without any difficulty. Plaintiff, though she says it was dark in the area, took a few steps forward (toward the market building), did not look down as she walked, saw no island or divider, stumbled on it and fell, sustaining injuries to her person.

Concerning lighting conditions plaintiff testified that as she was driving into the parking area she thought it was kind of dim; she saw no signs on top of the building; and no lights in the parking lot; there was no light shining up and down the island, which was the color of natural cement; the only lights she saw were coming

through the entrance doorway; she probably did see lights on the front of the market. She and Mrs. Stringer testified that the place where she fell was dark, the parking area quite dark. Plaintiff also said she took Mrs. Mary Ridenour, who was night manager of the store, to the spot where she had fallen, told her it was dark and "it should be light up there" to which Mrs. Ridenour replied: "Yes, it is kind of dark here." Mrs. Stringer testified that plaintiff said "it is awfully dark" and the manager said "Yes, it is." This was substantiated by the Ridenour testimony to the extent that she said plaintiff claimed it was "a little dark" and she said "Yes, it is." Plaintiff also said that on her way to the scene with the manager she did see the island, but only when she was right against it.

It was proved that the building had three floodlights on the west side, near the roof, each having two 500 watt bulbs; that light came through the open door and five sets of windows over the entrance; the front or north side of the building had a row of neon lights; there was a large electric sign "Metrick's" on the roof and facing the parking area; and another one "Metrick's Free Parking" on the west boundary of that area; a street light at the north end of the parking, and lighted stores with large luminous signs across the street from the parking. The defense evidence was to the effect that all these lights, including the floodlights, were burning at the time of the accident. If this evidence be accepted the parking lot, including the spot where plaintiff stumbled on the island, was well illuminated. On the other hand plaintiff's showing, direct and circumstantial, was sufficient to warrant an inference that the floodlights were not burning at the time of the accident and that the place where she fell was dark.

[1] In this setting counsel for plaintiff called to the witness stand Mr. Oliver Jones, who was defendant's manager of that store until late July, 1951, and asked him this question: "Q. Now, directing your attention to the parking lot on the west side of the premises there, at any time in the summer of 1951 was there an accident reported to you of someone falling over a raised portion of the divided area in the parking lot at night?" This evoked objections and considerable argument outside the presence of the jury. The court ruled that sufficient foundation for evidence of other accidents had not been laid. Finally an offer of proof was made in these words: "At this time we make the following offer of proof, that Mr. Jones, if allowed to answer, would testify that in July of 1951 a woman fell over the island that divided the parking lot while walking toward the market at a time when one or more of the floodlights were out." After further argument the court sustained objections to the offer, plaintiff's attorney remarked: "I can't see any way to lay a foundation" and the judge said, "Well, I think that ends it then." This latter remark of counsel was merely a confession that he could not lay a foundation such as required by the court nor do more than he had done in that regard. Viewed in the light of the immediate context and the preceding discussion it cannot be held a consent to the court's ruling; it was submission, not agreement, that was expressed.

[2] Another preliminary matter is the contention that the ruling was correct because plaintiff's offer embraced only hearsay. One of the legitimate purposes of evidence of other accidents is the proving of notice to defendant of existence of a dangerous condition. When that is the objective a report made to defendant's responsible agent is not subject to the hearsay rule. People v. Lang Transportation Corp., 43 Cal.App.2d 134, 140–41, 110 P.2d 464. If that were the only objection the evidence should have been received for the proper limited purpose and the jury instructed accordingly. If perchance there was the report but no such accident in fact, or if the circumstances were not comparable, it would be open to defendant to so show. Piollet v. Simmers, 106 Pa. 95, 111; 65 C.J.S., Negligence, § 234, p. 1052; see also, People v. La Macchia, 41 Cal.2d 738, 749, 264 P.2d 15.

The important question is whether the evidence was admissible at all. Construed together, as they should be in fairness, the

quoted question and offer of proof amount to a tender of evidence that the former accident occurred at night and that a woman walking in the same direction as plaintiff fell over the island at a time when one or more of the floodlights were out.

[3] The applicable general rule is well established and is stated in Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, 312, 200 P.2d 814, 817: "Evidence as to previous accidents, similar to the one in issue, is admissible upon the general proposition that such evidence tends to show the dangerous character of the place. Evidence showing that previous accidents have occurred under substantially the same general circumstances as the subsequent accident—the one in issue—tends to disclose the cause of the latter, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place, and tends to establish negligence on his part." Also in Jaehne v. Pacific Tel. & Tel. Co., 105 Cal. App.2d 683, 689, 234 P.2d 165, 169: "Evidence of prior accidents which occurred under substantially the same general circumstances as the accident in question, is admissible to prove the existence of a defective or dangerous condition, to prove negligence, to prove notice, and to disclose the cause of the accident in question."

[4] It will be observed that such proof may serve at least four different evidentiary functions,—as proof of (a) existence of defective or dangerous condition, (b) the cause of the subject accident, (c) knowledge or notice of the dangerous condition, (d) negligence in permitting that condition to continue. But it is not necessary that the proffered evidence of previous accidents be probative in all those respects. If it fairly raises an inference upon one phase of the case it is admissible. Specifically, it should be received if it tends to prove a dangerous condition, even if it be not enough to constitute proof upon any of the other matters. This point is brought out by Professor Wigmore's treatment of the subject; he discusses separately the use of prior accidents for different purposes. 2 Wigmore on Evidence (3d Ed.) § 458, at page 472: "The mass of precedents dealing with the use of other injuries (or 'accidents') as evidencing the dangerousness of a place or a machine are concerned with an inference of precisely this form, *i. e.* an inference as to the *harmful tendency or capacity* of the machine, highway, building, or track, as indicated by the occurrence of such harm to *human beings in other instances.*

"* * * the object of the inference is not to show previous acts of human negligence, nor even (directly and necessarily) a present negligence. The purpose is merely to show the nature of the machine or the place, as having a tendency to produce such human injuries; just as copper acids may have a tendency to destroy herbage or strychnia a tendency to produce convulsions. If it can be shown what that tendency is, it may then be possible to show that the maintenance of a place or machine of that tendency—*i. e.* likely to cause such harm—is negligence. But this additional conclusion is not necessarily involved in the evidential purpose, which seeks simply the illustration of the nature of the thing or the place by its observed effects." See also paragraph 3 on page 475.

[5–7] Counsel for appellant argues that the disputed evidence should have been received as proof of a dangerous condition of a continuous nature; that the concrete divider was of natural color and constituted a dangerous barrier when the lot was dark; that that was the condition at the time of the accident. In considering this contention it should be observed that the proffered evidence related to an accident when one or two of three floodlights were not burning, while the evidence at bar spells either of two conditions,—all floodlights out or all of them burning. For present purposes we must assume that none were lighted. So appellant's position becomes one of claiming that this area, if dangerously dark when one or two floodlights were off, was equally dangerous, or more so, when none were lighted. This seems to be sound reasoning and reduces the appellant's claim to one of proper proof of a dangerous condition of the lot and notice thereof to defendant through its former manager. To this respondent's counsel replies that the condition

of the two accidents are not shown to have been substantially the same. That is the general test of admissibility. Westman v. Clifton's Brookdale, Inc., supra, 89 Cal.App. 2d 307, 312, 200 P.2d 814; Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 618, 62 P.2d 790; Magnuson v. City of Stockton, 116 Cal.App. 532, 535, 3 P.2d 30; Long v. John Breuner Co., 36 Cal.App. 630, 639, 172 P. 1132; McCormick v. Great Western Power Co., 214 Cal. 658, 664, 8 P.2d 145, 81 A.L.R. 678; Dyas v. Southern Pacific Co., 140 Cal. 296, 304, 73 P. 972; Gorman v. County of Sacramento, 92 Cal.App. 656, 664, 268 P. 1083; Young v. Bank of America, 95 Cal.App.2d 725, 729, 214 P.2d 106, 16 A.L.R.2d 1155; George v. City of Los Angeles, 51 Cal.App.2d 311, 315, 124 P.2d 872. The cited cases are typified by Magnuson v. City of Stockton, supra, 116 Cal. App. 532, 535, 3 P.2d 30, 31, which says: "* * * the rule is well settled that in order to permit the admission of testimony of previous accidents it is not necessary that it be shown that such accidents occurred under circumstances *precisely* the same as those characterizing the accident in question, but it is sufficient *that they are similar in their general character.* Robinson v. Western States Gas & Elec. Co., 184 Cal. 401, 194 P. 39; Long v. John Breuner Co., 36 Cal.App. 630, 172 P. 1132." Counsel for appellant rely largely upon cases such as Martindale v. Atchison, T. & S. F. R. Co., 89 Cal.App.2d 400, 411, 201 P.2d 48, claiming, in essence, that all of the circumstances must be shown to have been generally similar before a foundation can be laid for receiving the evidence. In their brief counsel stress absence of proof of these things: "(3) That the woman assertedly involved in the prior accident was normal (if her alleged fall was because of old age and disability, crippled condition, blindness, instability because of some existing injury such as a broken leg coupled with use of crutches, any one of which would render the prior accident inadmissible); (4) That the prior accident was caused by or resulted from the same thing which plaintiff here claimed caused her to fall (if the former accident resulted from slipping on grease dropped from cars being parked or from spilled milk or other liquids or from fruit peelings, etc., it would be inadmissible); (5) That the climatic conditions were remotely similar (there may have been a heavy fog on the prior occasion or it may have been raining heavily)." This argument introduces into the foundational proof the actions of other individuals at the time of previous accidents and thus would make the foundation-laying an insuperable task. We again quote the Magnuson case, 116 Cal. App. at page 535, 3 P.2d at page 31: "This rule must necessarily be true, for it would be very difficult, if not impossible, to show that two persons were drowned in *exactly* the same place and in the same manner. Accidents do not happen that way." Appellant's argument would inject a false quantity into the problem now before us, which is whether the continuing condition of the parking lot was such that one accident in the dark would be evidential in a later case.

Dyas v. Southern Pacific Co., 140 Cal. 296, 304, 73 P. 972, 974 dealt with a derrick-car accident alleged to be due to an insecure foundation to which the derrick-car was fastened. Having shown that there was no change of condition during the intervening period the court held that evidence of a previous like accident was admissible. Then said: "Appellant contends that the difference in the derricks, the adjustment of the bucket, and the method of operation made this evidence inadmissible, that it was too remote, and an entirely collateral matter. The character of the derrick, however, could make no difference. The pertinency of the evidence was as to the insecure condition of the substructure upon which the derrick rested, and defendant's knowledge of it and inattention to it. * * * The Dyas derrick was operated upon the same substructure, as far as the method by which it was attached was concerned, and the condition of that substructure at the time of the accident was a proper subject of inquiry. If five years previously the substructure was in such a condition as to fail to retain the derrick in its hold upon it, proof of that fact, coupled with proof of no repairs, was matter properly to go before the jury in determining whether the

substructure was not in a similar, if not worse, condition when Dyas was killed, and whether the accident was not directly attributable to that fact." This case supports appellant's position, not that of respondent.

[8, 9] The same thought was brought out by Mr. Justice Shinn in Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 618–620, 62 P.2d 790. Plaintiff sued for injuries claimed to have been caused by a dip in an intersection, she being thrown to the top as the automobile occupied by her passed over it. The question was one of dangerous or defective condition. The trial judge received evidence of previous accidents without regard to the speed of the respective cars and this was held to be error. At page 618 of 17 Cal.App.2d at page 792 of 62 P.2d the court said: "In cases of accident due to the alleged dangerous condition of premises, it is proper to receive evidence of earlier accidents occurring at the same place. It tends in some degree to prove the condition to have been a dangerous one and that the accident in question may have resulted from such condition. It may also tend to prove that the one charged with the duty of maintaining the premises knew, or should have known, of the condition. Long v. John Breuner Co., 36 Cal.App. 630, 172 P. 1132. But evidence along this line should not be received without some safeguards. It should be shown that the physical condition of the premises was substantially the same at the time of each accident. That fact was not disputed in the present case. And, where other factors enter into the case, such as the conduct of the persons injured in the use of the premises, evidence of the results of other accidents is of no value unless a showing is made as to the circumstances and conditions under which the several accidents occurred." At page 620 of 17 Cal.App.2d, at page 793 of 62 P.2d: "But, as we have pointed out, the speed of the cars was a factor that could not be disregarded if the evidence was to have any value. The mere fact that some automobiles bounced in crossing the depressions did not show that the condition of the intersection was either dangerous or defective, although, if it had been shown that they bounced in crossing at reasonable and ordinary speed, the evidence would have had a very considerable value. * * * The question is not whether accidents do or do not occur; it is whether they occur under given conditions, and the all-important condition in the present case was whether such accidents occurred when cars crossed the intersection at usual and reasonable speeds." In other words, when the similarity depends upon the conduct of the actors in the accident, rather than the condition of the locale, the general similarity rule requires a matching of those elements (such was the Martindale case, supra, which involved a railroad crossing accident), but that is not necessary when the sole fact of dangerous condition of the premises is in issue. This is illustrated by the holdings in Westman v. Clifton's Brookdale, Inc., supra, 89 Cal.App.2d 308, 312, 200 P.2d 814; Magnuson v. City of Stockton, supra, 116 Cal.App. 532, 535, 3 P.2d 30; Long v. John Breuner Co., supra, 36 Cal.App. 630, 639, 172 P. 1132; Gorman v. County of Sacramento, supra, 92 Cal.App. 656, 664, 268 P. 1083. See also Cohn v. New York C. & H. R. R. Co., 6 App.Div. 196, 39 N.Y.S. 986; Cottman v. Federman Co., 71 Ohio App. 89, 47 N.E.2d 1009, 1011; Saunders v. A. M. Williams & Co., 155 Or. 1, 62 P.2d 260, 263; 65 C.J.S., Negligence, § 234a(2), p. 1053.

[10] We hold that exclusion of the proffered evidence in this case was error; whether it effected a miscarriage of justice will be considered later.

[11, 12] As to error claimed in giving of certain instructions. First appellant complains of the giving of BAJI[1] 140 reading as follows: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in

1. Book of Approved Jury Instructions, Los Angeles Superior Court.

plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive." This instruction is but a modern version of a truth long recognized, and quoted in Zibbell v. Southern Pacific Co., 160 Cal. 237 at page 242, 116 P. 513 at page 515: "'It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing credibly that is to conclude its judgment.'" This instruction, or an earlier BAJI form of same, has been held not erroneous in Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 696, 258 P.2d 1063; La Branch v. Scott, 82 Cal.App.2d 1, 9, 185 P.2d 823; Bischell v. State of California, 68 Cal.App. 2d 557, 563, 157 P.2d 41.

[13–15] But, says appellant's counsel, the instruction should not have been given because the evidence shows that the island was not plainly visible and hence it was misleading. This argument overlooks the fact that defendant's evidence, if accepted, proved the island and the place of plaintiff's fall to be amply illuminated. It also overlooks the rule that each side has a right to have the jury instructed on any theory of its case which finds substantial support in the evidence, Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 633, 255 P.2d 795; Daniels v. City & County of San Francisco, 40 Cal.2d 614, 623, 255 P.2d 785, and regardless of the judge's own acceptance of that theory, Kelley v. City, etc., of San Francisco, 58 Cal.App.2d 872, 876, 137 P.2d 719. The instruction does not, as claimed, assume that the curb was "clearly visible" and "in plain sight". It leaves the jury to determine whether that hypothesis is or is not established.

[16] Counsel further says that the instruction unduly emphasized the duty to look and see because the matter was also covered by BAJI instruction 213 C which was given, particularly the portions reading as follows: "The owner * * * is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. * * *

"Each, the invitee and the invitor, so long as he is exercising ordinary care and no circumstance exists that either causes him or would cause a reasonably prudent person in his position to think differently, has a right to assume that the other is or will be possessed of normal faculties of sight and hearing and will exercise ordinary care, and has the right to rely on that assumption." There is no merit in this argument. The one instruction (140) tells the jury the effect of testimony as to what a witness did and the other (213 C) speaks of the assumptions that each party to the case may make as to what the conduct of the other has been or will be. There was no error in giving this instruction BAJI 140.

[17] Next, appellant charges error in the giving of two additional instructions in conjunction with said 140. The two additional instructions are set forth in the margin.[2] The real complaint is that their combined effect is undue emphasis upon defendant's theory that the island was in plain sight and plaintiff negligent in not seeing it. There is some overlapping of instructions here, a thing very difficult for

2. "The defendant was not obliged to give the plaintiff notice of a danger which might arise from causes or conditions which were readily apparent to the eye; the defendant was entitled to assume that the plaintiff would perceive and see that which would be obvious to her upon the ordinary use of her sense of sight, and the defendant was not required to call plaintiff's attention to or notify her of a condition which would be readily apparent to her upon the ordinary use of her eyesight. * * *

"Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended."

a judge to avoid in the stress of the trial. But the jurors were told that there was no such intention on the part of the judge. "If in these instructions, any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others. * * *

"I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it." And an examination of the instructions in their entirety reveals no intent on the part of the judge to slant them in either direction. The following language from Faeh v. Union Oil Co., 107 Cal.App.2d 163, 165, 236 P.2d 667, 668, is immediately pertinent: *"Did the trial court commit prejudicial error in giving three instructions concerning the same subject, to wit, whether defendants' vehicle entered the intersection when plaintiff's vehicle was on a through highway and constituted an immediate hazard?*

"No. The jury were properly instructed that even though the propositions governing defendant's conduct were stated in various ways that neither the repetition of instructions nor any other behavior on the part of the judge in delivering the charge was meant to indicate in one way or another what he thought of the controversy. "Clearly the mere repetition of instructions upon the same subject in view of the trial judge's admonition did not constitute prejudicial error." To the same effect are Dick v. Schoener, 120 Cal.App.2d 230, 233, 260 P.2d 965; Rose v. Tandowsky, 80 Cal. App.2d 927, 932, 183 P.2d 347. We find no prejudicial error in the instructions which were given.

[18] Refusal of certain requested instructions is urged as error. One of them reads: "An invitee walking from her car parked in a parking lot provided by a retail store keeper to the retail store has a right to assume that there were no obstructions or other dangerous agencies that would interfere with her reasonably safe travel thereon." This request is defective in that it omits the qualification that the person referred to must be exercising care herself. The giving of that instruction would have been erroneous. Roller v. Daleys, Inc., 219 Cal. 542, 546–547, 28 P.2d 345; Angier v. Bruck, 56 Cal.App.2d 55, 58, 131 P.2d 876; Carlson v. Shewalter, 110 Cal.App.2d 655, 659, 243 P.2d 549.

[19] The court refused to give two other instructions requested by plaintiff, which are set forth in the margin.[3] It is true that the subject matter is covered by BAJI 213 C, which was given; it opens with this sentence: "Toward an invitee, he who extended the invitation, express or implied, is obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee." But this language is general while the requests of plaintiff gave specific application of the same principle to her theory of the case. They are correct in their content and appellant should not have been required to rest upon generalities. Barnett v. Garrison, 93 Cal.App.2d 553,

3. "You are instructed that if a parking lot provided by the storekeeper as an adjunct to a retail store is used as a passageway between the parked cars and the store, the storekeeper owes a duty to his customers or prospective customers to keep the parking lot in a reasonably safe condition for use as a passageway and to use ordinary care to avoid accidents and injuries to his customers or prospective customers using the parking lot for that purpose. * * *

"You are instructed that defendant as a keeper of a public place of business owed a duty to his customers and prospective customers to keep his premises and the means of ingress thereto and the parking lot maintained for his customers in a reasonably safe condition and to use ordinary care to avoid accidents or injuries to his customers. To fail in such a duty would constitute negligence."

558, 209 P.2d 426; Stout v. Southern Pacific R. Co., 127 Cal.App.2d 491, 503, 274 P.2d 194. At least one of these requested instructions should have been given. But this ruling alone would not be of such serious consequence as to require a reversal.

[20] Another rejected request is set forth in the margin.[4] It was modeled on BAJI 213 E. A similar instruction was held properly refused in Curland v. Los Angeles County Fair Ass'n, supra, 118 Cal. App.2d 691, 697, 258 P.2d 1063, 1066. This court there said: "The instruction, in part, is argumentative and not a statement of the law. Insofar as it stated the law correctly, the subject matter was fully covered by instructions given."

[21–24] Appellant also complains of refusal of an instruction (BAJI 213 J (new)), reading as follows: "If a dangerous or defective condition of or on property is created by the negligent conduct of the owner or his employee acting within the scope of the employment, and if an invitee thereafter suffers injury, of which such condition was a proximate cause, in any action that the invitee may bring for damages for such injury, the law conclusively presumes that the owner had knowledge of said condition from the time of its creation." It is a correct statement of law and was not adequately covered elsewhere. BAJI 213 C does not do so[5] because it omits the statement that defendant is charged with knowledge when his own servant has negligently created a dangerous condition. See Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841; Lorenz v. Santa Monica etc. School Dist., 51 Cal.App.2d 393, 401, 124 P.2d 846; Sanders v. MacFarlane's Candies, 119 Cal. App.2d 497, 501, 259 P.2d 1010; Calame v. Stevens, 110 Cal.App.2d 45, 48, 242 P.2d 109. From this knowledge flows an obligation to give warning unless the danger is an obvious one. Popejoy v. Hannon, 37 Cal.2d 159, 170, 231 P.2d 484. The gravity of this error becomes apparent when the status of the issue of illumination is recognized. Plaintiff made an earnest effort to prove directly or circumstantially that alterations were under way in the market and that part of that job was the installation of a time clock to control the operation of the floodlights, which had previously operated in response to a switch thrown by hand; that that work was still in progress or just completed and the clock, due to interruption of power during the day, failed to turn the lights on until after the normal time, thus accounting for the darkness which plaintiff claimed to exist at the time and place of the accident. The evidence, though weak, was sufficient to support this theory. To so find may have called for a modicum of speculation by the jury, but not too much, see Miller v. Southern Pacific Co., 117 Cal.App.2d 492, 507, 256 P.2d 603; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 424, 218 P.2d 17. If this did happen it would be understandable

4. "When a retail store is open for business, one who enters upon the premises, which includes a parking lot provided for prospective customers, to purchase some commodity or service or to present one's sale [sic] as a prospect for becoming a buyer, or to transact any business, embraced within the business of the store, with the owner or its agent or employee, does so at the implied, if not the express, invitation of the owner of the store, and is called an invitee. Upon that owner the law places the duty of exercising ordinary care so as not unnecessarily to expose the invitee to danger or accident and, to that end, to keep in a reasonably safe condition the parking lot, aisles, passageways, and means of ingress and egress between the parking lot and the store made available for the invitee's use, and which the latter is expressly or impliedly invited to use."

5. It contains this phraseology: "'If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owner has actual knowledge of them, or if they are discoverable by him in the exercise of ordinary care, it is his duty to give reasonable warning of such danger to the invitee. The owner is not bound to discover defects which reasonable inspection would not disclose, and he is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses.'"

that defendant's manager, who worked inside the store, did not know of it. The instruction which was given implies that defendant had a reasonable time for discovery before becoming liable, while the requested one charged defendant with immediate knowledge and duty to give warning if the condition was negligently created and the danger not an obvious one. The evidence which warrants the inference of the alleged condition also sustains one of negligence in its creation. The fact that that work was done by an independent contractor is of no consequence for the duty which defendant owed its patrons with respect to the safety of the premises to which they were invited is a nondelegable one. Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 237, 240 P.2d 672; Knell v. Morris, 39 Cal.2d 450, 456, 247 P.2d 352; Prosser on Torts, p. 643. If the floodlights were operated by the new clock on the day of the accident, if it failed to turn them on until after that event, if that caused a dark and dangerous condition in the parking lot, defendant was chargeable with knowledge of the fact; appellant had a right to have the jury so advised; and the refusal so to do constituted serious error. That the jurors were interested in this subject is evidenced by their returning from the jury room for further instructions on it. "The Foreman: Yes, we would like to reread that portion of the instructions to the jury that pertains to the duty of the invitor to the invitee in respect to liability of the invitor, and that portion of law pertaining to obvious hazards." The court then reread BAJI 213 C, which, as above noted, does not cover this matter of imputed knowledge.

[25] Our final question is whether there has been a miscarriage of justice. "In determining, from a consideration of the entire record, whether the error prejudiced plaintiffs' rights. Const. art. VI, § 4½, the rule is no different from that applicable in a criminal case and stated as follows: 'If it cannot be said that, in the absence of the error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a miscarriage of justice within the meaning of the constitutional provision.'" Daniels v. City & County of San Francisco, 40 Cal.2d 614, 623, 624, 255 P.2d 785. In Westman v. Clifton's Brookdale, Inc., supra, 89 Cal. App.2d 307, 314, 200 P.2d 814, 819, this court concluded as follows: "We cannot say that had the evidence been received and considered by the jury, a different result would not have ensued. The exclusion of the evidence referred to was reversible error."

[26] We are reviewing the second trial of this case. The jury in the first trial disagreed. The verdict was 9 to 3 in the second. It appears that the court erroneously excluded evidence of a former accident and refused a correct instruction of considerable importance to plaintiff's case. After an "examination of the entire cause, including the evidence" (commanded by Const. art. VI, § 4½), we cannot say that, in the absence of the errors found herein, a different verdict would have been improbable. This spells a miscarriage of justice.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

132 Cal.App.2d 444

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

C. L. ATCHLEY, Defendant and Appellant.

Cr. 2607.

District Court of Appeal, Third District, California.

April 20, 1955.

Defendant was convicted of murder in the first degree and of assault with a deadly weapon with intent to commit murder. The Superior Court, Yuba County, Warren Steel, J., rendered judgment, and defendant appealed. The District Court of

Appeal, Van Dyke, P. J., held that evidence sustained finding by trial court upon entry of plea of guilty that defendant was guilty of murder in the first degree.

Judgment affirmed.

1. Criminal Law ⇐573

Where information charging murder and assault with a deadly weapon with intent to commit murder was filed on August 30, defendant in open court waived all time limitations, whereupon trial was set for November 8, trial date was continued to November 15 at specific request of counsel for defendant, and trial was actually begun on November 16, record did not sustain contention that defendant was denied a speedy trial.

2. Indictment and Information ⇐37

Information charging murder in the form authorized by Penal Code and usually employed in homicide cases was sufficient and was not vulnerable to attack on ground that it did not charge murder in the first degree and that hence plea of guilty did not encompass a plea of guilty to murder in the first degree. Pen.Code, §§ 809, 951.

3. Criminal Law ⇐273

Plea of guilty to information charging murder admitted defendant's guilt of murder and authorized court to determine the degree. Pen.Code, § 1192.

4. Homicide ⇐253(3)

Evidence that defendant killed victim of gunshot wounds willfully, deliberately and with premeditation sustained finding by trial court upon entry of plea of guilty that defendant was guilty of murder in the first degree. Pen.Code, § 1192.

5. Criminal Law ⇐1119(1, 4)

Record on appeal from conviction of murder in the first degree was devoid of any support for contentions that defendant had been denied an open court trial, had not been allowed to seek his own attorney, was not allowed to produce witnesses, was not permitted a jury trial, and was not present at trial, that judge and district attorney were guilty of misconduct, and that counsel for defendant had sold him out to the prosecution.

C. L. Atchley, in pro. per.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged by information with the crime of murder and with the crime of assault with a deadly weapon with intent to commit murder. He was represented by counsel. A jury was selected and the trial proceeded for several days, during which time the prosecution was engaged in putting on its case. A brief statement of the showing made by the prosecution follows: Appellant and Helen Hilliard had been living together for a considerable time. Shortly before the happening of the events with which we are here directly concerned Helen and appellant had separated and she had married a Mr. Hilliard who was residing on a farm owned and operated by Richard Moore. Appellant undertook to persuade Helen to return to him notwithstanding her marriage to Hilliard. This she refused to do. Due to his actions Moore had told appellant to stay away from Moore's place. Appellant thereupon sent Neva Dilday, a woman acquaintance, to see Helen on the Moore place and to intercede with her to return to appellant. Again Helen refused. Shortly thereafter appellant again sent Neva Dilday to intercede with Helen. The two women were sitting on the front porch of the Moore residence and Moore was in the back part of the house. The two women heard Moore exclaim "No, No, Don't do that". The words were followed by a shot and Moore came staggering through to the front porch bleeding from a gunshot wound. He went down the steps a little way along the path to the public road and there fell to the ground. Helen went to him and knelt beside him in an endeavor to aid him. Defendant came around the house carrying a

shotgun and a pistol. He walked up to Helen and shot her in the arm. She begged him to cease shooting, promising she would return to him as he had requested. Nevertheless, he shot her through the back as she knelt on the ground. He then fired a second shot into the prostrate body of Moore. Moore died from the effects of the gunshot wounds, but Helen recovered. By this time Neva Dilday had fled the scene and returned to the car in which both had come to the Moore place. Appellant followed her to the car and drove to a neighbor's home. He handed over the guns, stating that he had killed two people. He requested the neighbor to "call the law". On his way there in the car he had told Neva Dilday that he had killed Moore and Helen and that he ought to have killed two more people while he was at it.

When the foregoing evidence had been received appellant through his counsel asked leave of court to withdraw the pleas which he had entered and this request was granted. He thereupon pleaded guilty to both counts and the trial court, as shown by its minutes, thereupon discharged the jury, set a day for the passing of sentence, and on that day, and based on the plea of guilty to the murder count and on the evidence that far received, found the appellant guilty of murder in the first degree and sentenced him to life imprisonment. The sentence on the count charging assault with a deadly weapon with intent to commit murder was for the period prescribed by law.

[1] On this appeal appellant is representing himself. He advances various contentions, all of which have been carefully examined and none of which can be sustained. His contention that he was denied a speedy trial falls before the record. The information was filed August 30, 1954. The minutes of the trial court show that appellant in open court waived all time limitations and thereupon the trial was set for November 8th. On October 28th, at the specific request of counsel for appellant, the trial court continued the trial date to November 15th. The trial actually was begun on the 16th.

[2, 3] Appellant complains that the information did not charge him with the crime of murder of the first degree and that his plea of guilty to the charge made did not encompass a plea of guilty to that degree of murder. The information was in the form authorized by Section 809 of the Penal Code and Section 951 of the Penal Code and was in the form usually employed in homicide cases. It was sufficient and is not vulnerable to the attack made against it. People v. Mendez, 27 Cal.2d 20, 161 P.2d 929. His plea, personally announced by him, was a plea admitting his guilt of murder and authorized the court to determine the degree. Penal Code, § 1192.

[4] Appellant challenges the sufficiency of the evidence to uphold a finding of murder of the first degree. The contention is not tenable. We think it obvious from the previous recital of the facts that the evidence upon which the court based its finding of first degree murder amply sustains that finding. It affords full support for an inference that appellant killed Moore wilfully, deliberately and with premeditation.

[5] Appellant makes a series of contentions which may be stated generally. He contends there was "no open court trial" as guaranteed by the Constitution; that he was not allowed to seek his own attorney; that he was not allowed to produce witnesses and not permitted a jury trial; that he was "not present at the trial"; that the judge and district attorney were guilty of misconduct; that his attorney sold him out to the prosecution. The record is utterly devoid of any support for any of the foregoing contentions.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

132 Cal.App.2d 421

In the Matter of the ESTATE of Milo L. ROWELL, Sr., Deceased.

Robert C. KIRKWOOD, State Controller, Appellant and Respondent,

v.

Milo E. ROWELL, Walter F. Willmette and Loren S. Smith, Executors; Milo E. Rowell, Walter F. Willmette, George E. Popovich, as General Partners of The Rowell Company, etc., assignees of all the devisees and legatees of the Last Will and Testament of Milo L. Rowell, Deceased (except of the trust created thereby), Walter F. Willmette, as Guardian of the persons and estates of Lynn Willmette and Bruce Willmette, Minors, and each of all legatees under the Last Will and Testament of Milo L. Rowell, Deceased, Respondents and Appellants.

Civ. 4908.

District Court of Appeal, Fourth District, California.

April 19, 1955.

Rehearing Denied May 13, 1955.

Hearing Denied June 16, 1955.

Proceeding on objections to inheritance tax appraiser's report. The Superior Court of Fresno County, Philip Conley, J., ordered appraiser to amend his appraisal and report, to recompute character and value of interest, and to apply exemptions, in accordance with findings, and Milo Popovich, J., rendered order approving amended report and fixing inheritance tax accordingly, and appeals were taken. The District Court of Appeal, Griffin, J., held, inter alia, that where there was sufficient competent evidence to support determination of trial court slightly reducing appraiser's valuation of corporate stock, court could not be said to have erred in its determination, although evidence of objectors might well have supported lesser amount.

Motion to dismiss appeal denied and order affirmed.

1. Taxation ⇐900(5)

Where on September 1, trial court ordered inheritance tax appraiser to amend his appraisal and report on certain estate, to recompute character and value of the interest, and to apply exemptions, in accordance with findings, and on October 29, trial court signed order approving amended report, and fixed inheritance tax accordingly, September 1 order was, in effect, interim order, and was not appealable final order, and appeal from October 29 order and within prescribed time thereafter was proper and timely. Probate Code, § 1240; Revenue and Taxation Code, § 14513.

2. Taxation ⇐895(5)

Basic question for determination in any contest over inheritance tax appraisal of corporate stock is fair market value of stock on date of transferor's death. Revenue and Taxation Code, § 13951.

3. Taxation ⇐895(5)

"Fair market value" of corporate stock for inheritance tax purposes is price which willing buyer would pay to willing seller, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts, and such value is generally quite distinct from ratio between number of shares issued and book value or value of corporation's property. Revenue and Taxation Code, § 13951.

See publication Words and Phrases, for other judicial constructions and definitions of "Fair Market Value".

4. Taxation ⇐895(5)

Determination of fair market value of stock in closely held corporations, where there is usually very limited market for the shares, and often the only practical market is other stockholders, may be properly made by ascertaining net market value of property which shares represent, and then assigning to each share its proportionate worth. Revenue and Taxation Code, § 13951.

5. Taxation ⇐895(5)

In hearing on objections to inheritance tax appraiser's report rendering appraisal of corporate stock, where there was sufficient competent evidence to support determination of trial court slightly reducing appraiser's valuation, trial court could not be said to have erred in its determination, although evidence of objectors might well have supported lesser val-

uation. Revenue and Taxation Code, §§ 13951, 14512, 14513.

6. Taxation ⇐900(1)

In hearing on objections to inheritance tax appraiser's report rendering appraisal of corporate stock, there is no compulsion that trial court must base its findings on any one expert witness' opinion. Revenue and Taxation Code, §§ 13951, 14512, 14513.

7. Taxation ⇐895(5)

In hearing on objections to inheritance tax appraiser's report rendering appraisal of corporate stock, evidence supported finding that corporation's forty year old lease to certain warehouse property, although subject to cancellation on thirty days' notice, had valuation of $30,000.

8. Appeal and Error ⇐931(1)

On appeal, District Court of Appeal must construe every conflicting inference and all evidence in manner most favorable to support findings of trial court.

9. Adoption ⇐18

There is no legal or blood relationship between adopted children and parents of adopting parents.

10. Taxation ⇐886½

Children adopted by decedent's daughter were not "lineal issue" of decedent within meaning of provision of inheritance tax law defining Class A transferee. Revenue and Taxation Code, § 13307(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Lineal Issue".

11. Taxation ⇐886½

Adoption creates relationship of lineal issue, within meaning of provision of inheritance tax law defining Class A transferee, only between adopted children and their adopting parents. Revenue and Taxation Code, § 13307(a).

12. Taxation ⇐886½

Award of Class A transferee inheritance tax rate to children adopted by decedent's daughter, as being lineal issue of child to whom decedent for not less than 10 continuous years prior to the transfer stood in the mutually acknowledged relationship of a parent, was not unreasonable or unjustifiable interpretation of provisions of inheritance tax law defining Class A transferee. Revenue and Taxation Code, § 13307(c, d).

James W. Hickey, Chief Inheritance Tax Atty., San Francisco, Raymond G. La Noue, Deputy Inheritance Tax Atty., Vincent J. McMahon, Asst. Inheritance Tax Atty., Sacramento, for Kirkwood.

Richard Z. Lamberson, Breckinridge Thomas, Fresno, for Rowell et al.

GRIFFIN, Justice.

Milo L. Rowell, Sr., died June 15, 1951. The State Inheritance Tax Appraiser filed his report on May 21, 1953. Therein he appraised 82 shares of stock of the United Warehouse Company, a corporation, at $78,392, or $956 per share, to which report objections were filed by the executors of the Rowell estate, as well as certain representatives of the devisees, legatees, assignees and wards (hereinafter referred to as objectors). One of the questions here presented is whether the court and Inheritance Tax Appraiser incorrectly appraised these shares as to their market value. The other question involved is whether certain devisees were entitled to be classified as Class A transferees under section 13307, or as Class D under section 13310 of the Revenue and Taxation Code.

The trial judge (Conley) found generally in favor of the State Controller, with some modification as to the amount of the appraisal of the stock and against the State Controller as to the classification placed upon these particular legatees here involved by the Inheritance Tax Appraiser. On September 1, 1953, he ordered that the Inheritance Tax Appraiser "amend his appraisal and report" accordingly, and to "recompute" the character and value of the interest in the property of said decedent and the inheritance tax thereon, and apply the exemptions according to the findings. On October 13, 1953, the amended report was filed and on October 29, the trial judge (Popovich) signed an order approving the amended report, as ordered, and fixed the inheritance tax accordingly. Objectors ap-

pealed from that portion of the order of September 1, overruling their objection to the appraisal of the stock as well as that portion of the order of October 29, fixing the inheritance tax thereon. The Controller appealed only from that portion of the order of October 29th reclassifying these certain devisees as Class A, and fixing the inheritance tax accordingly.

[1] Objectors renewed a motion to dismiss the Controller's appeal on the ground that the order of September 1 was a final order which, in effect, established the basis of the tax. It is contended that more than 60 days elapsed thereafter before he filed his notice of appeal and that the subsequent order fixing the tax was not a final order; that it merely confirmed the mathematical calculations prescribed in the first order. He cited such cases as Zappettini v. Buckles, 167 Cal. 27, 138 P. 696; and Chambers v. Hathaway, 187 Cal. 104, 200 P. 931. We see no merit to this contention. Among the appealable orders mentioned in section 1240 of the Probate Code is designated an order "fixing an inheritance tax or determining that none is due". The order of September 1st is, in effect, an interim order. It did not fix the tax. It amounted to no more than a finding on the issues presented by the contest. It included a direction to the Inheritance Tax Appraiser to amend his appraisal, recompute the character and value of the interest, and apply the exemptions as indicated by the order. Section 14513 of the Revenue and Taxation Code is the statute providing for the action of the court upon the conclusion of the hearing on the objections. It provides that "Upon the completion of the hearing the court may make such order as to it may seem appropriate". Since it did not attempt to fix the tax therein it was not a final order from which an appeal is permitted. In re Estate of Rath, 10 Cal.2d 399, 405, 75 P.2d 509, 115 A.L.R. 836; In re Estate of Pala, 55 Cal.App.2d 647, 131 P.2d 593.

The next question is somewhat involved and requires a recitation of the factual background. The clear market value of the property in the estate of Rowell was, for taxation purposes, originally appraised at $550,213.08. This included 82 shares of the United Warehouse Company, a so-called "close corporation" with 279 outstanding shares. Brooks v. Willcuts, 8 Cir., 78 F.2d 270, 273, i. e., where the stock is closely held. See California Administrative Code Title 18, Inheritance Tax, Sec. 783, Untraded and Closely Owned Securities. It was organized in 1908, and deceased was one of the five original organizers. It was stipulated and found by the court that the deceased was not related by blood or marriage to any of the other stockholders; that there had been no sales or offer of sales of stock during the period which would be pertinent to the valuation of the stock; that the corporation's sole business was the rental of warehouse buildings or facilities owned or leased by the corporation and incidental thereto; that it occasionally engaged in the acquisition of real property, the construction of warehouse buildings and the sale of such properties; and that its sole income was from such rentals, plus an occasional capital gain by virtue of a sale of part of its realty. As of June 15, 1951, the corporation leased warehouse properties to certain responsible tenants, which leases were made to expire in 1952 and 1954. These rentals showed a monthly income of approximately $3,400.

The market value of the real property (parcels A to F, inclusive) owned or leased by the corporation, as of June 15, 1951, the date of decedent's death, was found to be $266,900. Parcel E, the Southern Pacific lease (valuation here in dispute), was appraised at $30,000. It was found by the court that the liabilities of the corporation exceeded its assets, other than real estate, by $15,091.20, and that the net market value of its assets was $251,808.80; that its earnings, before taxes, dividends paid, federal taxes paid, and amounts transferred to surplus, for the years 1909 to 1950, both inclusive, were $348,849.52; that from said sum $223,951.50 was paid in dividends, $57,317.02 in federal taxes, and $67,581 was transferred to surplus. The court then found that the market value of the 82 shares was $902 per share, or a total of $73,964. According to the stipulation in evidence, the Inheritance Tax Appraiser

originally appraised these shares at $956 per share or $78,392. Objectors claimed that the market value of these shares did not exceed $400 per share and proceeded to produce evidence to establish their claim.

Under section 14512 of the Revenue and Taxation Code, for the purpose of the hearing, the report of the Inheritance Tax Appraiser is presumed to be correct. There was received in evidence a stipulation as to certain facts in relation to parcel E. It was therein agreed that the Southern Pacific Company owned said real property near its tracks; that it was leased to the United Warehouse Corporation, and that in appraising the "underlying assets" of the corporation, the appraiser placed a valuation of $30,000 upon it and a valuation of $236,900 upon the remaining parcels owned by the corporation. Objectors called the Inheritance Tax Appraiser as their witness to determine what method he followed in appraising the value of the stock in question. He testified he viewed the properties, made a breakdown of all of the improvements, considered the age of the buildings, the cooling system, plumbing, etc., cost of reproduction, and considered property depreciation, the balance sheet showing the earnings of the corporation since 1937, and items of expense; that he reviewed the leases existing thereon as to length, rental income, responsibility of lessees, the length of time the corporation had been in this business, its nature, the likelihood of continued prosperity, competition in the business, its location in the industrial area, the market value of the individual properties, and took "into consideration all of the matters submitted to him which he could develop"; that he determined the present market value of the underlying assets, subtracted the liabilities and "divided the balance by the number of shares issued" but he believed he made a mathematical error because "it didn't come out like it should" so the actual appraised value should be $902 instead of $956 per share.

Thereupon objectors produced stock exchange and investment experts who testified generally that the stock in question was not a listed stock but that of a close corporation; that in determining the fair market value of such stock, consideration is given to many factors, i. e., the history of the corporation as to previous earnings, the present balance sheet, future market as to buyer and seller, dividend history and policy, possible future earnings, whether or not the stock is a minority interest, the cash set-up; that such stock generally has a lower ratio than a listed security; and made a determination of the price earnings ratio, which "in theory is the market price in many cases". It was then concluded by one witness that the fair market value of the stock in question was around $350 per share, and he said this was "ultra big-hearted". Other witnesses stated that in their opinion the fact that the stock involved constituted only a minority interest in the entirety affected its market value; that since the lease of the ground from the Southern Pacific Company was subject to cancellation upon 30 days' notice it lessened its value and this fact should be taken into consideration in evaluating that property; that if so considered it would have no present value even though the lease provides that the lessee may remove the buildings located thereon in case such notice was given; that under no circumstances would the market value of such leasehold interest exceed $5000. Considerable testimony was received as to the record of the income of the corporation, and the depreciation of its properties, etc.

One expert appraiser witness placed the fair market value of this stock at approximately $250 per share. He fully related the factors considered by him, and his reasons for the opinion expressed. Milo E. Rowell, son of deceased, was attorney for the warehouse corporation for many years. He testified as to his qualifications, training, and experience in handling financial affairs of the family in general, and fully qualified himself as a witness in this respect. He testified generally as to the properties of the warehouse corporation and furnished data upon which the experts based their opinion as to the market value of the shares in question. He was also one of the main beneficiaries under the will.

In rebuttal, the Inheritance Tax Appraiser, after relating his years of experience as such, testified that in appraising parcel E, the warehouse property leased from the Southern Pacific Company, he took into consideration the present reproduction cost of the building and estimated it to be $135,850; that he depreciated it by 80 per cent, leaving a residue of $27,120; that he then considered the income from the property, past and present; that the present income was approximately $875 per month and after deducting $150 per month (rental to Southern Pacific Company) he arrived at the figure of $725 per month, which would produce an annual income of $8,700, before deducting taxes; that he did not consider the 30-day cancellation clause in the lease as a too-important factor, because the parties had been operating under it for over 40 years and receiving the income related, without any indication that it would be canceled; that he was acquainted with the policy of the Southern Pacific Company in respect to the leasing of such warehouse property and it was not their policy to cancel such leases as long as such warehouses furnished freight for their particular line; that he believed this lease would not be presently terminated but would continue to remain in force as it had in the past, and if it should be terminated the railway company would not want the warehouses removed but would consent to a sale or assignment of the lease to someone who would bring freight transportation to its company; that he fully considered all of these possibilities in appraising this leasehold interest, and he refused to take a pessimistic view of the relationship of the railway company to the leases of this type.

[2–4] It appears to be objectors' contention that the record conclusively shows that the Inheritance Tax Appraiser, in appraising the market value of the stock, solely, literally and erroneously followed the rule laid down in Re Estate of Felton, 176 Cal. 663, 169 P. 392, 393, wherein it was stated that the Felton Company was a close family corporation; that its shares of stock were never upon the market and never had been sold privately; that "According to the views of respondent, the *only* way to establish the market value of such shares of stock is to ascertain the value of the property which they represent, assigning to each share its proportionate worth". The court therein stated: "This is the method of determining market value which has been adopted in New York and approved by the courts". (Citing cases.) And that the Court was "in accord with respondent's theory that under the circumstances of this case the method of reaching the value of the shares of stock which was adopted was the proper one." It was then stated that there was no force in the appellant's contention that the stock was of less value since it was a minority interest, because appellant eventually obtained a majority interest in the corporation. It then said that "Appellant owns a majority of the stock; the other shares belonging to his sister. While the particular stock subject to the tax is less than half of the issue, appellant, as its possessor, is not under the disadvantages that sometimes confront holders of minority interests". In that case a list of the properties of the corporation was furnished by one of the appellants to the appraiser. In addition, he gave him an estimated value of the assets contributed at the time of the organization of the company, and the values placed by him upon these possessions three months after the death of the decedent. Apparently the trial court used those values as the basis of the worth of the assets in fixing the "market value" of the shares of stock, and then divided the aggregate value of the entire assets by the number of shares of stock issued. The reviewing court (in 1917) placed considerable emphasis upon the fact that the two heirs who furnished the valuation list did not take the witness-stand to question the value placed upon the shares by the Inheritance Tax Appraiser, and held that outside parties who testified generally as to the value of the property represented by the shares had little idea or only a general knowledge of their value. The Supreme Court concluded that the trial court did

not base its finding solely upon the estimate submitted by the heirs, and discussed other evidence tending to support the findings sustaining the report of the Inheritance Tax Appraiser. It concluded that the estimated statement of assets of the heirs had "some evidentiary force as an admission of the value of the property", but aside from this there was expert testimony regarding the market value of the various items of property. Accordingly, the court found that the appraisal was otherwise supported by substantial evidence. It stated that the market value of stock at the date of the death of a decedent is "the proper basis" for the fixing of the tax; that generally such market value is quite distinct from the ratio between the number of shares assessed and the value of the corporation's property; and that the rule followed in that case for determining market values was that employed in other cases, and said that where there is "a close family corporation", "under the circumstances" above mentioned "the method of reaching the value of the shares of stock which was adopted was the proper one." We are not in accord with the contention of the Inheritance Tax Appraiser that in all so-called "close corporations", where the shares of stock have never been upon the market, "the *only* way to establish the market value of such shares of stock is to ascertain the value of the property which they represent, assigning to each share its proportionate worth." (Italics ours.) While this may have been the only way of making such determination under the circumstances of that case, it is clearly not the *only* way in *all* so-called "close corporations". In the instant case there is no evidence that this is a "close family corporation". Secondly, it is not indicated that the deceased owned a majority interest in the shares of stock. There are many allowable factors which must be considered in determining not only the value of the assets but also the value of the stock in question. California Administrative Code, Title 18, Sec. 783, supra. The basic question for determination in any case is the fair market value of the stock on the date of the transferor's death. Sec. 13951, Revenue & Taxation Code. The fair market value is the price which a willing buyer would pay to a willing seller, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts. Pacific States Savings & Loan Co. v. Hise, 25 Cal.2d 822, 839, 155 P.2d 809, 158 A.L.R. 955. Generally, such value is quite distinct from the ratio between the number of shares issued and the book value, or the value of the corporation's property. In re Estate of Felton, supra, 176 Cal. at page 667, 169 P. at page 393; Blackard v. Jones, D.C., 62 F.Supp. 234. However, as in the Felton case, in determining this fundamental question in closely held corporations there is usually a very limited market for the shares, and often the only practical market is the other stockholders. Accordingly, in the absence of other influencing and determining factors, a determination of this value may be properly made by ascertaining the net market value of the property the shares represent, and then assigning to each share its proportionate worth. A similar situation was presented in Brooks v. Willouts, 8 Cir., 78 F.2d 270, which supports the trial court's conclusion in the instant case. See, also, In re Estate of Goodhue, 127 Cal. App. 283, 15 P.2d 771, and cases cited: Union Trust Co. of Pittsburgh v. Heiner, D.C., 19 F.2d 362; Schnorbach v. Kavanagh, D.C., 102 F.Supp. 828; Blackard v. Jones, supra; Wishon v. Anglim, D.C., 42 F.Supp. 359; 23 A.L.R.2d 775; 117 A.L.R 143–153, and cases collected. When objections are made to the Inheritance Tax Appraiser's report, these influencing factors should be considered by the trial court. The only question here presented is whether or not the trial court did take these factors into account in considering the report of the Income Tax Appraiser, and in fixing the tax due

[5, 6] It does appear from the testimony of the Inheritance Tax Appraiser that most of the factors indicated by the objectors were considered by him, and that he used such factors as he believed to be material and pertinent in determining the

valuation of the corporation's assets. If the valuation subsequently placed upon this property, considering all these factors, was proper, it cannot be said that the method adopted by the Inheritance Tax Appraiser was erroneous as a matter of law. Apparently, the trial court considered not only the evidence produced and considered by the Inheritance Tax Appraiser, but also the evidence produced by the objectors. After full consideration, the amount of the appraisement of the Inheritance Tax Appraiser was reduced in some degree and the court fixed its own appraisement of these assets, based upon the factors submitted, and determined that the valuation of the shares of stock was $902 per share. Although the evidence of objectors might well have supported a lesser amount, it cannot be said, as a matter of law, that the trial court erred in its determination since there was sufficient competent evidence to support it. There is no compulsion that a trial court must base its findings on any one expert witness' opinion. In re Estate of Giubbani, 108 Cal. App.2d 434, 238 P.2d 1036.

[7, 8] The finding that Parcel E had a valuation of $30,000 has evidentiary support. It is the rule that every conflicting inference and all conflicting evidence must be construed by this reviewing court on appeal in a manner most favorable to support the findings of the trial court. We must therefore conclude that its findings were based, not on the Inheritance Tax Appraiser's opinion, but on all the facts of the case. In re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384.

The appeal of the State Controller presents a much closer question. Decedent, at the time of his death, in addition to other heirs, left surviving him a daughter, Judith L. Willmette. She had two children by legal adoption. The decedent left certain property to them. The Inheritance Tax Appraiser, in his report to the court, taxed said property to them at the rates and exemptions of Class D transferees, that is, as strangers. Objectors filed objections to this report, contending that these adopted children were entitled to the rates and exemptions of Class A transferees. The trial court so found, under subdivisions (c) and (d) of Section 13307 of the Revenue and Taxation Code which, at the time of death, read in part as follows:

"'Class A transferee' means any of the following:

"(a) A transferee who is the husband, * * * lineal ancestor, or lineal issue of the decedent.

"(b) A transferee whose relationship to the decedent is that of a child adopted by the decedent * * *.

"(c) A transferee to whom the decedent for not less than 10 continuous years prior to the transfer stood in the mutually acknowledged relationship of a parent, if the relationship commenced on or before the transferee's fifteenth birthday.

"(d) A transferee who is the lineal issue of a child mentioned in subdivision (b) or (c)."

Effective September 9, 1953, subdivision (e) was added to that section and reads:

"(e) A transferee whose relationship to the decedent is that of a person adopted in conformity with the laws of this State by any lineal issue or child mentioned in this section; * * *"

It is conceded that this amendment covers the question at issue in this case. However, it was not enacted and did not become a law until after the date of decedent's death. It is the claim of the Controller that these adopted children did not come within the provisions of section 13307, supra, so as to be classified as Class A transferees, and that subsequent legislation so classifying them was an indication of the intent of the legislature that, at the time of the death of decedent, it was not so intended, citing such cases as Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 353, 139 P.2d 908; People v. Santa Fe Federal Savings and Loan Association, 28 Cal.2d 675, 685, 171 P.2d 713; In re Estate of Pierce, 32 Cal.2d 265, 196 P.2d 1; and In re Estate of Mercer, 205 Cal. 506, 271 P. 1067.

[9–11] It seems clear, under the decisions, that there is no legal or blood relationship between these adopted children and the parents of the adopting parents. See In re Darling's Estate, 173 Cal. 221, 226, 159 P. 606, 608, where it is said: "The adoption simply fixes the *status* of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent." See also In re Estate of Jones, 3 Cal.App.2d 395, 39 P.2d 847; In re Estate of Stewart, 30 Cal.App.2d 594, 86 P.2d 1071; and In re Estate of Pierce, supra, 32 Cal.2d at page 269, 196 P.2d at pages 3, 4. Accordingly, they are not lineal issue of decedent within the meaning of subdivision (a) of said section. It is only between the adopted children and their adopting parents that such relationship is created. In re Estate of Winchester, 140 Cal. 468, 74 P. 10; In re Darling's Estate, supra; In re Estate of Morris, 56 Cal.App.2d 715, 133 P.2d 452.

The only provision which would have included such adopted children, at the time, would be under the interpretation of subdivisions (c) and (d), as applied to the daughter of deceased, Mrs. Willmett, who was a transferee under subdivision (c), to whom the decedent, for not less than ten continuous years prior to the transfer, stood in the mutually acknowledged relationship of a parent, which relationship commenced before the transferee's fifteenth birthday. Accordingly, it is argued and the trial court found that these adopted grandchildren were the lineal issue of decedent's child mentioned in subdivision (c), and accordingly were entitled to the exemption as a Class A transferee.

Although the argument seems somewhat novel, from the wording used in those subdivisions classifying certain transferees, such a transferee is included and would not be excluded even though decedent's natural daughter would also be classified under subdivision (a). Accordingly, if such adopted grandchildren were originally intended to be so included in Class A transferees, the subsequent clarification of the statute in this respect would not necessarily be an indication that the legislature did not intend to include them in the first enactment. It is objector's contention that the amendment appears to be an effort to reframe the original intent of the legislature and to correct the Controller's strained construction and method of application of the uncertain language of that section as applied to such adopted children, citing Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 90, 162 P.2d 635.

The Controller claims that under the Inheritance Tax Law, Stats. 1893, Chap. CLXVIII, both natural children and adopted children of a decedent were exempted from the Inheritance Tax Law; that in 1903, Stats. 1903, Chap. CCXXVIII, Section 1 thereof was amended to include mutually acknowledged children, and the only problem then before the legislature was to provide tax exemption for certain children, i. e., illegitimate children, step-children, and those occupying a position *in loco parentis*; that it did not intend to include therein natural children who might already be included in the first exemption; that to do so would be to presume that the legislature intended to perform an idle or nugatory act; that the Controller has always construed such adopted children as here mentioned to be strangers to the decedent, citing California Administrative Code, Title 18, Inheritance Tax, Sec. 631, Class D Transferee; and that accordingly, the construction of a statute by the officials charged with its enforcement over a long period must be given great weight, citing Nelson v. Dean, 27 Cal.2d 873, 880, 168 P.2d 16, 168 A.L.R. 467; and In re Estate of Atwell, 85 Cal.App.2d 454, 468, 193 P.2d 519.

[12] Although the argument of the Controller has considerable persuasive force, the general policy, presently expressed by the legislature that legally adopted grandchildren should enjoy the same tax exemption as those of a natural grandchild is not an unreasonable or unjustifiable interpretation of the intent and policy of the legislature in relation to the first enactment here under consideration. It therefore cannot be said, as a matter of

law, that the interpretation placed upon this section, as it previously existed in this respect, is unreasonable and not justifiable.

The motion to dismiss the appeal is denied. Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

132 Cal.App.2d 301

Isabelle F. STEELE, Plaintiff and Respondent,

v.

Ralph STEELE, Defendant and Appellant.

Civ. 20533.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Hearing Denied June 16, 1955.

Action for divorce. From a judgment of the Superior Court, Los Angeles County, Kurtz Kauffman, J., which granted divorce and awarded all of certain real property to the wife, the husband appealed. The District Court of Appeal, Doran, J., held that the trial court was not compelled, merely because the realty in question had been taken by husband and wife by joint tenancy deed and because the parties had stipulated that one-half was the wife's separate property, to adjudicate that the other half was separate property of the husband.

Judgment affirmed.

See also Cal.App., 277 P.2d 56.

1. Husband and Wife ⇐14(1)

Mere form of deed by which parties have taken title to real estate does not necessarily determine real nature of transaction and this is particularly true in reference to property owned by husband and wife.

2. Appeal and Error ⇐1010(1)
Evidence ⇐390(4)
Husband and Wife ⇐14(3)

Deed to spouses as joint tenants raises presumption that they intended title to be so vested, but parol evidence is admissible to show they had mutual intent that property should in fact be acquired and held as community asset, and determination by trial court that presumption has been rebutted is conclusive on reviewing court unless it is manifestly without support in evidence.

3. Divorce ⇐254

Fact that deed to husband and wife was joint tenancy deed and that parties stipulated that undivided one-half was wife's separate property did not compel adjudication, in divorce action, that other half was separate property of husband.

4. Stipulations ⇐14(4)

Where husband stipulated, in divorce action, with respect to realty acquired by parties by joint tenancy deed, that one-half interest was plaintiff's separate property and that court could determine status of other half, husband had no standing to complain of court's action in declaring other half to be community property.

5. Stipulations ⇐18(7)

Parties to stipulation will not be permitted to deny truth of facts stated, nor be heard to claim that there are other facts that court may presume to exist.

6. Stipulations ⇐18(7)

Stipulation merges with pleadings and is controlling with respect to agreed facts therein contained.

7. Divorce ⇐184(10)

In divorce action wherein evidence was substantial but conflicting as to physical and mental cruelty, it was for trial court to resolve conflict and appellate tribunal had no power to reappraise evidence.

8. Divorce ⇐127(4)

There is no hard and fast rule as to sufficiency of evidence to satisfy statutory requirement of corroboration in divorce action. West's Ann.Civ.Code, § 130.

9. Divorce ⇐127(4), 184(10)

Where action for divorce is contested and it is apparent that no collusion exists, corroboration required is slight and its sufficiency is largely for determination of trial judge.

10. Divorce ⇐127(4)

Corroborative evidence in divorce action may be either direct or circumstantial in nature.

11. Divorce ⇐252

Where divorce is granted on ground of extreme cruelty, trial court possesses wide discretion in respect to division of community property. West's Ann.Civ.Code, § 146.

12. Divorce ⇐249(1)

Under circumstances shown in divorce action, trial court did not abuse discretion in awarding all of certain realty acquired by husband and wife by joint tenancy deed, to wife subject to payment of $10,000 in monthly installments from wife to husband. West's Ann.Civ.Code, § 146.

Noren Eaton, Sierra Madre, for appellant.

Frank S. Whiting, Joseph C. Brashares, Pasadena, for respondent.

DORAN, Justice.

This is an appeal by a husband from a judgment of divorce which declares that a half interest in certain real property held under a joint tenancy deed, was community property, and that the other half interest was the separate property of the wife. The trial court awarded this property to the wife who was ordered to pay to the husband $10,000 in installments of $100 per month. The husband was not required to pay any sums for the support of the wife or the three children. The parties were married on December 18, 1924, and separated on September 5, 1951.

[1] Much of appellant's argument relates to the form of deed under which title to the real property was held. In effect appellant argues that since the record title was held in joint tenancy, this fact would prevent the trial court from holding otherwise or making the award in question in favor of the wife. There is no merit to this contention. Aside from the fact of the parties' stipulation hereinafter to be discussed, it has long been established that the mere form of a deed does not necessarily determine the real nature of the transaction. This is particularly true in reference to property owned by husband and wife.

[2] The rule is stated in the late case of Veronin v. Veronin, 131 Cal.App.2d 298, 280 P.2d 173, 174, as follows: "While a deed to spouses as joint tenants raises a presumption that they intended title to be so vested, * * * it is now thoroughly settled that parol evidence is admissible to show that they had a mutual intention that the property should in fact be acquired and held as a community asset." Plaintiff here testified as to the acquisition of the property that "It was from the earnings of both of us and derivatives from the rents of previously owned properties", and such appears to have been the fact. As said in the Veronin case just cited, " 'A determination by a trial court that the presumption has been rebutted is conclusive on a reviewing court unless it is manifestly without support in the evidence.' "

At the opening of the trial a stipulation was entered into in open court, "that an undivided one-half is the plaintiff's separate property; that as to the remaining undivided one-half the Court can determine the status of that". To this stipulation the respective parties as well as the attorneys, expressed their agreement after the trial court had repeated the definite terms thereof.

[3] It is appellant's contention that "The finding of the court that a half interest in the joint tenancy property was community property is contrary to the evidence. It should have been found and adjudged to be the separate property of the husband". Appellant's brief then asserts that "There was no evidence of any intent to hold title to the whole property other than as joint tenants", and that since it was stipulated that one-half was the wife's separate property "it followed that the other half had to be the separate property of the husband".

[4] These contentions of the appellant are without merit. After knowingly entering into such a definite stipulation in open court that a one-half interest was the separate property of the wife, and that the trial court could determine the character of the other one-half interest, it does not stand in the mouth of either party to dispute its terms or to contend that the judge should have done something other than that provided by the stipulation. As stated in the respondent's brief, "Each of the parties must have realized * * * that the Court might determine the real property to be the separate property of the other, or community property, in which latter instance the Court might award the same to the other".

[5] "It has been uniformly held", says the reviewing court in Capital National Bank of Sacramento v. Smith, 62 Cal.App. 2d 328, 343, 144 P.2d 665, 673, "the court may not adopt findings in conflict with stipulated facts. * * * A stipulation of counsel * * * upon essential issues may be considered as evidence, and that a judgment shall be rendered accordingly, is binding upon the respective parties thereto and upon the court". And, quoting from 60 C.J. §§ 68–78, " 'they will not be permitted to deny the truth of the facts stated, nor be heard to claim that there are other facts that the court may presume to exist' ". See, also, 83 C.J.S., Stipulations, §§ 24–25.

Likewise untenable is the appellant's argument that "the stipulation was beyond the power of the attorney to make", and that "it constituted the giving away of his client's property". As hereinbefore referred to, and as noted in respondent's brief, "both the plaintiff and defendant were present in Court at the time the stipulation was made, that they each had the stipulation explained to them by the Court, and that they each announced their satisfaction with and acceptance of the stipulation".

[6] It is asserted by appellant that "The other half interest of the joint tenancy property should not have been found or adjudged separate property of the wife's since it was not within the issues and contrary to the evidence". This contention, also, is answered by reference to the stipulation which submitted that issue to the judgment of the trial court. As stated in Capital National Bank of Sacramento v. Smith, 62 Cal.App.2d 328, 144 P.2d 665, 674, "the stipulation merges with the pleadings and is controlling with respect to the agreed facts therein contained".

[7] An examination of the record fails to sustain appellant's contention that the findings and judgment are not supported by law and the evidence. The trial court's finding of extreme cruelty on the part of the husband is supported by substantial evidence of both physical and mental cruelty. Under such circumstances an appellate tribunal is not empowered to reappraise the evidence. There was, it is true, conflicting evidence given by the respective parties, which conflicts were resolved by the trial court.

[8–10] There is no hard and fast rule as to the sufficiency of corroborative evidence to satisfy the requirements of Section 130 of the Civil Code. As said in Price v. Price, 71 Cal.App.2d 734, 736, 163 P.2d 501, 503, "where the action is contested and it is apparent that no collusion exists, the corroboration required is slight and its sufficiency is largely for the determination of the trial judge". The corroborative evidence may be either direct or circumstantial in nature. In the instant case there was corroborative testimony in reference to the defendant's antagonistic attitude towards the plaintiff, evidence as to bruises and scratches on plaintiff's face, etc.

[11, 12] Appellant's contention that "The division of the community property was not a judicial decision being based upon findings not supported by the evidence, upon assumptions * * * and upon speculation", cannot be sustained. As provided in Section 146, Civil Code, where a divorce is granted on the ground of extreme cruelty, "the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just". That the trial

court possesses a wide discretion in respect to this matter is well established. There appears to have been no abuse of this discretion, and no reversible error of any kind.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 363

Rose NATHANSON, as Administratrix of the Estate of Joseph Nathanson, Deceased, Plaintiff, Respondent and Appellant,

v.

May MURPHY and Barbara Baglietto, Defendants, Appellants and Respondents.

Civ. 16329.

District Court of Appeal, First District, Division 1, California.

April 19, 1955.

Hearing Denied June 16, 1955.

Organizer of corporation brought action for fraud and deceit against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered judgment for administratrix of estate of deceased organizer and also entered orders modifying facts and conclusions of law and judgment, and vendors appealed from the judgment, and administratrix appealed from the orders. The District Court of Appeal, Bray, J., held that evidence established a case of deceit and false representation.

Judgment affirmed, appeal from order denying new trial dismissed, and other orders reversed.

1. Fraud ⇐58(2)

In action for fraud and deceit by organizer of corporation against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment, evidence established a case of deceit and false representation. West's Ann.Civ.Code, §§ 1709, 1711.

2. Fraud ⇐50

Generally, to establish cause of action for fraud or deceit, plaintiff must prove that material representation was made, that it was false, that defendants knew it to be untrue or did not have sufficient knowledge to warrant belief that it was true, that it was made with intent to induce plaintiff to act in reliance thereon, that plaintiff reasonably believed it to be true, that it was relied on by plaintiff, and that plaintiff suffered damage thereby.

3. Fraud ⇐27

Misrepresentation of acreage by a vendor may be a material fact justifying recovery in action for fraud and deceit.

4. Fraud ⇐9

Representation, to be actionable deceit, need not be made with knowledge of actual falsity, but need only be an assertion, as a fact, of that which is not true, by one who had no reasonable ground for believing it to be true, and be made with intent to induce one, who acted on representation, to alter his position to his injury.

5. Fraud ⇐9

There is no legal requirement that misrepresentations, to constitute grounds for recovery in action for fraud and deceit, be made at any particular moment during negotiations.

6. Fraud ⇐39

Action for deceit does not require privity of contract.

7. Fraud ⇐59

Intent of defendant to induce plaintiff to alter his position can be inferred, in action for fraud and deceit, from fact that defendant made representations with knowl-

edge that plaintiff would act in reliance on them. West's Ann.Civ.Code, § 1711.

8. Fraud ⇐4

Intent of defendant, in making misrepresentations, need not be to defraud, in order to render defendant liable in action for fraud and deceit, but merely to cause another to alter his position to his risk. West's Ann.Civ.Code § 1709.

9. Fraud ⇐23

Rule that where means of knowledge are at hand and equally available to both parties, and subject matter is alike open to their inspection, one who fails to avail himself of opportunity to inspect will not be heard to say that he was deceived by the other's misrepresentations, is not applicable in California to representations as to land quantities.

10. Fraud ⇐20, 50

Generally, owner of realty, in absence of facts showing the contrary, is presumed, in purchaser's action for fraud and deceit, to know boundaries and area of his realty, and purchaser is warranted in relying on owner's representations in respect to such facts.

11. Vendor and Purchaser ⇐34

Acreage of realty is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and therefore when vendor states to purchaser the amount of realty in a tract, which is the subject of the sale, vendor will not thereafter be heard to say, in court of equity, that purchaser had no right to believe vendor.

12. Appeal and Error ⇐1010(1)

Where trial court, in action for fraud and deceit, believed plaintiff when he testified that he relied on false representations by defendants, District Court of Appeal on appeal was bound by the trial court's determination.

13. Fraud ⇐59(1)

In action for fraud and deceit by organizer of corporation against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment, fact that organizer was employed by corporation for a while and received a salary did not minimize his damages, where he was paid by corporation for his services and not for reimbursement for $5,000 advanced to vendors.

14. Fraud ⇐39

In action for fraud and deceit by organizer of corporation against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment, organizer was the real party in interest. West's Ann.Code Civ.Proc. § 367.

15. Fraud ⇐62

In action for fraud and deceit by organizer of corporation against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment, organizer was entitled at least to the $5,000 advanced by him to vendors. West's Ann. Civ.Code §§ 1709, 3333.

16. Fraud ⇐57

In action for fraud and deceit by organizer of corporation against vendors, who falsely represented that ranch contained 960 acres when in fact it contained no more than 765 acres, and induced corporation to purchase ranch and organizer personally to advance $5,000 to vendors as down payment, trial court properly refused to admit evidence of vendors as to value of feed and live stock sold by organizer as manager of corporation while corporation was in possession of ranch, where no claim had been presented against estate of organizer, who had died, and no set-off, counterclaim, or cross complaint was pleaded.

17. Fraud ⇐60

Where there was no jury in action for fraud and deceit, trial court had discretion to determine whether interest would be awarded under statute providing that in action for breach of obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given

in discretion of "jury." West's Ann.Civ. Code § 3288.

See publication Words and Phrases, for other judicial constructions and definitions of "Jury".

18. Judgment ⇐294, 336
Motions ⇐58, 59(1)

Judgment or order once regularly entered can be modified or vacated by court, which entered it, only in manner prescribed by statute.

19. Judgment ⇐314

Where trial court, after allowing interest in action for fraud and deceit, entered orders amending findings and conclusions and judgment by striking out provisions allowing interest, without acting in manner prescribed by statutes, orders would be reversed. West's Ann.Civ.Code § 3288; West's Ann.Code Civ.Proc. §§ 473, 663, 663a.

Morgan V. Spicer, H. R. Whiting, San Francisco, for plaintiff-appellant.

William Klein, Toland C. McGettigan, San Francisco, for defendants-appellants.

BRAY, Justice.

In an action for deceit and false representation plaintiff recovered judgment of $5,000 and interest from June 11, 1947. Thereafter the trial court made an "Order Modifying Findings of Fact and Conclusions of Law Heretofore Signed" and an "Order Modifying Judgment." Defendants appeal from the judgment.[1] Plaintiff appeals from the two orders.

Questions Presented.

Defendants' Appeal.

I. Sufficiency of the evidence and of allegations of the complaint.

II. Was Joseph Nathanson a real party in interest?

III. The correct measure of damage.

IV. Error in denying admission of evidence concerning claimed conversion of defendants' property by Nathanson.

Plaintiff's Appeal.

Power of court to change findings and judgment.

I. Sufficiency of the Evidence and of Allegations of the Complaint.

Defendants contend that neither the facts as alleged in the complaint, found by the court nor shown by the evidence, made out a ground for recovery. As the evidence supports the allegations of the complaint it is unnecessary to consider the pleading separately but only to determine whether the facts as found entitle plaintiff to the judgment.

Defendant May Murphy is the mother of defendant Barbara Baglietto. They owned a ranch in the counties of Tehama and Shasta.[2] In 1946 Joseph Nathanson[3] approached Mrs. Murphy in regard to purchasing the ranch, stating that he was interested in promoting a corporation to take it over. She was interested in selling and told him the ranch contained 960 acres. A corporation was formed called the Community Cooperative Development Company. The corporation applied to the corporation commissioner for a permit to sell stock to make "a down payment on a going stock ranch and for the acquisition of an auto court." It stated that a number of ranches were under consideration but that it was the present purpose of the directors to acquire a ranch of more than 900 acres in the vicinity of Cottonwood (defendants' ranch). In April, 1947, Nathanson persuaded Mrs Murphy to go with him to the office of Mr Penaat, a director of the company, and an attorney. There, they went over a proposed memorandum for the purchase of the property by the corporation. This required a payment of $5,000 by June 9th at which time the owners were to deed the property to the corporation and receive back a note for the

1. Defendants purport to appeal also from an order denying a new trial. That there is no appeal from such an order has been held so many times as not to require citation of authorities.

2. All of the negotiations as to the sale of the ranch were with defendant Murphy. She, however, admittedly had authority to represent and bind the daughter.

3. He died prior to trial. His deposition, previously taken, was used at the trial.

balance of the purchase price secured by a deed of trust on the property. In the early part of June, Nathanson from his own money paid defendant the $5,000. Defendants executed the deed to the corporation and the corporation executed the note and deed of trust. The property was described by metes and bounds without reference to acreage. The next day the permit to sell stock was issued, referring to the ranch to be purchased as containing 960 acres. The corporation then solicited sales of stock for approximately two months, when it stopped doing so because it discovered that the ranch contained not more than 770 acres. The tax bill for the period July 1, 1947, to June 3, 1948, which became a lien in March, 1947, showed the acreage as 757 acres. Negotiations were had with Mrs. Murphy to reduce the purchase price because of the discrepancy in acreage. These came to naught and the $5,000 was never restored. The corporation commissioner finally terminated the permit to sell stock. The corporation has no assets and in 1948 defendants foreclosed the deed of trust. Thereafter Nathanson sued for the recovery of $5,000 damages plus additional damages of $10,000 for loss of commissions on sale of corporation stock, $5,000 for the reasonable value of his services, $2,500 for the reasonable value of time expended, and $500 for expenses incurred, all based on the charge of misrepresenting the acreage.

The court found that defendants knew that Nathanson was interested in organizing and promoting the corporation to purchase the ranch; that the corporation permit was granted to purchase defendants' "960 acre ranch"; that after discovering defendants' false representations as to acreage the corporation could not lawfully issue its stock; that Nathanson paid $5,000 of his own money as partial consideration for the conveyance by defendants to the corporation; that defendants knew said representations to be untrue and made them with intent to deceive Nathanson and to induce him to pay said sum to them; that the representations were false and untrue; that the ranch only contains 763 acres; that Nathanson did not know the representations to be false, but believed and relied upon them and would not have paid the $5,000 had he known the truth; that because the corporation could not issue its stock, it could not fulfill the contract of purchase; that the corporation has no assets from which to repay Nathanson.

[1, 2] Both as to pleading and as to evidence all the facts necessary to establish a case of deceit and false representation appear here. The elements required are succinctly set forth in Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958, 964: "In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby."

[3] 1. A material representation was made. Nathanson testified Mrs. Murphy told him the ranch contained 960 acres. Defendants owned a real estate broker's business. Under its name on two occasions newspapers advertised the property as containing 950 acres and on two occasions as 940 acres. The advertisements were seen by Nathanson. Mrs. Murphy gave Nathanson a description of the ranch on her firm's stationery "About 950 acres more or less * * *" Mrs. Murphy stated to Nathanson and Penaat that the acreage was 950. A letter to the corporation commissioner prepared by Penaat, signed by Mrs. Murphy and seen by Nathanson, described the ranch as containing 900 acres. The memorandum of sale reviewed by Nathanson and Mrs. Murphy referred to the ranch as containing 950 acres. Misrepresentation of acreage may be a material fact. Morey v. Bovee, 218 Cal. 780, 25 P.2d 2 (18 acres of orange trees represented as 23 acres); Quarg v. Scher, 136 Cal. 406, 69 P. 96 (23½ acres represented as 40); Mosher v. Lack, 41 Cal.App. 23, 181 P. 813 (55.64 acres represented as 80); Dohrman v. J. B. Roof, Inc., 108 Cal.App. 456, 291 P. 879 (90 foot lot represented as 100). Here it was material.

2. The representations were false. There can be no question under the evidence that the ranch contained no more than 765 acres.

3. Defendants knew the representations to be untrue or did not have sufficient knowledge to warrant a belief that they were true. There is no direct evidence that defendants knew the exact acreage. However, the evidence shows that defendants never had the ranch surveyed to determine its size. They introduced no evidence as to what they based their representations on. Therefore they did not have sufficient knowledge to warrant a belief that they had 950 acres.

[4] A case very much in point is Gagne v. Bertran, 1954, 43 Cal.2d 481, 275 P.2d 15. It was an action for deceit against a test hole driller who was not a party to the contract of sale but who represented to the plaintiff the amount of fill on the property, as a result of which representation the plaintiff entered into the contract. "To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an 'assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' [citations] and made 'with intent to induce (the recipient) to alter his position to his injury or his risk * * *' [citations]." 43 Cal.2d at pages 487, 488, 275 P.2d at page 20.

[5, 6] 4. Made with intent to induce plaintiff to rely thereon. Defendants contend that the facts that some of the representations were made a year prior to the transaction, that there were six other incorporators besides Nathanson, that the sale was to the corporation and that the down payment was to be paid by the corporation from proceeds of stock sales, negative any intent to defraud Nathanson. There is no legal requirement that to constitute grounds for recovery the misrepresentations be made at any particular moment during the negotiations. Here the transaction was the product of months of negotiations. The representations and the formation of the corporation were steps that finally consummated in the sale. Defendants knew that Nathanson was vitally interested in the formation of the corporation and the purchase of the ranch. At Penaat's office, Mrs. Murphy inquired from where the down payment was to come. Nathanson explained that he was going to put it up. "She was satisfied when she learned that the $5,000.00 that was offered was definitely available and would not have to be raised through the sale of stock." An action for deceit does not require privity of contract. Here the representations were made directly to Nathanson to induce him to pay the $5,000 to defendants for the benefit of the corporation.

[7] Assuming, however, the representations were made directly to the corporation and merely indirectly to Nathanson, Mrs. Murphy knew that Nathanson would act upon them. Therefore, the representations are actionable. "Defendant's intent to induce plaintiffs to alter their position can be inferred from the fact that he made the representations with knowledge that plaintiffs would act in reliance on them." Gagne v. Bertran, supra, 43 Cal.2d 481, 488, 275 P.2d 20; see also Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P.2d 839, 91 A.L.R. 1357. Moreover, Mrs. Murphy knew that it was intended that the corporation stock would be sold to investors generally on the representation that the ranch acreage was as stated by her. Therefore, it must be presumed that she intended such a class of persons including Nathanson to act in reliance on her representations. "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." Civil Code, § 1711.

[8] Moreover, the intent need not be to defraud, but merely to cause another to alter his position to his risk. Section 1709, Civil Code, provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

[9] 5. Plaintiff reasonably believed the representations to be true. Defendants,

after stating "we admit the majority of California cases seem to be the contrary" refer to the rule cited in 12 R.C.L. 372, citing Champion v. Woods, 79 Cal. 17, 21 P. 534, to the effect that where the means of knowledge are at hand and equally available to both parties and the subject matter is alike open to their inspection, one who fails to avail himself of these opportunities will not be heard to say that he was deceived by the others' misrepresentations. That rule has never been applied in California to representations as to land quantities.

[10, 11] "As a general rule the owner of real estate, in the absence of facts showing the contrary, is presumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts." Eichelberger v. Mills Land, etc., Co., 9 Cal. App. 628, 634, 100 P. 117, 120. See also Hargrove v. Henderson, 108 Cal.App. 667, 674, 292 P. 148; Younis v. Hart, 59 Cal. App.2d 99, 104–105, 138 P.2d 323. "The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement; and, when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say, in a court of equity, 'The vendee had no right to believe him.'" Quarg v. Scher, supra, 136 Cal. at page 410, 69 P. at page 97.

[12] 6. Plaintiff relied on the representations. Nathanson so testified. The trial court believed him. We are bound by that court's determination.

The fact that Nathanson was to receive a job from the newly formed corporation does not change the fact that his payment to defendants of the $5,000 was caused by defendants' representations. True, he expected the corporation to reimburse him. But he and defendants knew that his only possibility of reimbursement would be from sales of stock by the corporation under the permit which was issued upon the representation by the corporation, relying upon defendants' representation as to the ranch acreage.

7. Plaintiff suffered damage thereby. The corporation had no money with which to repay Nathanson. The permit under which the corporation undertook to sell stock was based upon the representation that the ranch contained 960 acres, and expressly refers to such acreage. Both Nathanson and Penaat testified that the sales of stock were stopped because of fear of violating the law when they and the corporation learned that the application to the corporation commissioner and the permit itself misrepresented the acreage. However, plaintiff's cause of action is based upon the fact that by defendants' actions Nathanson was induced to invest in the corporation and thereby lost his investment.

[13] The fact that Nathanson was employed by the corporation for a while and received a salary did not minimize his damage. He was being paid for his services, not for reimbursement of his investment.

II. Real Party in Interest.

[14] Citing section 367, Code of Civil Procedure, to the effect that all actions must be prosecuted by the real party in interest, and cases to the same effect, defendants contend the corporation is the real party in interest. The representations were made to Nathanson before there was any corporation. While the idea of forming a corporation was Nathanson's, nevertheless the inducement to pay defendants the $5,000 was made to Nathanson. A case similar to ours is Sutter v. General Petroleum Corp., 1946, 28 Cal.2d 525, 170 P.2d 898, 167 A.L.R. 271. There 27 stockholders in their own names sued third parties for fraud and deceit, based on fraudulent representations causing them to organize and invest in a corporation to purchase the defendants' property. There, as here, the defendants claimed that the injury was not to the plaintiffs but to the corporation formed by the plaintiffs. The court pointed out that (as in our case) the representations were made and the plaintiffs' actions in reliance thereon, took place before the corporation was formed. It stated that the essence of the plaintiffs' charges was that by reason of the representations of the defendants, the plaintiffs were induced among

other things to form and invest in a corporation, and that therefore, the plaintiffs had brought themselves within the rule. "* * * a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong. [Citations.]" 28 Cal.2d at page 530, 170 P.2d at page 901.

III. Measure of Damages.

In Sutter v. General Petroleum Corp., supra, 28 Cal.2d at page 531, 170 P.2d at page 901, the court said that each plaintiff "lost his investment which was represented by the stock, and its reduction in value would be the extent of his loss. The damages all flowed from the tort of defendants." It assumed, without deciding, that section 3343, Civil Code, applied. That section provides that one defrauded in the purchase of property is entitled to recover the difference between the actual value of that with which he parted and the actual value of what he received. It held that additionally, each plaintiff would be entitled to the reasonable value of his services in developing and operating the project which failed because of the fraud of the defendants, under both section 3333, Civil Code, which provides that for the breach of an obligation not arising from contract the measure of damages except where otherwise provided in that code is the amount which will compensate for all the detriment proximately caused thereby, and under section 1709, Civil Code, which provides that one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. In our case, Nathanson sought additional damages for the value of his services, etc. The court, however, held that no evidence was offered to support these claims.

[15] In cases of fraudulent representations by a vendor to a vendee it has been held that section 3343, Civil Code, provides the measure of damages. See Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935, and cases there cited. In Gagne v. Bertran, supra, 43 Cal.2d 481, 275 P.2d 15, which was, as heretofore explained, an action against a third party on representations which caused the plaintiffs to enter into a contract with a third party, the court said: "* * * the damages, whether for deceit or negligence, must be measured by the actual losses suffered because of the misrepresentation. Civ.Code §§ 1709, 3333 * * *." 43 Cal.2d 490, 275 P.2d 22. It then held that the plaintiffs were entitled to the difference between the actual value of the property and the amount the plaintiffs paid for it, if any, and for any consequential damages there might be. Certainly, in our case, under either section 3333 or 1709, or both, plaintiff was entitled at least to $5,000.

Defendants' argument that Nathanson's investment in the corporation had value at the time of the fraud is answered in Sutter v. General Petroleum Corp., supra, 28 Cal. 2d 525, at page 533, 170 P.2d 898, at page 903, where the court said: "It may be that the complaint indicates that the stock had some value at the time the representations were made and the money invested, still where the fraud consists, as it does here, of the false representations as to the condition of the steel island and the availability of the lease, the consequences of the fraud—manifestation of the injury to plaintiff—did not occur until the collapse of the steel structure and the loss of the lease. Certainly it cannot be doubted that there is a sufficient showing of injury to plaintiffs." In our case, if the stock had any value at the time of the formation of the corporation, the consequences of defendants' fraud did not arise until the discovery of the true acreage. It was then that the stock, if it had any value, became valueless and the injury to Nathanson occurred. Assuming some value to the stock originally, the language in Feckenscher v. Gamble, 12 Cal. 2d 482, 500, 85 P.2d 885, 893, is applicable here: "Although there was some equity in the property which plaintiff acquired in the trade at the time she actually acquired it, yet by reason of one of the misrepresentations made to her to the effect that the trust deed was not immediately due, she lost the entire property by a sale under the trust deed, so that it can reasonably be said

that she actually received nothing of value from the transaction."

IV. Conversion.

[16] The corporation had possession of the ranch for a period. Nathanson acted as its manager. Defendants offered to prove the value of feed and livestock sold by Nathanson during this time. The livestock were covered by a chattel mortgage from the corporation to defendants, made as a part of the purchase of the ranch transaction. The court refused to admit evidence thereof on the ground that no claim had been presented against the Nathanson estate, and no set-off, counterclaim or cross-complaint was pleaded. See 23 Cal.Jur. 277, necessity for pleading a set-off, and Reveal v. Stell, 1922, 56 Cal.App. 463, 205 P. 875, necessity for presenting claim against estate on a cross-demand. Defendants contend, however, that the purpose of the offer was not to establish a set-off but to show that Nathanson's "out of pocket" damage was less than claimed. It is not clear from the offer of proof whether defendants claim that Nathanson received the money from the alleged conversion of defendants' property personally or for the corporation. If for the corporation obviously it could not constitute a reduction of Nathanson's damages. Assuming that Nathanson received it, that fact would have to be alleged. This is not an action between vendor and purchaser, in which event the conversion of the vendor's property by the vendee would constitute a reduction of the vendee's damages. Here defendants claim that neither Nathanson nor the corporation had the right to sell the chattel mortgaged property. It is claimed the sale was contrary to the terms of the mortgage executed by the corporation. If so, Nathanson took the property expressly against the will of the mortgagee and was guilty of conversion. This would not be a minimizing of damages but would be a set-off, which would have to be pleaded. Nathanson was not a party to the contract between defendants and the corporation. His alleged action would have been a tort completely separate and apart from his transaction with defendants. Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 192 P.2d 935, is not in point. That was an action between vendee and vendor.

Plaintiff's Cross-Appeal.

Power to change findings and judgment.

[17–19] After judgment and after motion for new trial had been denied, the trial court made the orders amending the findings and conclusions and the judgment by striking out the provisions allowing interest from June 11, 1947, the date of the payment to defendants of the $5,000. The orders were not made pursuant to the provisions of section 473, Code of Civil Procedure; to correct clerical errors or misprision in the record; or on motion for new trial pursuant to the provisions of sections 663 or 663a Code of Civil Procedure. Section 3288, Civil Code, provides that in an action for the breach of an obligation not arising from contract and in every case of oppression, fraud or malice, interest may be given in the discretion of the *jury*. There being no jury in this case, this means the trial court, to whose discretion is left the determination of whether interest will be awarded. Pavlovich v. Neidhardt, 128 Cal.App.2d 559, 562, 275 P.2d 836. The court exercised its discretion and awarded interest. "* * * the rule is well settled that a judgment or order once regularly entered can be modified or vacated by the court which entered it only in the manner prescribed by statute * * *." Eisenberg v. Superior Court, 193 Cal. 575, 581, 226 P. 617, 619.

The purported appeal from the order denying a new trial is dismissed. The other orders are reversed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

132 Cal.App.2d 340

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Sabas APODACA, Jr., Defendant and Appellant.

Cr. 5290.

District Court of Appeal. Second District. Division 2, California.

April 18, 1955.

Rehearing Denied April 27, 1955.

Prosecution for possession of heroin. The Superior Court, Los Angeles County, Ralph K. Pierson, J., entered judgment of conviction and denied motion for new trial. Accused appealed. The District Court of Appeal, Fox, J., held that where accused allegedly had $900 in his possession at time of arrest, and was given receipt for such money by policeman when booked at jail, and accused did not produce a receipt showing a lesser sum, court did not abuse its discretion in sustaining objection to cross-examination question asked in attempt to impeach an arresting officer if it wasn't a fact that when money was picked up and when the alleged transaction had taken place, the money is introduced in evidence.

Judgment and order affirmed.

1. Criminal Law ⇐1153(4)

Witnesses ⇐267

The scope of cross-examination is within the sound discretion of the trial court, and its rulings in such matters will not be disturbed on appeal in the absence of a clear abuse of discretion.

2. Witnesses ⇐330(3)

In prosecution for possession of heroin, against accused, who allegedly had $900 in his possession at time of arrest, and had been given receipt for such money by police when booked at jail, where accused did not produce receipt, court did not abuse its discretion in sustaining objection to cross-examination question asked to impeach an arresting officer if it was a fact that when money is picked up and when an alleged transaction has taken place the money is introduced in evidence since matter was irrelevant. West's Ann.Const. art. 6, § 4½; Pen.Code, § 869; Health and Safety Code, § 11500.

Minsky & Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Dep. Atty. Gen., for respondent.

FOX, Justice

Defendant was convicted of the possession of heroin in violation of section 11500 of the Health and Safety Code. He appeals from the ensuing judgment and the order denying his motion for a new trial.

Defendant was under observation of Police Officer Poe, who was in plain clothes, for about 45 minutes on the morning of February 21, 1953, in the area near the merry-go-round section of Lincoln Park, in the city of Los Angeles. While defendant was seated on a park bench, Officer Poe observed three persons approach the bench at different times and have a conversation with defendant. "After the course of the conversation," which the officer could not hear, he "saw a small package exchange hands, at which time money, in the form of bills," was handed to the defendant. Officer Poe then observed defendant walk toward the merry-go-round entrance to the park, going on back of a wall where the cars were parked. There defendant met another person. Officer Poe walked to the rear of the parked cars, from which position he observed defendant and the other party seated on a log, and saw the latter take some money out of his pocket. At that point an officer stepped out from behind the automobiles and up to where defendant and the other party were seated, announcing that he was a police officer sufficiently loud so that he was heard by Officer Weston, who was some 50 feet away. Defendant then got up, put his hand in his left trouser pocket and started to walk away. Officer Poe stepped up to defendant, put his hand on his shoulder, told him to stop, and that he was under arrest. Defendant thereupon removed his hand from his pocket and threw a white object over his shoulder. The officer saw where the object landed. A severe struggle ensued between defendant

and Officer Poe, each trying to retrieve this discarded object. Defendant grabbed it and apparently started to put it in his mouth when Officer Weston intervened. Defendant again threw the package. Officer Weston directed a man standing close by to retrieve it and bring it back to him. This the man did. The object that defendant threw was the same one that he had previously thrown over his shoulder and attempted to put into his mouth. It consisted of a latex bag containing some 12 grams of powder which was identified as heroin.

Defendant's version was that as he was approaching his automobile in Lincoln Park someone threw a package to him, which he immediately threw away over his shoulder. Whereupon he was seized by a police officer whose identity he did not learn until handcuffs were being placed on him.

Defendant's sole ground for a reversal is that the trial judge committed prejudicial error in limiting the cross-examination of Officer Weston, who testified on rebuttal that defendant had approximately $900 on his person at the time of his arrest.

[1] It is settled that the scope of cross-examination is within the sound discretion of the trial court, and that its rulings in such matters will not be disturbed on appeal in the absence of a clear abuse of such discretion.

On rebuttal, Officer Weston testified, without objection, that when defendant was booked at the jail he had a little over $900 on his person. On cross-examination he was asked this question: "Isn't it a fact, Officer, that when money is picked up and when an alleged transaction has taken place, the money is introduced in evidence?" An objection was sustained on the ground that it was incompetent, irrelevant and immaterial. After a few questions on another subject, the following transpired:

"Q. By Mr. Garber: You did not take that $900.00 and book it for evidence to be used in this case? A. We booked it with the prisoner at the jail, and he was given a receipt for it.

"Q. Do you have that receipt with you? A. No. It is in the jail records.

"Q. Do you have with you any record of having introduced that money to be used for evidence?"

Objection to this last question, on the grounds that it was incompetent, irrelevant and immaterial, was also sustained. The rulings were correct. Whether it was customary to offer in evidence in a criminal trial money found on a defendant at the time of his arrest or whether the officer had with him "any record" showing that the money taken from the person of this defendant had been introduced in evidence, were wholly irrelevant and immaterial to any issue in the case.

[2] Although no suggestion was made to the trial judge as to the purpose of these questions, defendant now asserts he was attempting to impeach officer Weston. There is no merit in this theory. An affirmative answer to the first question would not have tended to impeach the officer since the failure to offer the money in evidence is of no significance in a prosecution for possession rather than sale of narcotics. Defendant seeks to create the impression that he did not have the amount of money on his person when arrested that the officer testified he had. It was, however, a simple matter to trap the officer if he had lied for he testified that the money was "booked" with the defendant and "he was given a receipt for it." The defendant, however, neither denied having been given a receipt for the money nor did he produce the receipt to establish that it was for a smaller amount. There was obviously nothing of an impeaching nature in the final question. No suggestion was made that the money had been used for evidentiary purposes. If such had been the fact it would have been disclosed by the transcript of the preliminary hearing which presumably had been furnished defendant prior to trial in the superior court as required by law. Pen.Code, § 869. He made no such disclosure. There was, therefore, no showing of the existence of any such record, or that this witness was the proper custodian thereof, if such, in fact, existed. Consequently, no basis for impeachment was shown. It is clear that the court did not abuse its discretion in sustaining the ob-

jections to these two questions and that the defendant was not prejudiced by such ruling. People v. Obersmith, 129 Cal.App.2d 97, 276 P.2d 19; Art. VI, § 4½ of the Calif.Const.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

132 Cal.App.2d 233

Matter of the ESTATE of Booth NASH, sometimes known as Edwin Booth Nash, Deceased.

Civ. 8555.

District Court of Appeal, Third District, California.

April 13, 1955.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Merced County, sitting in probate, Gregory P. Maushart, J., entered a decree in favor of heirs of deceased wife of deceased testator, and sole surviving heir of deceased testator appealed. The District Court of Appeal, Schottky, J., held that where will of husband provided that remainder of his estate, including his share and his wife's share in community property, was given to bank in trust to pay income to wife during her life, if she should so elect, and that on her death trust should cease and trust estate should go to husband's heirs, and, after husband's death, wife elected to take under will, and Superior Court, sitting in probate, made decree of settlement of account of bank as husband's executor and final distribution finding that wife had elected to take under will, decree, on becoming final, was conclusive on rights of wife and those claiming through her or under her.

Decree reversed with directions.

1. Courts ⇐198

Where will of husband provided that remainder of his estate, including his share and his wife's share in community property, was given to bank in trust to pay income to wife during her life, if she should so elect, and that on her death trust should cease and trust estate should go to husband's heirs, and husband died, and wife elected to take under will, superior court, sitting in probate, had jurisdiction over wife's share of community property. Probate Code, § 202.

2. Courts ⇐198

Proceeding for administration of estate of deceased is in rem, and jurisdiction of superior court, sitting in probate, is complete over property of estate and over all persons claiming interest therein under deceased, as to all matters involved in complete and effective administration. Probate Code, § 202.

3. Executors and Administrators ⇐315(6)

With respect to matters within jurisdiction of superior court, sitting in probate, decree of distribution of estate of deceased is conclusive and is not subject to collateral attack, except in equity for extrinsic fraud, or, after it becomes final, to direct attack, except in accordance with section of Code of Civil Procedure, dealing with relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect. Probate Code, § 41; West's Ann. Code Civ.Proc. § 473.

4. Judgment ⇐681

Where will of husband provided that remainder of his estate, including his share and his wife's share in community property, was given to bank in trust to pay income to wife during her life, if she should so elect, and that on her death trust should cease and trust estate should go to husband's heirs and, after husband's death, wife elected to take under will, and Superior Court, sitting in probate, made decree of settlement of account of bank as husband's executor and final distribution finding that wife had elected to take under will, decree, on becoming final, was conclusive on rights of wife and those claiming

through her or under her. Probate Code, §§ 202, 1021.

5. Executors and Administrators ⇐315(6)

Where Superior Court, sitting in probate, made decree of settlement of account of bank as husband's executor and final distribution finding that wife had elected to take under will, and after wife died intestate her heirs filed a claim in husband's estate proceeding for one half of the community property of the husband and wife, Superior Court erred in receiving evidence tending to show that wife had not made an election under will, since decree was res judicata on that issue.

George C. Perkins, 1306 Tribune Tower, and Weinmann, Rode, Burnhill & Moffitt, Oakland, for appellant.

Preston, Braucht & George, Merced, for respondents Bank of America.

C. Ray Robinson by W. E. Craven, Merced, for respondent McIntosh.

Stephen P. Galvin, Merced, for respondent Savercool.

Lin Griffith, Merced, for respondent Simpson.

SCHOTTKY, Justice.

Booth Nash died in Merced County on January 14, 1950. He left a will dated July 17, 1930, which was admitted to probate. The relevant portions of the will are the Fifth and Eighth articles, which provide as follows:

"Fifth: All of the rest, residue and remainder of my estate, whether the same be real, personal or mixed, of whatever kind or character and wheresoever the same may be situated, of which I may die seized or possessed, or in which I may have any interest or right of testamentary disposition or power of appointment at the time of my death, including all our community property, my wife's share thereof as well as my own, I hereby give, devise and bequeath to Bank of Italy National Trust and Savings Association, a national banking association, to be held in trust, nevertheless, subject to the following uses, terms, conditions and limitations:

"(a) During the period of this Trust my said Trustee shall pay to my said wife, Dorothea Nash, all of the net income arising herefrom, together with such portions of the principal hereof, if any, as shall be required, in its absolute discretion, for the proper care, maintenance and support of my said wife.

"(b) This Trust shall cease and terminate upon the death of my said wife, Dorothea Nash; whereupon my said Trustee shall pay, deliver and convey all of the trust estate then remaining in its hands, with the exceptions of those portions provided for in Articles Sixth and Seventh hereof, to my heirs at law in accordance with the laws of succession of the State of California then in force."

"Eighth: I am confident that my said wife, Dorothea Nash, will be agreeable to the distribution of the rest, residue and remainder of my said estate in trust as set out by the provisions of the foregoing Paragraph Fifth hereof, particularly since she will thereby avoid the hazards and responsibilities attendant upon the management and investment of an estate, but should my said wife elect to take outright the one-half (½) share of our community property to which she will become entitled upon my death, it is my intention that she shall receive the same, in addition to rather than in lieu of the provisions of the said foregoing Paragraph Fifth hereof."

The Bank of America National Trust & Savings Association, as successor to the Bank of Italy National Trust & Savings Association, was the executor and petitioned for the probate of the will. Prior to distribution, the widow, Dorothea Nash, executed an election to take under the terms of the decedent's will and waived her right to have any portion of the community property, as such, distributed to her.

On September 11, 1951, the superior court sitting in probate made its order and

decree of settlement of account and of final distribution wherein it found that the eighth article of the will provided an election to be made by the widow, Dorothea Nash, and, after setting forth the eighth article, further found "that the widow has made her election and that she has elected to have the entire estate of the said deceased distributed under the terms of the Will and administered under the trust provisions thereof, without regard to the fact that one-half of the community property might otherwise have been set aside to her, and in pursuance of the said election the Court finds that the decree of distribution affects the entire property and estate of the decedent regardless of the community character of any portion thereof." Accordingly, the court distributed to the widow, Dorothea Nash, the personal effects of the decedent and distributed the residue of the estate to the Bank of America National Trust and Savings Association, in trust, for the period of the lifetime of Dorothea Nash, and further provided that the remainder, upon the termination of the trust specified in the fifth paragraph of the decedent's will, shall be, "and the same is hereby, distributed in accordance with Subdivision (b) of Paragraph Fifth of decedent's Will, to wit, to the heirs at law of Booth Nash, sometimes known as Edwin Booth Nash, deceased, in accordance with the laws of succession of the State of California in force at the date of the death of Dorothea Nash."

Dorothea Nash died intestate on October 18, 1952. On November 20, 1952, the testamentary trustee filed its petition in this proceeding. On January 2, 1953, Beryl L. McIntosh, a sister of Dorothea Nash, filed her Statement of Claim of Interest in Estate, setting forth that Dorothea Nash was survived by a brother, William S. Firmstone, four sisters, Beryl L. McIntosh, Blanche M. Harris, Hattie B. Firmstone and Della G. Herring, and a niece and nephew, Dorothy C. Simpson and John D. Savercool, the children of a deceased sister of Dorothea Nash. In her statement Beryl McIntosh claimed that one-half of the community property of Booth and Dorothea Nash was the property of and should be distributed to the estate of Dorothea Nash, deceased, and to the heirs of said decedent.

George H. Nash, appellant herein, filed an answer to the statement of claim of Beryl McIntosh, asserting that he was the sole surviving heir at law of Booth Nash and requesting that the entire remainder of the trust property be set aside to him.

After hearing testimony the court found that the widow, Dorothea Nash, was not required to make any election, that she did not make any election and had never been advised as to her legal rights. The court entered its decree determining the distribution of the estate and ordered that one-half of the assets of the estate of Booth Nash be distributed to George W. Nash, the sole and surviving blood relative of Booth Nash, and that the remaining one-half of the estate be "distributed to the Estate of Dorothea Nash, deceased, and to the heirs of the said decedent, Dorothea Nash, under and pursuant to the laws of succession of the State of California."

George H. Nash, sole surviving heir of Booth Nash, has appealed from the said decree determining distribution of the estate.

The principal contention of appellant is that "insofar as the decree appealed from purports to redetermine the issues with respect to the widow's election, and the distribution of the estate, which were passed upon and determined by the decree of final distribution, it is erroneous and improper and cannot be sustained."

[1] We think it is clear that in the proceedings leading up to and including the decree of distribution, the probate court in the estate of Booth Nash had jurisdiction over the widow's share of whatever community property was owned by decedent and Mrs. Nash at the time of his death.

Section 202 of Probate Code, so far as pertinent here, provides:

> "Community property passing from the control of the husband, * * * by reason of his death * * * is subject to his debts and to administration and disposal under the provisions of Division III of this code * * *."

[2] As stated in Colden v. Costello, 50 Cal.App.2d 363 at page 370, 122 P.2d 959, at page 963 (hearing denied):

"The Probate Code provides one comprehensive, exclusive method for administration upon the estates of decedents. The proceeding is *in rem* and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration. * * * The title of a surviving wife to her interest in the community estate rests upon a decree of distribution. Her right as survivor of the community is one thing; the decree of distribution which determines and identifies the estate which comes to her by virtue of her right is quite another, and is indispensable as a muniment of her title. * * *"

In re Estate of Kurt, 83 Cal.App.2d 681, at page 684, 189 P.2d 528, at page 530, the court said:

"Cases dealing with a surviving wife are not in point. A different situation exists where the husband dies leaving the wife surviving. The community property in that case is subject to administration (Prob.Code, sec. 202) and both before and since 1923 the wife's share of community property comes to her through the probate court, so that her claim is in privity with the estate and can be litigated therein."

[3] It is well settled that with respect to matters within its jurisdiction the decree of distribution is conclusive and is not subject to collateral attack except in equity for extrinsic fraud, or after it becomes final, to direct attack except in accordance with section 473 of the Code of Civil Procedure.

In re Estate of Loring, 29 Cal.2d 423, 175 P.2d 524, 530, strongly relied upon by appellant, the probate court, upon a petition for instructions with respect to a testamentary trust, ruled that certain legacies were subject to the limitations specified by Probate Code, section 41, although no such limitation had been placed upon the legacies by the decree of distribution. The Supreme Court reversed the order, holding that the decree of distribution was conclusive as to the trust beneficiaries. The court specifically held that even though new issues were involved the decree of final distribution was conclusive and such new issues could not be determined "by reopening issues that were conclusively passed upon in the distribution proceedings."

Said the Supreme Court in the Loring case:

"It is settled, and the Lorings concede, that a decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and of the rights of all parties thereunder." 29 Cal.2d at page 427, 175 P.2d at page 527, citing numerous cases.

"* * * Moreover, the question is not whether it was proper for the probate court to pass upon the validity of all the provisions of the trust, but whether, assuming that it did, its determination is conclusive. Since the court had jurisdiction to pass upon the validity of at least the residuary provisions of the trust, it clearly had jurisdiction to pass upon the validity of the other provisions thereof. Although the Lorings contend that it did not pass upon the validity of the other provisions the wording of the decree compels the conclusion that it did. It may well be that in doing so it failed to consider the provisions of the Probate Code restricting charitable bequests to one-third of the estate and erroneously held all the provisions of the trust to be valid. It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error." 29 Cal.2d at page 432, 175 P.2d at page 529, citing cases.

"The Lorings contend that the issues in the present case arose after the decree and because of a change in circumstances unforeseen at the time it was rendered; that these issues are cognizable in equity only; and that the probate court has no equity jurisdic-

tion, save the limited jurisdiction that it can exercise after distribution under the provisions of section 1120 of the Probate Code. They further contend that it is that limited jurisdiction that the court should now exercise and that to hold that the decree of distribution is res judicata as to the issues in the present case would render section 1120 meaningless, for it would give the court no jurisdiction except to 'rubber-stamp' the decree of distribution. It must be conceded that circumstances now are different from those at the time of the decree and that the probate court has jurisdiction to determine in the light of the changed circumstances how to divide the trust estate among the beneficiaries. It cannot make that determination, however, by reopening issues that were conclusively passed upon in the distribution proceedings. Section 1120 itself contemplates that the exercise of the court's equity jurisdiction is so limited, for it provides that the court may determine to whom the property shall pass upon the termination of the trust, 'To the extent that such determination is not concluded by the decree of distribution.'" 29 Cal.2d at page 433, 175 P.2d at page 530.

In re Estate of White, 69 Cal.App.2d 749, 160 P.2d 204, the personal representatives of the decedent's son filed objections to a trustee's report, contending, among other things, that a certain trust was void, thereby creating an intestacy. In denying this contention the court said, 69 Cal.App.2d at page 755, 160 P.2d at page 207:

"When an estate of a deceased is distributed to trustees appointed under a will, the decree is an adjudication of the validity of the trust. In Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322, 330, the court said: 'Whatever may be the merit of plaintiff's contentions, the decree of distribution in the probate proceeding in decedent's estate was conclusive as to the interpretation of the will, and the rights of legatees thereunder, and the property included or covered by the will, the existence, validity of and rights under any testamentary trust, and the incidental matters which necessarily are involved in a determination on those subjects whether right or wrong. It cannot be collaterally attacked except for extrinsic fraud or certain jurisdictional defects.'"

See also Estate of White, 69 Cal.App.2d 749, 160 P.2d 204; Clavey v. Loney, 80 Cal.App. 20, 251 P. 232; Wells Fargo Bank v. Superior Court, 32 Cal.2d 1, 193 P.2d 721; Cook v. Cook, 17 Cal.2d 639, 111 P.2d 323; In re Estate of Cecala, 104 Cal.App.2d 526, 232 P.2d 48; Cunha v. Hughes, 122 Cal. 111, 54 P. 535; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; California Probate Code, section 1021; 11b Cal.Jur. 794.

As hereinbefore set forth the court in the decree of distribution found that Dorothea Nash, the widow, "has made her election and that she has elected to have the entire estate of the said deceased distributed under the terms of the Will and administered under the trust provisions thereof, without regard to the fact that one-half of the community property might otherwise have been set aside to her, and in pursuance of the said election the Court finds that the decree of distribution affects the entire property and estate of the decedent regardless of the community character of any portion thereof."

[4] The decree of distribution, after distributing the decedent's personal effects to his widow, distributed the remainder of the estate in trust to be held in accordance with paragraph Fifth of the will. We are satisfied that under the authorities hereinbefore cited and well established principles of law, when said decree of distribution became final it was conclusive on the rights of the widow and those claiming through or under her. This would be so even though the decree of distribution was erroneous in this respect (which we do not hold) and could have been successfully attacked by the widow on appeal.

Both the trial court and the respondent appear to have been under the erroneous impression that the trial court could redetermine the question of whether or not

the widow had elected to take under the provisions of the will. In its memorandum opinion the trial court said:

"The evidence in the above entitled matter having been heretofore submitted to the Court on the 23rd day of April 1953, and after due consideration thereof, it is ordered that the estate of Dorothea Nash is entitled to receive 50% of the value of Booth Nash Estate.

"The Court is of the opinion that Dorothea Nash was not required to make an election under the Will. The Court finds from the evidence that Dorothea Nash never made an election. The undisputed evidence of Mr. F. E. Braucht, and Mr. A. K. Falch representing the Executor Bank of America, prepared the purported election and neither one of them ever read or explained it to her. There was no consideration for it. The heirs are to be determined by Section 228 Probate Code.

"The Court is of the opinion that the case of Estate of Boyd, 95 Cal.App.2d 44, 212 P.2d 17, is controlling."

In re Estate of Boyd, 95 Cal.App.2d 44, 212 P.2d 17, 18, which the trial court regarded as controlling, and which is also cited by respondent, is not in point and does not support respondent's position. In that case the husband left the residue of his estate in trust, the income to be paid to the widow during her life and upon her death the trust property to be distributed to the children of the marriage. The will was admitted to probate and the widow petitioned for, and received, a family allowance. Then the widow petitioned for a determination of her interest in the estate, claiming that the assets were all community property and that she was entitled to one-half thereof free of the trust. After a hearing the court sitting in probate held that appellant by petitioning for and accepting a family allowance had elected to abide by the terms of the will and was precluded from claiming any interest in the estate by reason of such election other than her interest as set forth in the will. Upon appeal the court reversed this order, and in so doing used the following language quoted and relied upon by respondent:

"A widow's obligation to make an election arises only where the testator, by the terms of his will, clearly manifests an intention to make a testamentary gift to her stand in lieu of her community interest in the property of the estate. [Citations.]

"In the instant case there is nothing inconsistent between appellant's accepting a family allowance and the provisions in the will for her benefit. The provisions in the will were general in their nature, and decedent, by the terms of his will, did not manifest an intention to require her to make an election between her rights under the statute and those which she might receive under the will. Therefore she was not required to make, and her action did not constitute, an election."

In re Estate of Boyd is clearly distinguishable from the instant case because there was nothing in the will requiring an election by the widow, and furthermore, the widow demanded her statutory rights prior to the distribution of the estate. Estate of Boyd was not a case where a decree of distribution distributed property to a trustee upon certain trust conditions and after said decree became final the heirs of the wife sought to change the terms of the decree of distribution.

Respondents have not cited any case, nor have we found any, that is contrary to the holding of Estate of Loring, supra, that after property has been distributed to a trustee by a decree of distribution and the decree of distribution has become final, the probate court has no power to make any order except an order that will carry out the terms of the trust as set forth in the decree of distribution.

[5] The court was clearly in error in receiving evidence by which respondent sought to show that Dorothea Nash had not made an election because it was precluded from so doing by the decree of distribution which had become final. Said decree of distribution, signed by the same judge who signed the decree now appealed from, found

that she had made an election and that determination was res adjudicata of that issue. Upon hearing the trustee's petition for instructions and respondents' statement of claims the only power that the court possessed was to order the terms of the trust as set forth in the decree of distribution carried out. As stated in Estate of Loring, supra, "It cannot make that determination, however, by reopening issues that were conclusively passed upon in the distribution proceedings."

In view of the foregoing it is unnecessary to discuss the other contentions discussed in the briefs.

The decree appealed from, entitled "Decree Determining Distribution of Estate" is reversed, with directions to the trial court to order distribution in accordance with provisions of the decree of distribution.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 190

In re ESTATE of George Charles ADAMS, Deceased.

Arthur C. ADAMS, Appellant,

v.

Caroline Schmitt AYERS et al., Respondents.

Civ. 16156.

District Court of Appeal, First District, Division 1, California.

April 11, 1955.

Hearing Denied June 8, 1955.

Action by relatives of the intestate's predeceased spouse to inherit as statutory heirs of the intestate, their share of that portion of the estate found to have been community property of the intestate and his predeceased wife. From a judgment in the Superior Court, City and County of San Francisco, Timothy I. Fitzpatrick, J., claimants under the deceased wife appeals. The District Court of Appeal, Peters, P. J., held that where the residuary consisted of thousands of dollars of securities purchased after the death of the wife, proof that over a period of ten years the husband commingled about $34,000 of community property with about $56,000 of separate property was not a sufficient tracing so as to require that the generalized assets be divided in proportion to the sources of the funds by which the residuary assets had been purchased.

Reversed with directions.

1. Husband and Wife ⇐274(4)

In suit by relatives of intestate's predeceased spouse to inherit as statutory heirs of the intestate, their share of that portion of the estate which was community property of the predeceased spouse, burden was on the claimants to prove their right to recover. Probate Code, § 228.

2. Husband and Wife ⇐274(1)

The right of a person as heir to inherit community property, where deceased leaves no issue, and estate was community property of deceased and previously deceased spouse depends not merely upon the fact of a certain relationship but upon such fact plus fact that property claimed has formally been either the community property of the deceased and the predeceased spouse or else the separate property of the latter. Probate Code, § 228.

3. Husband and Wife ⇐262(1)

Where property is acquired during coverture and taken in name of the husband, it is presumed to be community property. West's Ann.Civ.Code, § 164.

4. Husband and Wife ⇐262(1)

Where separate and community property are so commingled that it is impossible to trace the funds, the whole will be treated as community property but presumption may be rebutted and is subject to some limitations. West's Ann.Civ.Code, § 164.

5. Husband and Wife ⇐262(1)

In considering whether the presumption that where separate and community property are so commingled that it is impossible to trace the funds, the whole shall

be treated as community has been rebutted, it is important to consider such factors, as to whether the community property is adequate to account for the entire estate and whether community expenditures are in excess of community income. West's Ann. Civ.Code, § 164.

6. Husband and Wife ⇐262(1)

Where separate and community property are so commingled so that it is impossible to trace the funds, question whether the presumption that the whole is community property has been rebutted is primarily a question of fact, and unless the presumption has been clearly rebutted, it alone will support a finding of community character of the property. West's Ann. Civ.Code, § 164.

7. Husband and Wife ⇐264

In suit by relatives of intestate's previously deceased spouse to inherit as statutory heirs of the intestate, their share of that portion of the estate found to be community property of the intestate and the predeceased spouse, findings in reference to the community property existing at the time of the predeceased spouse's death were amply supported. Probate Code, § 228; West's Ann.Civ.Code, § 164.

8. Husband and Wife ⇐274(1)

Any increase in the value of community or separate property due to no efforts of the possessor partakes of the nature of the original property, as respects descent thereof where the decedent dies leaving no issue and the estate was community property of the decedent and a previously deceased spouse. Probate Code, § 228.

9. Husband and Wife ⇐259

The enhancement in value of property caused by the efforts of the person possessing it must be treated as separate or community earnings dependent upon the status of the person at the time the services were rendered. Probate Code, § 228.

10. Husband and Wife ⇐274(1)

In action by relatives of intestate's previously deceased spouse to inherit as statutory heirs of intestate, their share of that portion of estate found to have been community property of intestate and previously deceased wife, where husband after death of wife devoted his full time to market speculations creating a substantial increase in his value of the estate, trial court should have devised some formula by which proportion of increase due to such efforts could be computed and should have awarded such amount to the heirs of the husband as his separate property. Probate Code, § 228.

11. Husband and Wife ⇐262(1, 2)

Under the Probate Code, when surviving spouse dies intestate without issue, presumption is that all property in his estate is his sole and separate property, and one claiming it to be community property of deceased and predeceased spouse assumes burden of proving what portion of that estate was in fact community property of the two parties at the time of the death of the predeceased spouse. Probate Code, §§ 228, 229.

12. Husband and Wife ⇐262(2)

Under Probate Code, when surviving spouse dies intestate without issue, claimant of community property is not required to prove that identical property did not change in form after death of predeceased spouse but burden of tracing property into estate of surviving spouse is on the one claiming it to be community property, and if after death of a predeceased spouse, surviving spouse commingles community with his separate property so that it cannot be traced, those claiming under the statute have not sustained their burden and entire commingled property will be treated as separate property of the surviving spouse. Probate Code, §§ 228, 229.

13. Husband and Wife ⇐262(2), 274(1)

Where spouses live together for many years and then one spouse dies and the other lives for some time thereafter and survivor commingles community and separate property, upon his death intestate without issue, heirs of predeceased wife who become statutory heirs of husband, are entitled to one half of property that was formerly community property, but burden is on them to prove what was community property and to trace it into estate

of surviving spouse. Probate Code, §§ 228, 229.

14. Husband and Wife ⇐274(4,

In determining whether heirs of a predeceased spouse have sustained burden to prove what was community property and to trace it into the estate of surviving spouse dying intestate and without issue, ordinary rules applicable to tracing property apply and ordinarily question is one of fact and if findings of the trial court are supported by substantial evidence or any reasonable evidence therefrom, findings will be upheld. Probate Code, §§ 228, 229.

15. Husband and Wife ⇐264

Under Probate Code, if the first spouse dies after a long married life and if shortly thereafter the surviving spouse dies intestate and without issue, there being no evidence the surviving spouse was gainfully employed, inference that the property was community will support the findings to that effect. Probate Code, §§ 228, 229.

16. Husband and Wife ⇐264

Evidence that the surviving spouse over a ten-year period after death of wife received no gift or income that could be characterized as separate will support inference that the property that was community on the death of the predeceased spouse remained such until the death of the surviving spouse. Probate Code, §§ 228, 229.

17. Husband and Wife ⇐264

In suit by relatives of intestate's predeceased spouse to inherit as statutory heirs of intestate, their share of portion of estate found to be community property of intestate and his predeceased spouse, where all securities constituting residuary had been purchased after death of wife, proof by claimants under wife, that husband had commingled about $34,000 of community property with about $56,000 of separate property was not a sufficient tracing so as to require generalized assets consisting of hundred thousands of dollars in securities to be divided in proportion to sources of funds by which residuary assets had been purchased where residuary was result of hundreds of investments and reinvestments. Probate Code, §§ 228, 229.

Norman A. Eisner, Haskell Titchell, San Francisco, for appellant.

Robert E. Hatch, San Francisco, for respondent.

PETERS, Presiding Justice.

The four surviving brothers and a sister of George Charles Adams (hereafter called the Adams claimants), through one of them who was appointed administrator of the estate, appeal from a decree determining that certain relatives of the intestate's predeceased spouse (hereafter referred to as the Schmitt claimants), are entitled to inherit as statutory heirs of George Adams, under section 228 of the Probate Code, their share of that portion of the estate found to have been the community property of George Adams and his predeceased wife, Isabella.

The basic question presented revolves around the sufficiency of the evidence to sustain the findings that in 1941, when Mrs. Adams died, certain described property was the Adams' community property, and that the Schmitt claimants successfully traced that property into a portion of the estate of George Adams, who died in 1951.

The basic facts and findings are as follows: George Adams died July 22, 1951, leaving a will in which his wife Isabella was named as sole beneficiary. George had married Isabella Schmitt on December 5, 1908, and lived with her in California until her death on June 2, 1941. Inasmuch as Isabella predeceased George, his will was ineffective, and the property in his estate must be divided as if he died intestate. George did not remarry, and neither he nor his predeceased wife are survived by issue.

As already stated, George was survived by four brothers and a sister, all of whom are now alive. They constitute the Adams claimants.

In 1941 Isabella was survived by her husband, three sisters, and by a nephew, the sole child of a predeceased sister. One

of the three surviving sisters died in 1947, and was survived by eight children. Another sister has assigned her interest in the Adams estate to Eleanor Willis. This assignee and the above enumerated surviving relatives of Isabella constitute the Schmitt claimants. They came into the probate of the Adams estate by means of a petition to determine heirship filed by one of them.

The trial court made detailed findings, in which generally speaking, it grouped the assets of the estate of George into three main classes:

(1) Those assets that were clearly George's separate property, having been derived from a separate property source,

(2) Those assets that were community property at the death of Isabella, having been acquired during marriage or having become such by indiscriminate commingling during marriage, and which were still traceable into the estate of George, and

(3) Those assets, called residuary assets, consisting of property on hand at the death of George, both separate and community, that George had commingled into new and more valuable assets after Isabella's death.

The court found that during the 32 plus years of their married life the parties had a community property income by way of compensation for personal services and from certain business enterprises that was "large and far exceeded the community expenses." It also found that George had acquired as separate property 386¾ shares of Broadway Brewing Company common stock, and 153 shares of Acme Brewing Company preferred. The Broadway Brewing stock (386¾ shares) was still in George's estate at the time of his death, is admittedly separate property of George, and was properly excluded from the operation of section 228 of the Probate Code.

The court also found that after the death of Isabella and prior to his own death George "received separate property income" totalling $56,163.23, which included the proceeds of the sale of the 153 shares of Acme preferred, an inheritance of $1,988.08, $30 as juror's fees, and dividends from his separate property securities.

The court next found that during their marriage George and Isabella had accumulated the following as community property: Their home and its furnishings in San Francisco, certain real estate in Contra Costa and Alameda Counties, and money in bank totalling $618.51. In addition to the community income, which exceeded expenses in some unascertained amount, the court found that during the marriage George intentionally, and without the knowledge or consent of his wife, commingled his separate property funds with the community assets in such a manner as to make it impossible to segregate the separate from the community property.

The San Francisco home was sold during probate for $8,236. The parties concede that the proceeds of this sale were properly found to have been community property and that they were properly ordered distributed according to Probate Code section 228.

The court also held that of the numerous securities found to have been community property at the time of the death of Isabella, all were subsequently sold and the proceeds reinvested except 765 shares of Acme common, 578 shares of Union Brewing common, and 13 shares of Blair common. These unsold securities are now found in George's estate.

The court having already found that after the death of his wife and prior to his own death George received "separate property income" totalling $56,163.23, next found that during the same period George "possessed funds from community property sources" totalling $34,601.85. This consisted of $9,342.65 received in dividends and interest on the community property securities, $22,562.34 proceeds from the sale of community property securities, $2,078.35 received from the sale of the Contra Costa-Alameda Counties land, and the $681.51 from the bank.

The court next made a finding to the effect that, although from 1941 until his death in 1951, George was constantly engaged in the buying and selling of securities (and during this period increased his $90,000 investment so that at his death the securities were valued at several hundred thousand dollars), he "at no time was gainfully em-

ployed, rendered no valuable services and received no compensation, reward or benefits for his time, effort or services except said $30.00 in juror's fees." The court also found that this increase in value of the so-called residuary assets during these ten years was "due to a general rise in stock market values * * * and not otherwise" and that such "enhancement was not due in any substantial part to any peculiar knowledge or ability or special effort of said decedent."

The court found that during the 10-year-period following the death of his wife, George devoted all his time to his investments; that he began this buying and selling with the community property assets on hand in 1941 at the death of Isabella, totalling $34,601.85, and later added his own separate property of the value of $56,163.23, so that he ultimately invested and reinvested a total of $90,765.08. At the time of his death he had accumulated by this means $6,018.19 in cash and various enumerated securities called "residuary assets" which, together with the properties admitted to be separate or community, were appraised at over $300,000.

From the complete record of George's financial transactions subsequent to 1941 the court determined that because the residuary assets had been accumulated through investment of the commingled $90,765.08, the end product, that is, those securities in George's estate at his death resulting from the investment of the $90,765.08, should be classified in the ratio of $\frac{\$34,601.85}{\$90,765.08}$ or 38.12 per cent community property and $\frac{\$56,163.23}{\$90,765.08}$ or 61.88 per cent as separate property.

But the court did not order the residuary assets distributed under this 61.88 x 38.12 per cent formula. It next found that most of the enhancement in the value of the residuary assets came shortly after the death of Isabella when George was using assets found to have been community property in his investments, and that a smaller enhancement occurred when he was using the assets found to be separate property in his market transactions. The court, therefore, found that it was necessary to give some weight to this factor so that "the true contributing factors" would be reflected in the final percentages. In order to accomplish this the court found that it was "necessary, reasonable and proper * * * to add 6.76% to the 38.12%, making a total of 44.88% and to deduct 6.76% from said 61.88%, making a total of 55.12%." Thus of the residuary assets 44.88 per cent was found to be community, thus giving each set of claimants 22.44 per cent of these assets. Of these assets the Adams claimants received 77.56 per cent (55.12% separate, plus 22.44% community), and the Schmitt claimants received 22.44 per cent.

Based on these findings the court ordered the total estate distributed as follows: The 386¾ shares of Broadway Brewing stock, as George's separate property, to the Adams claimants; the $8,236 received upon the sale of the home, the 765 shares of Acme common, the 578 shares of Union Brewing common, and the 13 shares of Blair common, admittedly community property, distributed as such one-half to each group of claimants; and the residuary assets 77.56 per cent to the Adams claimants, and 22.44 per cent to the Schmitt claimants. The administrator on behalf of the Adams claimants appeals, his appeal involving only the residuary assets. The basic contention is that the Schmitt claimants, as a matter of law, did not sustain the burden of proof of showing what property in George's estate had been community property so as to be distributable under section 228 of the Probate Code.

[1, 2] The Adams claimants are correct in contending that the burden involved rested on the Schmitt claimants. These claimants are relatives of the predeceased Isabella. By section 228 they are made statutory heirs of George if they can prove that any property in his estate was in fact the community property of George and Isabella. Such proof is a condition precedent to recovery by them. The proper rule is stated as follows in Re Estate of Hanson, 126 Cal.App.2d 71, 77, 271 P.2d 563, 567: "It is the general rule that 'where the right of a person as heir depends not merely upon the fact of a certain relationship, but upon the fact of such relationship plus the fact

that the property he claims as heir had formerly been either the community property of the decedent and his or her predeceased spouse or else the separate property of the latter, the burden of proof of showing such additional fact rests upon him. It is a fact which must appear in order that he be an heir and he is an heir only as to property as to which it does appear.' In re Estate of Simonton, 183 Cal. 53, 60, 190 P. 442, 445; see also, In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042."

[3] The Schmitt claimants, as respondents, do not seriously challenge this rule of law, but contend that they have met this burden. Their argument is simply that the court has found that certain properties in the possession of George when Isabella died in 1941 were acquired during the more than 32 years of married life other than by gift, devise, bequest or descent, and were, therefore, the community property of George and Isabella. This determination is supported by the presumption contained in section 164 of the Civil Code that such property acquired during marriage was community property. By reason of this presumption, which is itself evidence, the Schmitt claimants established a prima facie case, and the burden of proving that the property acquired after marriage and in the possession of George in 1941 was separate property, rested on the Adams claimants. Then, respondents contend, it was proved that the residuary assets found in George's estate in 1951 were the resultant product of numerous investments made with both community and separate funds. The definite proportion of community assets that went into these investments was shown, although admittedly it was impossible, because of the commingling, to trace any specific community or separate dollar into any specific security. But having proved the proportion of community funds that went into the common pool, the trial court was justified, so it is urged, in dividing all of the residuary assets according to this formula. This, say respondents, satisfied their burden of proof. The Adams claimants, as appellants, challenge practically each step in this reasoning.

We agree with respondents that in arguing that there is evidence to support the findings and that they sustained their burden of proof, it is legally permissible to divide the question into two periods—the period when George and Isabella lived together as husband and wife—1908 to 1941—and the period after Isabella's death and up to the death of George—1941 to 1951. We also agree with respondents that the findings that certain properties were the community property of George and Isabella in 1941 are supported by the evidence.

The law on this subject is reasonably clear. Upon the death of Isabella there was in the possession of George various properties that had been acquired during coverture. The Schmitt claimants made no serious effort to trace the sources of the property, but relied principally on the presumption that where separate and community funds are commingled during marriage the whole will be presumed to be community property. This well-settled rule is stated as follows in Fountain v. Maxim, 210 Cal. 48, 50, 290 P. 576, 577:

"* * * the property here in question, having been acquired during coverture, and taken in the name of the husband is presumed, under section 164 of the Civil Code, to be community property * * *.

[4] "It has also long been the rule in this state that, where separate and community property are so commingled that it is impossible to trace the funds, the whole will be treated as community property, upon the principle that the burden is upon the party claiming property is separate property to establish its character as such." See also Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; In re Estate of Jolly, 196 Cal. 547, 238 P. 353; see cases collected 10 Cal.Jur.2d p. 702, § 35; see discussion and cases collected 1 Armstrong, California Family Law, p. 438, et seq. The presumption may, of course, be rebutted, and is subject to some limitations. Thus in Cline v. Cline, 4 Cal. App.2d 626, 629, 41 P.2d 588, 590, it is stated: "It is true that in such a situation, where the separate property cannot be clearly segregated or traced, the community being the paramount estate, draws the

whole mass to it. But it is also true that where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw to itself a separate estate. [Citing cases.]"

[5] In considering whether the presumption has been rebutted it is also important to consider such factors as whether the community property is adequate to account for the entire estate, In re Estate of Smith, 86 Cal.App.2d 456, 195 P.2d 842, and whether community expenditures are in excess of community income. In re Estate of Ades, 81 Cal.App.2d 334, 184 P.2d 1.

Appellant, on behalf of the Adams claimants, contends that the evidence produced by them demonstrates that the presumption of community character was rebutted in that it shows that almost all of the assets owned on June 2, 1941, the date of the death of Isabella, had as their source the separate property of George. The Adams claimants concede their inability to trace the source of the funds that were used to purchase securities prior to 1939, and so concede that these must be held to be community property. These pre-1939 assets include Transamerica and Bank of America shares, which were sold after Isabella's death, and the Blair Co. shares, that are still in George's estate. They also concede their inability to trace the source of the funds used to purchase the Contra Costa-Alameda Counties property. The proceeds from the later sale of this property, they concede, were properly held to be community property. But it is contended that, as to all other securities owned in June of 1941, they had their source in the separate property of George. They contend that they demonstrated that all investments prior to June of 1941 had their source in 6 savings accounts. It is worthy of note, although not emphasized by appellant, that these accounts were in the names of George C. "or" Isabella M. Adams. The stock transactions were with Ellsworthy & Company. It is also worthy of note, although unmentioned by appellant, that the account was in both spouses' names. The accountant produced by appellant attempted to take the records of Ellsworthy & Company and compare them with the bank records, and thus tried to prove that on the date a payment was made to the stockbroker a corresponding amount was withdrawn from the bank. Appellant also introduced some cashier's checks that corresponded to some of the transactions.

After having proved to their satisfaction that the securities were purchased from the six bank accounts, the Adams claimants then sought to prove that these bank accounts consisted of dividends from the separate property of George, namely, dividends from the Broadway Brewing Co. stock, or redemptions, dividends or sale of the Acme stock, all admitted to be George's separate property. It is contended that the amounts in such accounts not thus accounted for are so inconsequential as to not cause the separate property to lose its character when commingled with the community funds. It is somewhat difficult to ascertain the precise amount of those unaccounted for funds, but there is evidence that they constituted a very appreciable portion of the commingled assets.

[6] Appellant, in his brief, makes a detailed, lengthy and specific analysis of each bank account and claims that his evidence proved beyond a doubt that all but a small amount of the property on hand at Isabella's death had its source in the separate property of George, and that the presumption of community character relied upon by respondents was, as a matter of law, rebutted. We have read this evidence. It is not necessary to summarize it in this opinion. Had it been accepted by the trial court undoubtedly it would have supported a finding that most of such property was the separate property of George. But it was not accepted by the trial court. The trial court found that the securities in question were acquired as community property, thus in effect holding that the presumption contained in section 164 of the Civil Code had not been rebutted. The court expressly found that the amount of community property, including the unaccounted for funds, was "not inconsiderable" as compared to the separate property with which it was commingled, and that segregation was impossible. As pointed out in Re Estate of Smith, 86 Cal.App.2d 456, 470, 195 P.2d

842, 850: "This problem of tracing the nature of property is primarily a factual one, and normally is a question for the trial court" and the question as to whether the presumption contained in section 164 of the Civil Code has "been rebutted is primarily a question of fact." See also Berry v. Berry, 117 Cal.App.2d 624, 256 P.2d 646. Unless the presumption has been clearly rebutted, it alone will support a finding of community character. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868.

[7] In the instant case appellant made an impressive showing of original sources in trying to prove the property to be separate, but the conclusions reached are only "reasonable" and not "conclusive." It must be remembered that the trial court found that during marriage the Adamses had "a community property income" which "was large and far exceeded the community expenses." The appellant made no effort to prove the amount of this excess which "far" exceeded community expenses. This undoubtedly made up a part, how much we do not know, of the assets existing at Isabella's death. Moreover, the expert for respondents, Mr. Reardon, did not, as claimed by appellant, admit that the exhibit showing the claimed sources of the assets, was correct. At page 190 of the reporter's transcript he unequivocally testified that he did not agree that appellant's exhibit correctly depicted the source of the funds, stating "I do not agree that the basic source of payment for the securities listed here was the Broadway Brewing dividends. I do agree that it is quite probable that some of the Broadway Brewing dividend moneys were used to purchase some of these, but from what I have seen it is not at all clear to me that they were the exclusive source of the funds"; that there were many deposits in the basic bank accounts that could not be identified as being Broadway Brewing dividends; that (p. 191) "From what I have seen, I don't think they are all Broadway Brewing Company dividends. It is my opinion that they are not Broadway Brewing Company dividends"; that he was able to trace less than half of the bank deposits, and that (p. 192) "more than half of them are not identified." He then testified that from a sound accounting standpoint the conclusions reached by appellant's accountant as set forth in Exhibit V (p. 193) "are not justified," and that no one, from the evidence on hand, could ascertain with any reasonable certainty the basic source of the money used to purchase the securities. Although Reardon made some concessions as to the accuracy of the tracing of the bank transactions by appellant's accountant, such concessions were qualified. Thus he stated that he was willing to accept appellant's analysis of a particular transaction only if he could presume that unidentified deposits and withdrawals were to be disregarded. See R.T. pp. 255, 264, 268–9. He testified time and time again that it was impossible to segregate the separate from the community property, which testimony supports the presumption. Falk v. Falk, 48 Cal.App.2d 772, 120 P.2d 720. The point under discussion need not be further labored. It is quite clear that the findings of the trial court in reference to the community property existing at the time of Isabella's death in June of 1941 are amply supported.

But this is not decisive of the issues presented on this appeal. After having determined the amounts of separate and community property that existed in 1941, the court then determined that the residuary assets existing in 1951, totalling several hundred thousands of dollars, had resulted from commingling some $34,000 of community property with about $56,000 of separate property. Although the community property, after Isabella's death, had been invested before the separate property, although after the separate property had been invested George had engaged in literally hundreds of transactions (a total of 473 after Isabella's death), although admittedly on some transactions losses were incurred and on others gains made, and although it was impossible to trace any specific separate or community dollar into any specific security found in George's estate, the court determined that there should be, subject to a weighting in favor of the community property, a proportional segregation of the generalized assets based upon the proportions of separate and com-

munity funds that went into the common pool.

Before discussing this method of tracing assets, it should also be mentioned that the trial court also found that, although the record shows that from 1941 to 1951 George spent all his time in supervising his investments, during which period the assets increased in value from $90,000 to several hundred thousand dollars, no portion of the increase was due to his efforts. The precise finding is as follows:

"After the death of his wife and prior to his death, said George Charles Adams at no time was gainfully employed, rendered no valuable services and received no compensation. * * *

"During all of this time he confined his business activities to and continuously engaged in the field of investment, buying, selling and reinvesting in securities. * * *

"Due to a general rise in stock market values following the death of Isabella Schmitt Adams, and not otherwise, the aggregate value of said residuary assets at the time of the death of George Charles Adams was far in excess of said sum of $90,765.08. Said enhancement was not due in any substantial part to any peculiar knowledge or ability or special effort of said decedent."

[8, 9] Of course, it is elementary, that any increase in value in community or separate property, due to no efforts of the possessor, partake of the nature of the original property. But enhancement of value caused by the efforts of the person possessing it must be treated as separate or community earnings dependent upon the status of the person at the time the services were rendered. Here, any increase in value caused by the efforts of George between 1941–1951, since he was then a widower, would be his sole and separate property. Although the original investment was more than doubled in 10 years, the court found that this increase was not due to the efforts of George, but due "to a general rise in stock market values." In other words, had George simply bought stocks at random, or kept his original stocks, he would have increased his capital assets in the same proportion. Such finding is unsupported by any believable evidence or inference.

[10] The record shows, without conflict, that after the death of Isabella, George devoted his full time to market speculation, worrying, working and risking his capital in order to increase its value; that he was an active trader, engaging in some 473 transactions; that many times George would take a loss on a particular investment in order to get cash to make some other investment; and that George was clever in this type of transaction. His broker opined that he was an able and skilled trader. Admittedly, during the 10-year-period, there was a general market rise, but not sufficient to account for the increase in values here involved. It is contrary to common experience to conclude that, even during a general rise in market values, a random purchasing of stock will necessarily result in making a profit. The record shows actual losses suffered on numerous transactions. If stock trading were as simple as that, there would have been no losses at all during the 10-year-period, and yet we know that that was not the fact. The court should have devised some formula by which the proportion of the increase due to the efforts of George between 1941–1951 could be computed and should have awarded this amount to the Adams claimants as separate property of the deceased. This alone would require a reversal.

But there is a much more fundamental reason why the decree must be reversed, and that is that the respondents did not sustain their burden of proof in tracing the community assets of 1941 into the residuary assets of 1951—in other words, the proportional formula worked out by the trial court cannot be upheld.

[11, 12] There are many anomalies presented in interpreting and applying sections 228 and 229 of the Probate Code. See Ferrier, Rules of Descent under Probate Code Sections 228 and 229; 25 Cal.L. Rev. 261. Not the least of these is that, although upon the death of the wife, in-

testate, where the husband acquires all of the community property, he becomes the absolute owner of it, so that there no longer is community property in the true sense, nevertheless for purposes of succession under section 228 of the Probate Code, "the statutory provisions determining what is community property as construed by our decisions remain in force and applicable throughout the life of the surviving spouse, as to all property constituting community property of the spouses at the time of the death of the predeceased spouse." In re Estate of Brady, 171 Cal. 1, 7, 151 P. 275, 277. But when the surviving spouse dies intestate, the presumption is that all property in his estate is his sole and separate property, and the one claiming it to be community must assume the burden of proving what portion of that estate was in fact the community property of the two parties at the time of the death of the predeceased spouse. This does not mean that such claimant must prove that the identical property did not change form after the death of the predeceased spouse, In re Estate of Brady, 171 Cal. 1, 151 P. 275, but it does mean that the burden of tracing the property into the estate of the surviving spouse is on the ones claiming it to be community property. If, after the death of the predeceased spouse the surviving spouse commingles the community property with his separate property so that it cannot be traced to its origin as part of the community property, the heirs claiming under Probate section 228 have not sustained their burden, and the entire commingled property will be treated as the separate property of the surviving spouse. In re Estate of Simonton, 183 Cal. 53, 190 P. 442; In re Estate of Moore, 65 Cal.App. 29, 223 P. 73; In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873; In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; see cases collected 3 Cal.Jur. Ten Year Supp. p. 699.

[13] In the normal case, such as the instant one, the husband and wife live together many years (here over 32), and then one spouse dies. The other lives for some time (here 10 years). During that period the surviving spouse commingles what was formerly the community property and his separate property. Upon his death intestate the heirs of the wife who, by virtue of section 228, become the statutory heirs of the husband, are entitled under that section in the circumstances there set forth, to one-half of the property that was formerly community property. But the burden is on them to prove what was community property, and to trace it into the estate of the surviving spouse. That burden requires two steps in the proof. First, as already pointed out, the predeceased spouse's heirs must prove what portion of the property was community property at the time of the death of the predeceased spouse. In making that proof, as already held in this opinion, the presumption is that property acquired or in possession during the marriage was community property. Then the heirs of the predeceased spouse have the burden of tracing the community property into the property found in the estate of the surviving spouse. In meeting this burden such heirs now find the presumptions reversed. Now the presumption is, that the property in the estate of the surviving spouse, is the separate property of the surviving spouse, and, under the rule of the cases cited above, the heirs of the predeceased spouse must overcome that presumption by tracing the community property existing at the death of the predeceased spouse into the estate of the surviving spouse. Failing to so trace the community property by overcoming the presumption of separate character, the property in the estate of the surviving spouse must be treated as the separate property of the surviving spouse and distributed to his blood heirs.

[14–16] In determining whether the heirs of the predeceased spouse have sustained this burden, the ordinary rules applicable to tracing property apply. Ordinarily the question is one of fact, and if the finding of the trial court is supported by substantial evidence, or any reasonable inference from the evidence, the finding of the trial court will be upheld. In re Estate of Smith, 86 Cal.App.2d 456, 195 P.2d 842. Thus, if the first spouse dies after a long

married life, and shortly thereafter the surviving spouse dies, there being no evidence that the surviving spouse was gainfully employed, the inference that the property was community will support the finding to that effect. In re Estate of Bryant, 3 Cal.2d 58, 43 P.2d 529. Evidence that the surviving spouse over a ten-year-period received no gift or income that could be characterized as separate will support the inference that the property that was community on the death of the predeceased spouse remained such until the death of the surviving spouse. In re Estate of Jolly, 196 Cal. 547, 238 P. 353. But directly or indirectly the one claiming that the property is community must sustain the burden of proof. In Re Estate of Moore, 65 Cal.App. 29, 33, 223 P. 73, 75, the appellate court stated: "In the first place, if we view all of the evidence mentioned and give it all of the force which it is entitled to, it does not carry the inference that after Mary Ellen Moore received the $16,000 from her husband's estate that she preserved the same in kind, or that she invested the same in any particular security, or reinvested the same in any particular security. It may equally be inferred that she so mingled those moneys with her other properties that they cannot now be traced to their origin as a part of the community property. When such conflicting inferences may be drawn from the proof, then there is nothing for the jury, or the trial court sitting without a jury, but mere guesses and conjectures, and upon these no verdict or decision can be founded." The court commented on the failure to trace any particular security in the estate of the surviving spouse into the community property existing at the death of the predeceased spouse, and held that such failure was fatal. That is quite similar to the existing case.

[17] In the present case the court had before it several hundred thousands of dollars of securities constituting the so-called residuary assets. All of them had been purchased after the death of Isabella. They were presumably the sole and separate property of George. All the respondents proved was that over a period of ten years George commingled about $34,000 of community property with about $56,000 of separate property. The trial court held that this was a sufficient tracing, and that the generalized assets should be divided in proportion to the sources of the funds by which the residuary assets had been purchased. This formula has a deceptive appearance of simplicity and fairness, but upon analysis is found to be legally unsound. Such evidence is not sufficient to sustain a finding, under the evidence here, that the resultant generalized assets were community or separate in proportion to the properties that had gone into the common investment pool.

This concept of proportional segregation cannot be here upheld where the property has been transposed many times in some 473 transactions, where the community property was invested at times different from the separate property, and where on some transactions losses were incurred and on others profits were realized. The proportional segregation theory has been applied in several divorce cases where the court was dealing with fungible assets, or assets that could be traced into a definite distinct asset. Faust v. Faust, 91 Cal.App.2d 304, 204 P.2d 906; Jenkins v. Jenkins, 110 Cal.App.2d 663, 243 P.2d 79; Thomasset v. Thomasset, 122 Cal.App.2d 116, 264 P.2d 626; In re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918. But none of these cases dealt with assets that had been invested and reinvested and thus transmuted many times after the death of the predeceased spouse. In those cases there had been no complex transmutation of assets. There had merely been enhancement in value or profits or issue traceable to the original property. In such cases, obviously, the proportion of contributions remains constant. But this is entirely different from a situation where shares of stock in an estate are the result of hundreds of investments and reinvestments, and tracing is impossible. See Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; Falk v. Falk, 48 Cal.App.2d 772, 120 P.2d 720.

The trial court undoubtedly attempted to reach an equitable solution. But this

disarming appearance of fairness disappears when the nature and extent of the burden of respondents is considered. They were required to trace the community property into the estate of George. All they did was to trace the proportional contribution to the common pool. Under the trial court's theory tracing would become simply a matter of fixing the amount of contribution regardless of misfortune or luck or chance. The nature of the assets as they changed in quality or number would become immaterial. If this were the law the courts in innumerable tracing cases indulged in unnecessary work to trace the property into specific assets.

The decree appealed from is reversed with directions to the trial court to divide the estate in accordance with the views herein expressed.

BRAY and FRED B. WOOD, JJ., concur.

132 Cal.App.2d 354

F. O. BEUTKE and Louise A. Beutke, Plaintiffs and Appellants,

v.

AMERICAN SECURITIES COMPANY, a California corporation, American Trust Company, a California corporation, and American Trust Company, a California corporation, as Administrator with the Will Annexed of the Estate of James L. Meikle, also known as J. L. Meikle, Deceased, Defendants and Respondents.

Civ. 8546.

District Court of Appeal, Third District, California.

April 18, 1955.

As Modified on Denial of Rehearing May 13, 1955.

Hearing Denied June 16, 1955.

Action was brought against corporations for cancellation of note and trust deed and to quiet title to realty. The Superior Court of Shasta County, Richard B. Eaton, J., entered an order granting motion of corporations for change of venue from Shasta County to Alameda County, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that action was a transitory action, so that venue could be transferred to county of corporations' residence, but that there was no authority to change venue of action to another county, in which plaintiffs could have brought the action.

Order reversed.

1. Corporations ⇐503(4)

Defendant corporations did not waive or lose their right to move for change of venue by appearing in opposition to plaintiffs' application for temporary injunction.

2. Corporations ⇐503(3)

Action against corporations for cancellation of note and trust deed and to quiet title to realty was a "transitory action" so that venue could be transferred to county of residence of corporations. West's Ann.Code Civ.Proc. §§ 392, 395, 396b; West's Ann.Const. art. 6, § 5; art. 12, § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "Transitory Action".

3. Corporations ⇐503(1)

In so far as statute dealing with venue of actions generally affects right of individual defendant to change of venue, a corporation's principal place of business is its "residence". West's Ann.Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Residence".

4. Corporations ⇐503(1)

County, in which principal place of business of corporation is located, is county where it "resides" within meaning of statute dealing with venue of actions generally. West's Ann.Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Reside".

5. Corporations ⇐503(2)

Section of the Constitution providing that corporation or association may be

sued in county where contract is made or is to be performed, or where obligation or liability arises, or breach occurs, or in county where principal place of business of such corporation is situated, subject to power of court to change place of trial as in other cases, is permissive only and not mandatory. West's Ann.Const. art. 12, § 16.

6. Corporations ⇐503(3)

If action against corporation is not commenced in proper county, as set forth in Constitution and statutes, corporation may change venue to county of its residence, but is not authorized to have venue changed to some other county, in which plaintiff could have brought the action. West's Ann.Code Civ.Proc. §§ 392, 395, 396b; West's Ann.Const. art. 6, § 5; art. 12, § 16.

7. Corporations ⇐503(3)

Where action for cancellation of note and trust deed and to quiet title to realty was not brought in county of residences of corporate defendants, and they were therefore entitled to change of venue to the county of their residences, change of venue of action to third county, in which plaintiffs could have brought the action, was improper. West's Ann.Code Civ.Proc. §§ 392, 395, 396b; West's Ann.Const. art. 6, § 5; art. 12, § 16.

8. Corporations ⇐503(1)

Statute providing that when defendant is sued in official capacity as executor, administrator, guardian or trustee, on claim for payment of money or for recovery of personalty, county, which has jurisdiction of estate which he represents, shall be proper county for trial of action had no application to action against corporations for cancellation of note and trust deed. West's Ann.Code Civ.Proc. § 395.1.

John V. Copren, San Francisco, for appellants.

Fitzgerald, Abbott & Beardsley & Stacy H. Dobrzensky, Oakland, for respondents.

SCHOTTKY, Justice.

This is an appeal by plaintiffs from an order granting defendants' motion for a change of venue from Shasta County to Alameda County.

Plaintiffs commenced an action in Shasta County, their complaint alleging in substance as follows:

That defendant American Trust Company was administrator with the will annexed of the Estate of James L. Meikle, deceased, and as such administrator gave notice of sale at private sale of certain real property of said estate in Alameda County; that plaintiff F. O. Beutke, after negotiations with the administrator, delivered to the administrator, on May 31, 1950, a written bid in the sum of $125,000 to purchase the real property that had been advertised; that no ten per cent deposit in cash was given to the administrator, but instead the administrator procured from plaintiffs and appellants herein a promissory note in the sum of $12,500 which was secured by a deed of trust on property belonging to the makers and situated in Shasta County, California, the property being particularly described; that the note was payable to the American Trust Company, one of the defendants, individually and not as the administrator, and that the deed of trust was executed on the same date to defendant American Securities Company, as trustee for American Trust Company, individually and not as the administrator; that it was the understanding that if the bid was not confirmed by the court, or if confirmed and the sale completed, the note and trust deed would be cancelled and returned and a deed of reconveyance, covering the property in Shasta County, would be executed to the plaintiffs; and that the defendants caused the deed to be recorded in Shasta County on June 14, 1950; that at the time the bid was delivered to the administrator the property for which the bid was made was subject to a lien of a certain deed of trust that had been executed and delivered by J. L. Meikle and Lynda May Meikle to the Corporation of America, a California corporation, as trustee, to secure the payment to Central

Bank, a California corporation, of $75,000 and other amounts secured thereby; that this deed was dated July 20, 1946, and recorded on August 15, 1946 in Alameda County, California; that at the time of giving the bid plaintiffs knew of the encumbrance on the realty, but did not know that it was in danger of being foreclosed; that during the negotiations for the giving of the bid, delivery of the note and deed of trust, the defendant administrator promised that if plaintiffs' bid was confirmed by the court the administrator would clear the record of the lien of $75,000, pay and discharge such obligation, that the deed would not be foreclosed, and that the conveyance to plaintiff would be free and clear of the encumbrance.

Said complaint alleged further that in June, 1950, the administrator filed its return and report and petition for confirmation of the sale to plaintiff F. O. Beutke, for the sum of $125,000; that the court entered its order purporting to confirm the sale; that on July 27, 1950, the Corporation of America foreclosed the Meikle deed of trust and at public auction sold to Central Bank all of the property covered by such deed and belonging to the estate of James L. Meikle, and that thereafter there remained no property that the administrator could convey to plaintiff F. O. Beutke; that thereafter, notwithstanding that the sale had not been completed and the estate property was then lost, defendants refused to return the $12,500 note to plaintiffs and refused to execute to plaintiffs a deed of reconveyance of the Shasta County property; that American Trust Company, as beneficiary in its individual capacity, caused to be recorded in Shasta County a notice of alleged breach and election to sell under the deed of trust securing the note of $12,500; and that in May, 1951, the American Securities Company, as trustee under such deed of trust, caused a notice of trustee's sale to be published, which specified that the property belonging to plaintiffs would be sold.

Plaintiffs prayed for cancellation of the note and deed of trust, for the quieting of title to the property in Shasta County, for a temporary restraining order and for a temporary injunction. On the same day the court granted plaintiffs a temporary restraining order, restraining defendants from selling the property and ordered defendants to show cause why a temporary injunction should not issue. Defendants filed affidavits, appeared and contested the issuance of a temporary injunction and requested the discharge of the temporary restraining order. The court made and entered a temporary injunction, restraining defendants from proceeding with any sale of the property during the pendency of the action, which is still in full force and effect.

Thereafter, in March, 1953, defendants filed a demurrer and at the same time a notice of motion for change of venue from Shasta County to Alameda County. Defendants filed an affidavit and plaintiffs filed a counter-affidavit. After a hearing the trial judge granted the motion and ordered the cause transferred to Alameda County. We shall hereinafter refer to plaintiffs as appellants and to defendants as respondents.

In support of their contention that the order should be reversed appellants make the following major contentions: (1) That the real property involved is located in Shasta County and that under section 392 of the Code of Civil Procedure Shasta County is the proper county for the trial of the action; (2) that the principal place of business of respondents was in the City and County of San Francisco and not in Alameda County, and if respondents had any right to have the action transferred from Shasta County it could only be transferred to the county of their residence; (3) that the action is essentially an action to quiet title and therefore local in nature and the trial court erred in holding that this was a transitory action; and (4) that since respondents had submitted to the jurisdiction of the court by appearing in opposition to the application for the temporary injunction, it was error to consider the motion which was filed at a later date.

Respondents in reply contend that the action is mainly one to cancel the note and deed of trust, and is a transitory action; that the selection of Shasta County was incorrect in that it fails under any provision

to qualify as a proper county for the trial of this matter; that the change of venue was not granted upon the ground that Alameda County was the residence of respondents, but that it was on other grounds; and that the notice of motion was filed on time within the provisions of Code of Civil Procedure, § 396b.

[1] We are unable to agree with appellants' contention that respondents waived or lost their right to move for a change of venue by appearing in opposition to appellants' application for a temporary injunction, and appellants have cited no authority in support of this contention. It appears that respondents' time to plead in the action was extended by stipulation and that at the time respondents filed their demurrer they also filed their affidavit of merits and their notice of motion for change of venue. This was all they were required to do by section 396b of the Code of Civil Procedure. This contention of appellants appears to have been raised for the first time upon appeal, but in any event it is without merit.

In support of their contention that the instant action is essentially an action to quiet title, and that therefore Shasta County, in which the land is located, is the proper county for the trial of the action, appellants cite section 5 of Article VI of the Constitution of California and section 392 of the Code of Civil Procedure. Said section 5 provides "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." And section 392, so far as material here, provides: "(1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions: (a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property".

Appellants contend that the instant action is mainly one to quiet title, being local, and that therefore Shasta County is the proper county for the trial. Respondents in reply contend that the action does not come within the provisions of either of the quoted provisions, but is mainly an action to cancel the note and deed of trust.

There is considerable merit in appellants' argument that the primary object of the action is to remove the lien created by the deed of trust upon the property and that the cancellation of the note is a mere incident to that relief, but we believe that the case of Howe v. Tucker, 219 Cal. 193, 25 P.2d 832, cited by respondents and relied upon by the trial court is determinative of the question of whether the action is local or transitory. In that case the court said, 219 Cal. at page 194, 25 P.2d at page 833:

"Appellants properly state the sole legal question involved as follows: 'Is an action for the cancellation, upon the grounds of fraud and undue influence of, or for the determination of a trust in, a note and a deed of trust securing the note, in which deed of trust the trustee therein named is a person other than the payee of the note, a transitory action so that venue of the trial thereof should be transferred to the county of the defendants' residence, a proper motion and demand having been made therefor?'

"The court below answered the question in the negative and made its order accordingly. We are led to answer it in the affirmative.

"The promissory note may exist alone, without the aid of the deed of trust; cancellation or reformation of the latter would not affect the integrity of the note secured by it. The complaint here essays to have canceled not alone the deed of trust, but the promissory note as well. Under the prayer of the complaint this twofold relief is permissible. But, upon reason as well as authority, an action to cancel or reform a promissory note secured by a deed of trust is a transitory action, and must follow the per-

son of the defendant (section 395, Code Civ.Proc.; Jacobs v. C. H. Smith Lumber Co., 206 Cal. 128, 273 P. 571).

"It may be conceded also that a complaint having for its sole and exclusive object the cancellation of a deed or a deed of trust for fraud is a local action. Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931; State v. Royal Consolidated Mining Co., 187 Cal. 343, 351, 202 P. 133; Booker v. Aitken, 140 Cal. 471, 74 P. 11. But here we have united in one complaint allegations and a prayer authorizing relief in both transitory and local causes of action. In such situation we must be guided by the doctrine so well announced in Smith v. Smith, 88 Cal. 572, 576, 26 P. 356, 358, as follows:

"'When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. This being an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those "other cases" provided for in section 395, which the defendant is entitled to have tried in the county of his residence.'"

[2] It is clear that upon the authority of Howe v. Tucker respondents would have been entitled to a transfer of the action to the county of their residence if their motion had been to transfer it to such county.

[3, 4] However, the record shows that respondents' motion was to transfer the action to the county of Alameda, while the record shows, without conflict, that their principal place of business was the City and County of San Francisco. It is well settled that, as stated in Hale v. Bohannon, 38 Cal.2d 458, at page 478, 241 P.2d 4, at page 15: "Insofar as section 395 affects the right of an individual defendant to a change of venue, a corporation's principal place of business is its 'residence'." And as stated in Walker v. Wells Fargo Bank & Union Trust Co., 24 Cal.App.2d 220, at page 222, 74 P.2d 849, at page 850: "The county in which the principal place of business of a corporation is located, is the county where it resides within the meaning of said section".

Respondents contend that Alameda County was a proper county for the trial of this action within the provisions of section 16 of Article XII of our state constitution which reads:

> "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

They contend that once they show that Shasta County was not a proper county, then they may have the venue changed to any place where the plaintiff might have brought the action, and that they are not restricted to requesting the change to the county of their residence. However, our Supreme Court in the recent case of Hale v. Bohannon, supra, has ruled otherwise.

In that case the court said, 38 Cal.2d at page 478, 241 P.2d at page 15: "Where the plaintiff fails to bring his action in any of the counties specified by the Constitution, the corporation then is entitled to a change of venue to the county of its principal place of business under the last clause of the constitutional provision." And 38 Cal.2d at page 479, 241 P.2d at page 16: "The purpose of the constitutional provision was to provide a venue for actions against corporations greatly enlarged over that for actions against other defendants. * * * [T]he intention of the section was to benefit the plaintiff, who otherwise would be obliged to travel to the corporation's principal place of business to commence his action."

[5] Appellants argue correctly that section 16 of Article XII only recites the counties where a suit may be commenced, and is permissive only and not mandatory, and they cite Fresno National Bank v. Superior Court, 83 Cal. 491, at page 495, 24 P. 157, at page 158, where the court in discussing said section 16 said:

> "Without leading to any conflict, this section has the effect to permit a corporation to be sued in certain counties other than that of its residence or principal place of business, at the option of the plaintiff, and to deny to corporations the absolute right to a change of venue when sued in such other counties. This effected an important change in the law as it existed before the adoption of the present constitution, in so far as it denies the absolute right of the corporation to a change of venue to the county of its principal place of business when sued in any one of the other counties named in the section; and this seems to be the only effect intended."

[6, 7] We are therefore of the opinion that if an action is not commenced in a proper county, as set forth in the constitution and statutes, the corporation may change the venue to the county of its residence, but there is no authority for changing it to some other county in which the plaintiff could have brought the action. As hereinbefore pointed out, the provision allowing suit against a corporation in certain counties other than that of its residence is for the benefit of the plaintiff and does not give the defendant corporation the same rights. In the instant case respondents were entitled to request the change of place of trial to the county of their residence, but instead they made a motion to change the place of trial to Alameda County, which they concede was not the county where their principal place of business was located, and the court granted their motion. In the recent case of Sausen v. Anderton, 129 Cal.App.2d 324, 276 P.2d 814, where the action was a transitory one triable in the county of defendants' residence, this court said, 129 Cal.App.2d at page 326, 276 P.2d at page 815:

> "They had no right to have it so transferred, for neither of them resides in that county. * * * The defendants had an absolute right upon request to have the trial moved to one or the other of the counties of their residence. This does not mean that they could agree upon a county in which neither resided and have the cause moved to such county."

Respondents in their brief make the further contention that the trial court could have based its decision to transfer the cause to Alameda County upon the fact that the estate of which respondent American Trust Company was the administrator was being probated in Alameda County. They quote section 395.1 of the Code of Civil Procedure which reads:

> "When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

[8] Respondents assert that an action to cancel a note is, in practical effect, an action to recover it and hence an action to recover personal property. There is no merit in this contention of respondents, for as pointed out by appellants the instant

action is not an action for the recovery of money or for the recovery of personal property but is an action to cancel a note and deed of trust. Section 395.1 has no application to such an action.

In view of the foregoing we conclude that the trial court erred in granting respondents' motion to change the place of trial to Alameda County.

The order is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 392

Gertrude Eleanor WARREN, Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Robert Lloyd Warren, Real Party In Interest.

Civ. 20913.

District Court of Appeal, Second District, Division 3, California.

April 19, 1955.

Proceeding in mandamus to compel Superior Court of Los Angeles County to determine an order to show cause. The District Court of Appeal, Parker Wood, J., held that under the circumstances appearing it was a matter within discretion of trial court as to whether there should be a continuance to time of trial.

Petition for writ of mandate denied and alternative writ discharged.

Divorce ⇐397(1), 403(9)

Where divorced wife was earning approximately $250 a month and her ex-husband had complied with recent order of out-state divorce court relative to matter of support for children, it was not an abuse of discretion to continue, until time of trial of wife's action to require husband to make child support payments and to pay arrearage in alimony under out-state divorce decree, matter presented by order issued to require husband to show cause why he should not be required to pay to wife reasonable sums for attorney's fees, costs, and support of children pending trial of action. West's Ann.Civ.Code, §§ 137.2, 137.3.

Richard B. Newton and Paul F. Loveridge, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Roland Maxwell, Paul H. Marston, and Richard W. Olson, Pasadena, for real party in interest.

PARKER WOOD, Justice.

Petition for writ of mandate commanding the superior court to hear and determine an order to show cause regarding support of children, attorney's fees, and costs pendente lite.

Petitioner filed a complaint against Robert L. Warren wherein she alleged that she obtained a decree of divorce from him in Oregon in 1948, in which decree she was awarded custody of their two minor children, and defendant was ordered to pay $50 a month for the support of each child, and to pay $50 a month for plaintiff's support. She alleged further that in 1954, pursuant to application of defendant, the order for support of children was reduced to $25 a month for each child. She alleged further that $3,000 was unpaid upon the said order for her support. In the prayer she asked that defendant be ordered to pay: (1) $50 a month for the support of each child or, in the alternative, to pay the $25 a month for each child as ordered by the Oregon court and to pay $25 additional a month for each child; (2) $3,000 representing unpaid support for plaintiff; (3) reasonable attorney's fees, and costs.

Upon application of petitioner, an order was issued directing the defendant therein to show cause on December 21, 1954, in department 8, why he should not be required to pay to petitioner reasonable sums for attorney's fees, costs, and support of children pending the trial of the action.

On December 21, the defendant made a motion to dismiss the order to show cause. The minute order of that date states: "After oral arguments the matter is continued to January 11, 9:30 a. m." On December 29, petitioner obtained another order directing the defendant to show cause, with respect to the same matters, on January 28, in department 8. The minute order of January 11 states: "On statement of counsel, the matter is continued to January 28, 1955, at 9:30 a. m." On January 28, the minute order states: "All matters continued to time of trial."

Petitioner refers to section 137.2 of the Civil Code which provides that during the pendency of any action for the support of children "the court may order the husband * * * to pay any amount that is necessary" for the support of the children. She also refers to section 137.3 of the Civil Code which provides that during the pendency of any action for the support of children "the court may order the husband * * * to pay such amount as may be reasonably necessary for the cost of * * * the action and for attorney's fees."

Petitioner contends that the court had jurisdiction to order payments, pendente lite, for support of children, attorney's fees, and costs, even though a foreign judgment contains a provision for the support of children. The court had such jurisdiction. In Oravec v. Superior Court, 115 Cal.App. 2d 581, 252 P.2d 364, the wife obtained a divorce in another state, and the husband was ordered to make payments for the support of the children. The wife commenced an action in California against the husband for support of the children, attorney's fees, costs, and for judgment for an unpaid amount under the foreign judgment. She made application for support of children, attorney's fees, and costs pending the trial. The trial court dismissed the application upon the ground that the court was without jurisdiction to grant it. The wife therein petitioned the District Court of Appeal for writ of mandate compelling the trial court to hear her application. The court said, 115 Cal.App.2d at page 582, 252 P.2d at page 364: "The superior court had jurisdiction to award support money for the support of the minor children, for attorney's fees and costs. * * * The jurisdiction of the court was in no manner affected by the judgment of divorce which awarded petitioner the custody of the children and made an award against their father for their support. [Citation.] It is immaterial that petitioner was also seeking to establish the foreign judgment. * * * [T]he court was required to hear and determine the application on the merits." It is to be noted that in that case the application was dismissed upon the ground that the court did not have jurisdiction to grant it, whereas in the present case the order to show cause was not dismissed but was continued to the time of trial. The record herein does not show that the trial judge was of the opinion that the court did not have jurisdiction to grant petitioner's application.

Petitioner also contends that since the court had jurisdiction to make an order for the support of children, attorney's fees, and costs pending the trial, the court was under a duty to hear and determine the matter upon the merits. At the oral argument before this court it was stipulated that the superior court file in the present matter might be submitted to this Court and considered as a part of the record. That file shows that the petitioner herein, in her affidavit for an order to show cause in re support of children, attorney's fees, and costs, stated (1) that during the last year she earned approximately $250 per month and that she expected to continue in the occupation in which she earned that amount; (2) that $50 would be a reasonable amount for attorney's fees, and $20 would be a reasonable amount for costs; and (3) that $25 a month additional for each of the two children would be a reasonable amount for the children. With reference to attorney's fees and costs, it was

not necessary legally that petitioner obtain an order for payment thereof prior to the time legal services were rendered or costs were incurred. "Attorney's fees and costs * * * may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any * * * order of court therefor." Civ.Code, § 137.3. With reference to support for the children, the court was not required to make an order for their support. Said sections 137.2 and 137.3, above referred to, provide that the court "may order" the husband to pay for such support. In June, 1954, about five months before the first order to show cause herein was issued, the Oregon court had modified its order for support of the children by reducing the amount, required to be paid monthly for each child, from $50 to $25. The father complied with the order of the Oregon court when it provided for payment of $50 and when it provided for payment of $25. It therefore appears that the Oregon court had recently ruled upon the matter of support for the children, and the father complied with that order. The affidavit of petitioner shows that she earns approximately $250 a month. The minute order of December 21, 1954, shows that oral arguments were made on that date. Also, the minute order of January 11, 1955, shows that a "statement of counsel" was made on that date. The record does not indicate the subject of those arguments or of that statement. In view of the recent order of the Oregon court, the compliance by the father with that order, the earning capacity of petitioner, and the lack of a record as to the statements made by counsel in the trial court, it cannot be said that the trial court was under a duty to either grant the application, in whole or in part, or to deny it. Under the circumstances appearing here, it was a matter within the discretion of the trial court as to whether there should be a continuance to the time of trial.

Petition for peremptory writ of mandate is denied. Alternative writ of mandate is discharged.

SHINN, P. J., and VALLÉE, J., concur.

132 Cal.App.2d 332

In the Matter of the ESTATE of Minnie V. SIBERELL, Deceased.

Martha E. JONES, Executrix, Petitioner and Respondent,

v.

Mabel L. ROBSON, Leslie M. Siberell and Oliver D. Siberell, Contestants and Appellants.

Civ. 20772.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Proceeding to compromise claim for wrongful death of decedent. The Superior Court, Los Angeles County, H. Burton Noble, J., entered order adverse to contestants, who were decedent's adult children, and contestants appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain approved settlement of $2,500 for death of 71 year old woman and distribution, equally among decedent's six adult children, of the sums left after taking care of agreed attorney's fees and expenses.

Order affirmed.

1. Executors and Administrators ⇐87

Where petition to reopen probate estate, petition to compromise claim for decedent's wrongful death, and letters testamentary were sworn to before an Oregon notary, and reissue of letters testamentary to the previously appointed executrix for purpose of having proposed compromise proved was mere technical detail necessitated by previous discharge of executrix, decedent's children and heirs, who had not sought in probate court to have letters revoked for failure to take proper oath, would not be heard to raise such point upon appeal from order authorizing the compromise. Probate Code, § 578a.

2. Executors and Administrators ⇐37

The Probate Court is authorized to approve settlement of claims in a wrongful death case. Probate Code, § 578a.

3. Death ⇐101

Where wrongful death action had been tried in one county, and petition to compromise the claim was filed in Probate Court of another county, such Probate Court had authority to apportion proceeds of settlement, including attorney's fees as previously determined by written agreement. Probate Code, § 578a.

4. Death ⇐101

Executors and Administrators ⇐87

In proceeding to compromise claim for decedent's wrongful death, evidence was sufficient to sustain approved settlement of $2,500 for death of 71 year old woman and distribution, equally among decedent's six adult children, of the sums left after taking care of agreed attorney fees and expenses.

Hampton Hutton, Los Angeles, for appellants.

Calvin H. Conron, Jr., Bakersfield, William F. Brooks, Los Angeles, for respondent.

DORAN, Justice.

The appellants, children and heirs of the decedent, are here appealing from an order authorizing the executrix to compromise a claim for the wrongful death of Minnie V. Siberell, who was killed in an automobile accident in Kern County at the Grapevine station on the Ridge Route, August 25, 1951. The action for wrongful death was consolidated for trial with a separate action for damages instituted by decedent's daughter, Daisy Bishop, and Mrs. Bishop's daughter Marilyn, who were also injured in the accident.

The cases were tried before a jury which returned a verdict for the defendants. Subsequently a new trial was granted as to the defendant Grinestead, the driver of the other automobile. Mrs. Siberell's estate which had been closed before trial of the accident case, was then reopened and the previous executrix, Martha E. Jones, reappointed.

Pending the new trial, settlements were reached with respect to the Daisy Bishop case and that of Marilyn Bishop. Daisy Bishop recovered $3,000 and Mrs. Bishop's daughter Marilyn was given $8,000. The wrongful death case with which this appeal is concerned, was settled with the court's approval for the sum of $2,500. The order of approval allowed counsel fees in the sum of $1,000, and reimbursement for costs expended, $687.94. The remaining sum of $812.06 was apportioned among decedent's six children, each of whom received $135.35.

The first issue raised in appellants' brief is: "Where is appears on the face of the record that an executrix did not come into the State of California to qualify, does the Court have jurisdiction to act upon her petition to compromise a claim?" Upon the reappointment of the executrix, it appears that the petition to reopen the probate estate, the petition to compromise the claim, and the letters testamentary were sworn to before an Oregon notary.

As pointed out in the respondent's brief, appellants did not raise this point in the probate court by seeking to have the respondent's letters revoked for failure to take a proper oath. And, as further noted, Martha E. Jones had previously been appointed executrix but had been discharged prior to trial of the personal injury case, and the reissue of letters testamentary for the purpose of having a proposed compromise approved was a mere technical detail necessitated by the previous discharge.

[1] In Dominguez v. Galindo, 1953, 122 Cal.App.2d 76, 264 P.2d 213, 215, where a defendant in a personal injury action raised the defense of the failure of the administrator properly to qualify, the reviewing court quoted from Bank of Commerce & Trust Co. v. Humphrey, 41 Cal. App. 552, 183 P. 222: "The authority of the court to appoint does not rest upon the oath or bond. * * * If the clerk of court issues the letters in violation of the statute, without requiring the proper oath, any person interested may appear * * * and ask to have the letters revoked. But to allow every person who may be sued to go behind the letters of administration and object to the oath as given * * * would be to involve litigation in a hopeless confusion of collateral issues". Appel-

lants' objection possesses no substantial merit.

Appellants raise a second issue, stated as follows: "Where a wrongful death action is tried in one county and a petition to compromise the claim is filed in the Probate Court in another county, does the Probate Court have authority to fix attorney fees, apportion costs and proceeds among the heirs?"

[2] As pointed out in the respondent's brief, the Probate Court is expressly given authority by Section 578a of the Probate Code to approve settlement of claims in a wrongful death case. As the respondents say, "it is certainly logical and in the interest of avoiding a multiplicity of actions to assume that the Legislature intended that all unsolved problems in connection with a compromise of a wrongful death action should be handled therein".

[3] It is to be noted that this specific point was not raised by appellants at the hearing. According to appellants' brief the only objections made related to the amount of the settlement; allocation of expenses and attorney fees, and the qualification of the executrix. And, at the conclusion of the hearing, appellants' counsel stated: "Now it will also be necessary for this court to apportion the proceeds of this settlement". This the trial court proceeded to do. Under these circumstances, no reversible error is apparent.

The record discloses that the Probate Court did not, as appellant assert, "fix attorney's fees". These fees had been previously determined by a written agreement dated January 9, 1953; all that the Probate Court did was to apply this agreement in arriving at a figure representing the balance distributable to the heirs.

[4] Appellants complain that the settlement of $2,500 was inadequate and should not have been approved. As the trial court stated, "Unless you make some showing here that you stand a chance of getting more than the $2,500, counsel, I am not going to turn it down. This lady was 71 years old and you are almost up to the (insurance) limit and you have another lawsuit to try". There was also uncontradicted evidence in respect to a previous offer of settlement of $480, later increased to $750. And, as before noted, this particular case had been tried, lost, and a new trial granted. Appellants have made no showing which will warrant a reversal of the order approving the settlement.

As determined by the trial court, the sum of $812.06 was left after taking care of the agreed attorney fees and expenses, which sum was then apportioned among the decedent's six adult children, each of whom received $135.34. The equal division of this small amount among the heirs seems to have a logical determination with which, under the record herein, appellate interference is not justified. The evidence supports the findings made and no reversible error has been pointed out.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

44 Cal.2d 199

Felix MALLON, Plaintiff and Appellant,

v.

CITY OF LONG BEACH, a Municipal Corporation; A. L. Parmley, Lyman B. Sutter, Raymond C. Kealer, James R. Seaton, Clarence E. Wagner, Max Livoni, Carl Fletcher, Bazil U. Carlson and John Doe, as Councilmen of the City of Long Beach; Frank W. Brejcha, as Treasurer of the City of Long Beach; and John R. Mansell, as Auditor of the City of Long Beach, Defendants and Respondents.

Alma SWART, Plaintiff in Intervention in Certain Pleadings, and Appellant,

v.

CITY OF LONG BEACH, a Municipal Corporation; A. L. Parmley, Lyman B. Sutter, Raymond C. Kealer, James R. Seaton, Clarence E. Wagner, Max Livoni, Carl Fletcher, Bazil U. Carlson and John Doe, as Councilmen of the City of Long Beach; Frank W. Brejcha, as Treasurer of the City of Long Beach; and John R. Mansell, as Auditor of the City of Long Beach, Defendants, Defendants in Intervention in Certain Pleadings, and Respondents.

L. A. 23176.

Supreme Court of California.

April 5, 1955.

Rehearing Denied May 4, 1955.

Action was brought against the City of Long Beach and others to enjoin appropriation and expenditure for general municipal purposes of income derived from sale of oil and gas produced from tide and submerged lands granted in trust to the city by the state. The Superior Court of Los Angeles County, Paul Nourse, J., entered judgment adverse to plaintiff and plaintiff in intervention, and they appealed. The Supreme Court, Traynor, J., held that revocation effected by statute revoking in part the public trust on income derived by city from lands in question operated to transfer monies involved to the state, and did not operate as a transfer of those monies to the city.

Judgment reversed.

Spence, Shenk, and Schauer, JJ., dissented.

1. Navigable Waters ⇐37(8)

Submerged and tide lands, which had been granted in trust to the city of Long Beach by the state, were originally owned by the state subject to a trust for purposes of commerce, navigation, and fisheries for the benefit of all people of the state. St. 1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, p. 2443.

2. Mines and Minerals ⇐4

The grant of submerged and tide lands in trust to city of Long Beach by the state, included the minerals therein, which were also subject to the trust. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, p. 2443.

3. Navigable Waters ⇐38

The trust, in which tide and submerged lands are held for purposes of commerce, navigation, and fisheries, does not prevent the state from reclaiming tide and submerged lands from the sea, if that can be done without prejudice to public rights of navigation, and from applying them to other purposes and uses.

4. Navigable Waters ⇐37(8)

Statute revoking in part the public trust on income derived from submerged and tide lands granted in trust to the city of Long Beach by the state, does not conflict with section of the constitution dealing with access to navigable waters. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 792, St.1951, p. 2443; West's Ann.Const. art. 11, § 8, art. 15, § 2.

5. Navigable Waters ⇐37(8)

Statute revoking in part the public trust on income derived from submerged and tide lands granted in trust to the city of Long Beach by the state, does not violate section of the constitution providing that all tidelands within two miles of any incorporated city or town, and fronting on waters of any harbor, estuary, bay, or inlet used for purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations. St. 1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, p. 2443; West's Ann.Const. art. 15, § 3.

6. Navigable Waters ⇐37(8)

Legislature's finding that income derived from production of oil and gas from tide and submerged lands of Long Beach harbor is no longer required for navigation, commerce, and fisheries, nor for such uses, trusts, conditions, and restrictions as are imposed by statutes granting tide and submerged lands in trust, is conclusive on Supreme Court, in absence of evidence indicating that abandonment of public trust will impair power of succeeding Legislatures to protect, improve, and develop public interest in commerce, navigation, and fisheries. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, pp. 2443–2445.

7. Navigable Waters ⇐37(8)

Revocation effected by statute revoking in part the public trust on income derived from submerged and tide lands granted in trust to the city of Long Beach by the state, operated to transfer monies involved to the state and not to the city of Long Beach. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, pp. 2443–2445, St.1931, p. 2807; St.1946, 2d Ex.Sess. p. 367; St.1949, p. 2857; St.1953, p. 3826; Public Resources Code, § 6875.

8. Trusts ⇐134

Trustees normally hold title to corpus of trust in fee simple, but only for purpose of carrying out objects of trust.

9. Trusts ⇐61(4)

When trust is terminated, corpus does not become individual property of trustee, but reverts to settlor.

10. Municipal Corporations ⇐64, 68

The state, acting through the Legislature, has power to alter contractual or property rights acquired by a municipal corporation from the state for governmental purposes.

11. Constitutional Law ⇐206(1)

A municipal corporation has no privileges or immunities under the federal constitution that municipal corporation can invoke against the will of the state.

12. Municipal Corporations ⇐64

Under the state constitution, a freeholder city, such as the city of Long Beach, is exempt from legislative control only as to municipal affairs. St.1911, p. 1304, as amended by St.1925, p. 235, St. 1935, p. 793, St.1951, pp. 2443–2445.

13. Navigable Waters ⇐37(8)

Any interest of the city of Long Beach in submerged and tide lands granted in trust to the city by the state was acquired subject to a public trust to develop its harbor and navigation facilities for the benefit of the entire state, and was therefore subject to the control of Legislature. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, pp. 2443–2445.

14. States ⇐119

If statute revoking in part the public trust on income derived by the city of Long Beach from submerged and tide lands granted in trust to the city by the state should be construed as operating as a transfer of the income to the city of Long Beach, the statute would be unconstitutional as a "gift of public monies". St.1911, p. 1304, as amended by St.1925, p. 235, St. 1935, p. 793, St.1951, pp. 2443–2445; West's Ann.Const. art. 4, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Gift of Public Monies".

15. States ⇐119

Grants in trust of tide and submerged lands to municipal corporations by the state in furtherance of the interest of the entire state in the development of its harbors are not "gifts of public monies" in violation of the constitution. St.1911, p. 1304, as amended by St.1925, p. 235, St.1935, p. 793, St.1951, pp. 2443–2445; West's Ann.Const. art. 4, § 31.

16. States ⇐119

Construction and establishment by city of storm drains, city incinerator, public library, public hospitals, public parks, fire alarm system, off street parking facilities and city streets and highways, are not of such general statewide interest that state funds can properly be expended thereon without violating constitutional provisions prohibiting a "gift of public monies." St. 1925, p. 235, St.1935, p. 793, St.1951, pp. 2443–2445; West's Ann.Const. art. 4, § 31.

17. Constitutional Law ⇐48

A statute is presumably constitutional.

18. Mines and Minerals ⇐4

Navigable Waters ⇐37(8)

Under statute revoking in part the public trust on income derived by the city of Long Beach from tide and submerged lands granted in trust to city by the state, the city holds all funds from production of "dry gas" from the lands subject to resulting trust in favor of the state. West's Ann. Const. art. 4, § 25, sixth, seventh; St.1951, p. 2445.

Stratton & Taylor, Chas. C. Stratton and Mark L. Taylor, Long Beach, for appellant.

Theodore R. Gabrielson and Kenneth E. Matot, Los Angeles, for intervener and appellant.

Preston, Braucht & George, Merced, Crowe, Mitchell & Hurlbutt, Visalia, Neil Cunningham, San Francisco, and J. Thomas Crowe, Visalia, as amici curiae on behalf of intervener and appellant.

Walhfred Jacobson, City Atty., Joseph B. Lamb, Asst. City Atty., and Atlee S. Arnold, Deputy City Atty., Long Beach, for respondents.

TRAYNOR, Justice.

Plaintiff and plaintiff in intervention appeal from a judgment for defendants entered after defendants' demurrers to their complaints were sustained without leave to amend. Plaintiffs sought to enjoin defendants from appropriating and expending for general municipal purposes the income derived from the sale of oil and gas produced from the tide and submerged lands granted in trust to the City of Long Beach by the State of California. Stats.1911, p. 1304, as amended by Stats.1925, p. 235, Stats. 1935, p. 793, and Stats.1951, p. 2443. The expenditures to which plaintiffs object are purportedly authorized by a duly enacted amendment to the Charter of the City of Long Beach, the material parts of which provide:

"The 'Public Improvement Fund' is hereby created and established. * * * Money placed therein shall be used exclusively for the payment of costs and expenses for the acquisition, construction, reconstruction, development, operation, repair and maintenance of public improvements and the acquisition of such lands, rights and property as may be necessary or convenient therefor. * * *

"Within thirty days after the effective date of this section, the City Treasurer shall transfer to the 'Public Improvement Fund' fifty per cent of all revenue derived by the City from oil, gas and other hydrocarbons, and fifty per cent of the interest, earnings, income and/or profits from investment of said revenue which is in the 'Harbor Revenue Fund' on the date of such transfer. Within said thirty days, he shall also transfer to the 'Public Improvement Fund' fifty per cent of all revenue in the 'Harbor Reserve Fund' and the 'Tideland Oil Fund' on the date of such transfer.

"At least once each calendar month thereafter, the City Treasurer shall transfer to the 'Public Improvement Fund' fifty per cent of all revenue derived by the City from oil, gas and other hydrocarbons and placed in the 'Harbor Revenue Fund', which is not required by this Charter to be transferred from said 'Harbor Revenue Fund' to the 'Harbor Reserve Fund'. He shall also transfer to the 'Public Improvement Fund', at least once each calendar month thereafter, fifty per cent of all revenue, so derived, which is required by this Charter to be transferred to the 'Harbor Reserve Fund' and fifty per cent of all revenue, so derived, which is required by this Charter to be placed in the 'Tideland Oil Fund'." (Charter of the City of Long Beach § 260.8, approved by concurrent resolution of the Legislature, Const., Art. XI, § 8, Stats.1953, p. 3826.

The Harbor Revenue Fund, Stats.1931, p. 2807, the Harbor Reserve Fund, Stats.1949, p. 2857, and the Tideland Oil Fund, Stats. 2d Ex.Sess.1946, p. 367; Stats.1949, p. 2857, are depositories of the income derived from the production of oil and gas from the

tide and submerged lands granted to the city by the state, except for the income derived from the production of "dry gas" from those lands, which is handled separately and is discussed below. Plaintiffs claim that the transfers authorized by this charter amendment and the expenditures pursuant thereto are unlawful. Defendants contend that the type of expenditures enumerated in the amendment are proper ones for a municipality to make, and that the transfers ordered by the amendment are authorized by chapter 915 of the Statutes of 1951. That statute provides:

"Section 1. It is hereby found and determined: That the City of Long Beach since 1939 has produced and is now producing large quantities of oil, gas and other hydrocarbon substances from lands conveyed to said city by [the statutes cited above]. That from the revenue derived therefrom, said city has constructed upon said lands, wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, at a cost of approximately thirty-five million dollars ($35,000,000). That said city has available and unexpended approximately seventy-five million dollars ($75,000,000), also derived from said source, for the uses and purposes required by said acts, and is now receiving and will continue to receive for many years approximately twenty-four million dollars ($24,000,000) per annum from said source. That, in addition thereto, said city obtains large quantities of 'dry gas' derived from natural gas produced from said lands, which is sold by said city to domestic and other consumers. That by reason of the already large expenditure on such lands for the uses and purposes required by said acts, the large additional sums available and to become available throughout the years for such purposes, the expenditure of more than a total of fifty per centum (50%) of such revenue, received and unexpended and hereafter to become available for such uses and purposes, would be economically impracticable, unwise and unnecessary. That fifty per centum (50%) of all revenue heretofore derived and unexpended, and to be derived, by the City of Long Beach from oil, gas and other hydrocarbon substances, other than 'dry gas,' produced from lands conveyed by said acts, is no longer required for navigation, commerce and fisheries, nor for such uses, trusts, conditions and restrictions as are imposed by said acts. That none of the revenue heretofore derived, and to be derived, by said city from 'dry gas' obtained from said lands is any longer required for navigation, commerce and fisheries, nor for such uses, trusts, conditions and restrictions as are imposed by said acts.

"For the purposes of this act, 'dry gas' is defined to mean the gas directly produced from wells, which contains one-half of a gallon or less of recoverable gasoline per 1,000 cubic feet, or from which gasoline has been removed by processing.

"Sec. 2. That fifty per centum (50%) of all revenue heretofore derived and unexpended, and to be derived, by the City of Long Beach from oil, gas and other hydrocarbon substances, other than 'dry gas,' produced from lands conveyed by said above-entitled acts is hereby declared to be free from the public trust for navigation, commerce and fisheries, and from such uses, trusts, conditions and restrictions as are imposed by any of said above-entitled acts. That all of the revenue heretofore derived, and to be derived, by said city from 'dry gas,' obtained from said lands is hereby declared to be free from the public trust for navigation, commerce and fisheries, and from such uses, trusts, conditions and restrictions as are imposed by any of said above-entitled acts." Stats. 1951, pp. 2444–2445.

[1, 2] The tide and submerged lands from which the monies in question are derived were originally owned by the state subject to a trust for purposes of com-

merce, navigation, and fisheries for the benefit of all the people of the state. City of Long Beach v. Morse, 31 Cal.2d 254, 262, 188 P.2d 17; City of Long Beach v. Marshall, 11 Cal.2d 609, 614, 82 P.2d 362; Boone v. Kingsbury, 206 Cal. 148, 183, 189, 273 P. 797; City of Long Beach v. Lisenby, 175 Cal. 575, 579, 166 P. 333; People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, quoting from Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 452–453, 13 S.Ct. 110, 36 L.Ed. 1018. The Legislature committed the administration of this trust to the City of Long Beach (City of Long Beach v. Lisenby, supra, 175 Cal. 575, 579, 166 P. 333; and see Pub.Res.Code, § 6875) by conveying the lands involved to the city in fee simple, City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 613, 82 P.2d 362, subject to an express trust that they be devoted exclusively to the improvement of commerce, navigation, and fisheries for the benefit of all the people of the state. Ibid.; Atwood v. Hammond, 4 Cal.2d 31, 37–38, 48 P.2d 20, and cases cited. The lands granted included the minerals therein, which are also subject to the trust. City of Long Beach v. Morse, supra, 31 Cal.2d 254, 257–258, 188 P.2d 17; City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 614, 82 P.2d 362; Trickey v. City of Long Beach, 101 Cal.App.2d 871, 879, 226 P.2d 694. Before the enactment of the 1951 statute, quoted above, we held that "the proceeds from the sale of oil and gas from the lands in question may not be used for any purposes other than those specified in the trust conveyances under which the [City of Long Beach] claims title to the lands. The Legislature specified purposes relating to the harbor that it deemed beneficial to the state as a whole and did not authorize the City of Long Beach to use the corpus or the income of the trust for strictly local improvements." City of Long Beach v. Morse, supra, 31 Cal.2d 254, 262, 188 P.2d 17, 22; see also Trickey v. City of Long Beach, supra, 101 Cal.App.2d 871, 880, 226 P.2d 694. The transfers and expenditures authorized by the 1953 amendment to the Charter of the City of Long Beach are of the same character as those declared unlawful in the Morse case. (See, Stats. 2d Ex.Sess.1946, pp. 366, 367.) The lawfulness of those transfers and expenditures depend, therefore, on the validity and effect of the 1951 statute revoking in part the public trust on the income derived from the lands in question. Thus, the principal issues to be resolved in the present case are whether the revocation was a valid exercise of the legislative power, whether the revocation operated as a transfer from the state to the city of the monies affected thereby, and, if so, whether such a transfer would offend the constitutional prohibition against gifts of public monies.

[3–6] It is well established that "[t]he trust in which tide and submerged lands are held does not prevent the state from reclaiming tide and submerged lands from the sea where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses." Boone v. Kingsbury, supra, 206 Cal. 148, 189, 273 P. 797, 815; Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387, 452–453, 13 S.Ct. 110; Atwood v. Hammond, supra, 4 Cal.2d 31, 41, 48 P.2d 20; City of Oakland v. Oakland Water Front Company, 118 Cal. 160, 183–185, 50 P. 277; People v. California Fish Co., supra, 166 Cal. 576, 585–586, 138 P. 79; Ward v. Mulford, 32 Cal. 365, 372–373. This principle has never been judicially applied in this state to the partial revocation of the public trust as to the income derived from the extraction of minerals imbedded in the lands subject to the trust, but the Legislature has devoted such income from tide and submerged lands held by the state to uses unconnected with the purposes of the public trust. (See, Stats.1921, chapter 303, § 19; Pub.Res.Code, § 6816.) Furthermore, we can see no real distinction between reclamation of peripheral lands that become, in the course of harbor development, unusable for purposes of the trust, Atwood v. Hammond, supra, 4 Cal.2d 31, 40–41, 48 P.2d 20, and the reclamation of part of the minerals imbedded in the lands subject to the trust that likewise become unnecessary for the purposes of the trust. Such a partial revocation of the trust will in no way impair the public interest in commerce, navigation, and fisheries in Long Beach harbor, and thus

the revocation does not conflict with the manifest purposes of sections 2 and 3 of Article XV of the Constitution. See, People v. California Fish Co., supra, 166 Cal. 576, 598, 138 P. 79; Cimpher v. City of Oakland, 162 Cal. 87, 90, 121 P. 374. Moreover, the Legislature has "found and determined" that, to the extent affected by such partial revocation, the income derived from the production of oil and gas from the tide and submerged lands of Long Beach harbor "is no longer required for navigation, commerce and fisheries, nor for such uses, trusts, conditions and restrictions as are imposed by" the statutes granting the said tide and submerged lands in trust. Stats.1951, p. 2445. That determination and finding is conclusive upon this court in the absence of evidence indicating that the abandonment of the public trust will impair the power of succeeding legislatures to protect, improve, and develop the public interest in commerce, navigation, and fisheries. County of San Diego v. Hammond, 6 Cal.2d 709, 726, 59 P.2d 478, 105 A.L.R. 1155; Boone v. Kingsbury, supra, 206 Cal. 148, 183, 273 P. 797; People v. California Fish Co., supra, 166 Cal. 576, 597, 138 P. 79; City of Oakland v. Oakland Water Front Company, supra, 118 Cal. 160, 185, 50 P. 277. Plaintiffs' sole contention on this point, that succeeding generations might have need for the monies thus freed from the trust for development and improvement of the state's harbors, waterways, and fisheries, is a matter of speculation and is insufficient of itself to overcome the legislative determination. Moreover, since the revocation in question does not contemplate or authorize the alienation of the tide and submerged lands free from the trust, succeeding legislatures can, if they deem it necessary for the purposes of the trust, reestablish the public trust on all the income derived from the production of oil and gas from the lands in question.

[7–9] The next question is whether the revocation effected by the 1951 statute operates to transfer the monies involved, to the state, as the plaintiff in intervention contends, or whether it operates as a transfer of those monies to the City of Long Beach, as defendants contend. In an early case concerning title to former pueblo lands, which the state held subject to a public trust for "*municipal* purposes", this court said that "[t]hrough such repeal [of the act by which the administration of the trust was transferred to the City of Monterey] the entire property held for public use—which would include the pueblo lands—would revert to the state, and no limitation being imposed upon the Legislature under the Constitution of 1849[1] in that respect could be then disposed of in any manner it saw fit." City of Monterey v. Jacks, 139 Cal. 542, 555–556, 73 P. 436, 442, affirmed in 203 U.S. 360, 27 S.Ct. 67, 51 L.Ed. 220; see also, City of San Francisco v. Canavan, 42 Cal. 541, 554–556; Hart v. Burnett, 15 Cal. 530, 624. In an early Kentucky case, concerning a grant of public lands for school purposes, similar reasoning was employed: "the legislature granted this land to the persons named in trust for a certain purpose, and the title of the commonwealth did not pass from it to the grantees, except in trust for that purpose; and, when the object of the trust became extinct, the title reverted to the commonwealth as matter of law * * *. The reversion of title in such a case is * * * in consequence of the failure of the purpose to which it was granted". Kennedy v. McElroy, 92 Ky. 72, 17 S.W. 202; Id., Ky., 22 S.W. 442, 443. The reasoning in these cases is the same as that governing private trusts in which, in the absence of an express provision to the contrary, a revocation of the trust results in a reversion of the trust property to the settlor. Civ.Code, § 2280; see 3 Scott on Trusts (1939) § 345.3. That this reasoning applies to the trust on which the tide and submerged lands in question were conveyed to the City of Long Beach is indicated by the language in City of Long Beach v. Morse, supra, 31 Cal.2d 254, 257, 188 P.2d 17, 20, that the "city is a trustee and as such 'assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts.' [Citation.]" Defendants' reliance on the statement in City

1. The prohibition on "the making of any gift, of any public money or thing of value", Const. Art. IV, § 31, was not added to the Constitution until 1879.

of Long Beach v. Marshall, 11 Cal.2d 609, 82 P.2d 362, that the lands were granted to the city in fee simple, is therefore ill founded. It was clearly recognized in that case that the city's title in fee simple was subject to the public trust, 11 Cal.2d at page 613, 82 P.2d at pages 363, 364; and see, City of Long Beach v. Morse, supra, 31 Cal.2d 254, 259, 188 P.2d 17, and the problem of the effect of a revocation of the trust was not then before the court. Moreover, trustees normally hold title to the corpus of the trust in fee simple, but only for the purpose of carrying out the objects of the trust. See, City of Long Beach v. Morse, supra, 31 Cal.2d 254, 258, 188 P.2d 17. When the trust is terminated, the corpus does not become the individual property of the trustee; it reverts to the settlor.

[10–13] Defendants also contend that the dictum in Atwood v. Hammond, 4 Cal. 2d 31, 44, 48 P.2d 20, 26, that "the state by unilateral action could not divest the city of its title, nor annex a different use to this 18-acre parcel [of reclaimed tidelands]", established the rule that although the state can terminate the public trust over such lands, the termination of the trust results, not in a reversion to the state as grantor, but in the ownership by the city of an absolute title to the lands originally conveyed to it in trust. This contention is based on the assumption that, pursuant to a conveyance to it from the state of lands subject to a public trust, the city acquires property or contractual rights that are beyond the power of the Legislature to alter. Even if a conveyance, such as the one to the City of Long Beach in the present case, from the state to a municipal corporation is considered as a contract between the city and the state or as creating property interests in the city, the state acting through the Legislature has the power to alter contractual or property rights acquired by the municipal corporation from the state for governmental purposes. County of Alameda v. Janssen, 16 Cal.2d 276, 284, 106 P. 2d 11, 130 A.L.R. 1141; Railroad Comm. of California v. Los Angeles R. Corp., 280 U. S. 145, 156, 50 S.Ct. 71, 74 L.Ed. 234; City of Trenton v. New Jersey, 262 U.S. 182, 188, 191–192, 43 S.Ct. 534, 67 L.Ed. 937; City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394, 398–399, 39 S.Ct. 526, 63 L.Ed. 1054; Hunter v. City of Pittsburgh, 207 U. S. 161, 178–179, 28 S.Ct. 40, 52 L.Ed. 151 and cases cited; City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 91, 12 S.Ct. 142, 35 L.Ed. 943; see also Brooklyn & Richmond Ferry Co. v. United States, 2 Cir., 167 F.2d 330, 333; Schulz, "The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations," 36 Mich.L.Rev. 385, 387–398, 408. A municipal corporation has no privileges or immunities under the United States Constitution that it can invoke against the will of the state, Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015, and under the California Constitution a freeholder city, such as the City of Long Beach, is exempt from legislative control only as to "municipal affairs." Const. art. XI, § 6; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 665, 177 P.2d 558, 170 A.L.R. 225 and cases cited. It is clear in the present case that any interest of the City of Long Beach in the tidelands was acquired not as a "municipal affair," but subject to a public trust to develop its harbor and navigation facilities for the benefit of the entire state, and was therefore subject to the control of the Legislature. City of Monterey v. Jacks, supra, 139 Cal. 542, 555–556, 73 P. 436.

[14, 15] Moreover, the construction of the 1951 statute for which defendants contend would result in its unconstitutionality. If the statutory revocation operates as a transfer of the monies affected thereby to the City of Long Beach, such a transfer would be a gift of public monies in violation of section 31 of Article IV of the Constitution.[2] Defendants argue that the development of the harbor without expense to the state was sufficient consideration for

2. "Sec. 31. The Legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever * * *."

the original grant of the lands in trust, and that, the grant having thus been made, the state had nothing more of value to convey and the 1951 statute merely released certain conditions and restrictions on the original grant. Although the question of gift has never been directly discussed in any of the cases, it is clear that grants in trust of tide and submerged lands to municipal corporations have been made in furtherance of the interest of the entire state in the development of its harbors and thus such grants do not violate the constitutional prohibition against gifts. See, City of Long Beach v. Morse, supra, 31 Cal.2d 254, 262, 188 P.2d 17; Miller v. Stockburger, 12 Cal.2d 440, 444, 85 P.2d 132; Atwood v. Hammond, supra, 4 Cal.2d 31, 45, 48 P.2d 20; City of Oakland v. Oakland Water Front Company, supra, 118 Cal. 160, 189, 50 P. 277; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 29, 102 P.2d 438. Defendants contend, however, that the transfer to the city of the monies released from the trust by the 1951 statute would not violate the constitutional prohibition against gifts because the state had nothing of value to convey and the city received nothing of value by reason of that statute. There is no merit to this contention. If, as defendants contend, the city is entitled to those monies, it is entitled to them by reason of the statute. If defendants' interpretation of the statute is the correct one, the city now has available for general municipal expenditures millions of dollars that were not available to it before the enactment of the 1951 statute. City of Long Beach v. Morse, supra, 31 Cal.2d 254, 262, 188 P.2d 17. There being no benefit to all the people of the state from such a transfer, it would be a gift of public monies and thus prohibited by the Constitution.

County of Los Angeles v. Southern California Telephone Company, 32 Cal.2d 378, 196 P.2d 773, on which defendants rely, is not inconsistent with this conclusion. That case involved the validity of franchises acquired under the provisions of section 536 of the Civil Code. In holding that such franchises are not gifts within the meaning of section 31 of Article IV, we said that "the state is assured of a continuing benefit in return for the privileges granted under section 536 * * *. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates. Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. * * *

"Since the offer of a franchise in section 536, when accepted, results in a binding agreement supported by a valid consideration, there is no gift within the meaning of the constitutional prohibitions." 32 Cal. 2d at page 388, 196 P.2d at page 780.

[16, 17] It is suggested, however, that the expenditures purportedly authorized by section 260.8 of the Charter of the City of Long Beach are expenditures for public purposes and thus that a transfer of the funds in question from the state to the city would not be a gift within the meaning of section 31 of Article IV of the Constitution. There is no merit to this contention. That section of the Constitution specifically forbids the making of a gift of public monies or thing of value to any *municipal corporation,* and all lawful expenditures of such corporations are necessarily for public purposes. Moreover, as we said in City of Oakland v. Garrison, 194 Cal. 298, 304, 228 P. 433, 435, in reference to the appropriation of county funds for the improvement of a city street, "It is not sufficient, therefore, that the appropriation here in question be for a public purpose. It must also be for a purpose which is of interest and benefit generally to the people of the county of Alameda. The question, then, is whether the improvement of this particular street within the city of Oakland is a matter of such general county interest that the county funds may properly be expended therein." Applying that principle to the present case, we cannot hold that the construction and establishment by the City of Long Beach of storm drains, a city incinerator, a public library, public hospitals, public parks, a fire alarm system, off-street parking facilities, city streets and highways, and other expenditures that have been au-

thorized to be made from the "Public Improvement Fund", are of such general statewide interest that state funds could properly be expended thereon. Such expenditures are for purely "municipal affairs" within the meaning of section 6 of Article XI of the Constitution. See, City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 599, 212 P.2d 894 (sewer); Jardine v. City of Pasadena, 199 Cal. 64, 68, 248 P. 225, 48 A.L.R. 509 (isolation hospital); Stege v. City of Richmond, 194 Cal. 305, 312, 228 P. 461 (city streets); City of Pasadena v. Paine, 126 Cal.App.2d 93, 98, 271 P.2d 577 (city library); Alexander v. Mitchell, 119 Cal. App.2d 816, 826–827, 260 P.2d 261 (off-street parking facilities); Perez v. City of San Jose, 107 Cal.App.2d 562, 566, 237 P.2d 548 (city highways); Beard v. City and County of San Francisco, 79 Cal.App. 2d 753, 755, 180 P.2d 744 (public hospital); Armas v. City of Oakland, 135 Cal.App. 411, 420, 27 P.2d 666, 28 P.2d 422 (fire protection). Moreover, they are normal expenditures for a municipal corporation to make, and to hold that a grant of public monies from the state to defray such expenditures is not a gift within the meaning of section 31 of Article IV of the Constitution would render meaningless the express prohibition therein against gifts to "municipal corporations." We conclude, therefore, that in view of the intendments in favor of the constitutionality of a statute, Jersey Milk Maid Products Co. v. Brock, 13 Cal.2d 620, 636, 91 P.2d 577, and cases cited, we must adopt the construction of the 1951 statute indicated by City of Monterey v. Jacks, supra, 139 Cal. 542, 555–556, 73 P. 436, and we hold that the partial revocation of the trust effected by that statute necessarily results in a reversion to the state of the monies thus released from the trust, and the city holds those funds upon a resulting trust for the state. It is, therefore, unnecessary to consider plaintiffs' other constitutional objections to the construction of the statute urged by defendants.

[18] It remains only to consider the intervening plaintiff's contention that the provision in the 1951 statute, "[t]hat all of the revenue *heretofore derived,* and to be derived, by said city from 'dry gas,' obtained from said lands is hereby declared to be free from the public trust * * *." [Italics added], is an unconstitutional attempt to validate the past unlawful expenditure of such funds for general municipal purposes. Const. Article IV, § 25, subds. 16, 18. It was held in Trickey v. City of Long Beach, 101 Cal.App.2d 871, 226 P.2d 694, that the income derived from the production of "dry gas" from the tide and submerged lands granted to the city was subject to the public trust for commerce, navigation, and fisheries, and that the expenditure of that income for general municipal purposes was unlawful. It follows from the conclusion reached above that as a result of the 1951 statute the city holds all of the funds "heretofore derived, and to be derived" from the production of "dry gas" from the lands in question subject to a resulting trust in favor of the state.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and CARTER, JJ., concur.

SPENCE, Justice (dissenting).

I dissent.

In my opinion, the revenue in question from oil and gas production on tidelands, which lands had been previously granted by the state to the City of Long Beach, have been validly released by the Legislature from the trust, and the city may properly use the revenue so released for municipal improvements.

The precise question before us appears to be one of first impression, but I do not believe that the conclusions reached in the majority opinion can be reconciled with the decisions of this court in Atwood v. Hammond, 4 Cal.2d 31, 48 P.2d 20, and City of Long Beach v. Marshall, 11 Cal.2d 609, 82 P.2d 362, nor with the implications of the more recent decision of this court in City of Long Beach v. Morse, 31 Cal.2d 254, 188 P.2d 17. These and other authorities will be hereinafter discussed, but as the solution of the present problem involves a determination of the respective rights

of the state and the city to the revenues which have been admittedly released from the trust, the fundamental question to be considered is that of the nature of the trust under which the tidelands are held. It appears to me that this question has been erroneously oversimplified in the majority opinion, which treats the state as the "trustor" or "settlor," and the Act of 1951, Stats.1951, p. 2443, as a "revocation," or at least a "partial revocation" of the trust, resulting in a "reversion" to the state of said revenues. This reasoning is based upon an assumed analogy in all respects between the trust upon which the tidelands are held and the ordinary private trust, but I can find no proper basis for such analogy. On the contrary, the trust involved here appears to be *sui generis,* and any attempt to determine the respective rights of the state and city upon such reasoning can lead only to confusion and to erroneous conclusions.

When the state embarked upon the program of granting the tidelands to local authorities, it was dealing only with those portions of land along the shore line which were submerged at high tide and exposed at low tide. It is a matter of common knowledge that there are little, if any, tidelands at many points where the shore line is precipitous, and that the greatest areas of tidelands are found in and about our bays and at the mouths of our rivers, near which points many of our municipalities have developed. In their natural state, these tidelands were apparently of little value for any purpose, and were obviously of little value for navigation or commerce because of the relatively shallow water which covered them even when the tides were at their highest. Furthermore, the extent of the so-called tidelands has been subject to change over the years by reason of natural accretions to, or the wearing away of, the shore line, or by reason of artificial improvements by way of dredging and filling. In fact, the improvement of any tidelands for the purpose of navigation and commerce normally contemplates the artificial change of a part or all of such land into high land bordering upon water deep enough for the normal purposes of navigation and commerce. Hence, the state, in granting the tidelands to the local authorities, was dealing with lands having apparently little value and having irregular boundaries which could not be precisely and permanently delineated. The Legislature no doubt concluded that some of such lands should be improved and could best be improved in the interest of navigation and commerce by the local authorities which administered the lands bordering such tidelands. It therefore embarked upon its program, and the grants to the local authorities were accompanied with the express or implied undertaking that such lands would be so improved by the local authorities without expense to the state. Such was the express stipulation in the grant of the tidelands under consideration to the city of Long Beach. City of Long Beach v. Morse, supra, 31 Cal.2d 254, 257, 188 P.2d 17. Pursuant to such undertaking, those lands have been extensively improved over the years by the city of Long Beach by the expenditure of tremendous sums of money.

In the light of these observations, let us consider the nature of the "trust" with which we are dealing. It has been said that these tidelands were acquired by the State of California by the act of admission, subject however to a trust for navigation, commerce and fishing. City of Long Beach **v.** Marshall, supra, 11 Cal.2d 609, 614, 82 P.2d 362. The precise nature of this trust has never been clearly defined, and, as above indicated, the trust appears to be sui generis. (See cases discussed in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018, and Boone v. Kingsbury, 206 Cal. 148, 273 P. 797. Some things nevertheless appear certain. First, that the State of California was itself a trustee rather than a trustor in relation to any trust imposed upon such tidelands, and that the beneficiaries of such trust were not alone the people of this state but all the people of the United States. Thus, it has been indicated that the federal government could enforce such trust. Boone v. Kingsbury, supra, 206 Cal. 148, 189, 273 P. 797. Second, that the trust does not permanently attach to all the lands

which were originally tidelands, for many of the areas embraced in the original tideland areas have been improved by developing such lands into high lands, and portions thereof have become either the property of municipalities, Atwood v. Hammond, supra, 4 Cal.2d 31, 38, 48 P.2d 20, or of private owners, Boone v. Kingsbury, supra, 206 Cal. 148, 189, 273 P. 797, free of any trust when no longer necessary for the accomplishment of the trust purposes.

In determining the nature and extent of the trust imposed upon the tidelands, such lands should be distinguished from the lands involved in United States v. California, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889, which, under the complaint in that action, included only lands "lying seaward of the ordinary low water mark on the coast of California". 332 U.S. at page 22, 67 S.Ct. at page 1660. We are here concerned only with lands lying *shoreward* of such low water mark. While the trusts affecting both types of land may have a common origin, no question was raised in the cited case concerning the respective rights of the state and the federal government in "tidelands down to the low water mark." 332 U.S. at page 30, 67 S.Ct. at page 1664. Rather, the court merely refused to extend the law relating to the latter, as expounded in Pollard v. Hagan, 3 How. 212, 11 L.Ed. 565, to cover the land there in controversy to the seaward of the low water mark.

The historical background of the trust in tidelands throws some light upon the peculiar nature of such trust. The original colonies acquired these tidelands by right of conquest, and after the conquest, such lands were held by them " 'as they were by the king, *in trust* for the public uses of navigation and fishery, *and the erection* thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large. * * * It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.' " Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387, 457, 13 S.Ct. 110, 120, quoting from Stockton v. Baltimore & N. Y. R. Co., C.C., 32 F. 9, 19, 20.

With respect to the tidelands of California, it was said that " 'upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits, passed to the state, *with the consequent right to dispose of the title to any part of said soils* in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.' " Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387, 465, 13 S.Ct. 110, 123, quoting approvingly from Weber v. Board of Harbor Commissioners, 18 Wall. 57, 65, 21 L.Ed. 798.

In Boone v. Kingsbury, supra, 206 Cal. 148, at page 180, 273 P. 797, 811, in referring to "the title in the soil of the sea or arms of the sea," it is said that such title "at common law was vested in the sovereign in trust for people"; and in referring to the title of the states and to the exhaustive study therein made of the entire subject, it quotes approvingly on page 180 of 206 Cal., on page 811 of 273 P. from Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331, as follows: " 'The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy * * *.' "

In summary, it appears from these authorities that historically the title to the tidelands has been held by the sovereign subject to a trust which is defined in general terms as a trust for navigation, commerce and fishing; that the exact nature of the trust has never been clearly defined; that the main purpose of the trust is to

maintain a shore line which is generally free from any substantial interference with the public enjoyment of navigation, commerce and fishing; that the sovereign may deal with the tidelands in almost any way so long as there is no substantial impairment of the trust purpose; and that any substantial impairment of the trust purpose in the tidelands within any state could be abated by the state or the federal government.

Concerning the California tidelands, we find that title to all of such lands, with the possible exception of title to those lands covered by prior Mexican grants, was acquired by the state by the act of admission following their acquisition by the United States under the Treaty of Guadalupe Hidalgo. In dealing with those lands in the early case of City of Oakland v. Oakland Water Front Company, 118 Cal. 160, at page 183, 50 P. 277, at page 285, the court said: "* * * the several states hold and own the lands covered by navigable waters within their respective boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right,—a *jus publicum* and a *jus privatum*. The former pertains to their political power,—their sovereign dominion,—and cannot be irrevocably alienated or materially impaired. The latter is proprietary, and the subject of private ownership, but it is alienable only in strict subordination to the former."

The same distinction between the state's sovereign and proprietary rights in tidelands was made in City of Santa Cruz v. Southern Pac. R. Co., 163 Cal. 538, 544, 126 P. 362, and in People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79. In its sovereign capacity, the state held these lands subject to a public trust for navigation, commerce and fishing; and it could not completely divest itself of its responsibilities as such trustee to the impairment of the public interest. Boone v. Kingsbury, supra, 206 Cal. 148, 183, 189, 273 P. 797; City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 614, 82 P.2d 362. However, in its proprietary capacity and as the proprietary owner, the state could grant the tidelands to a municipality subject to this public trust. Atwood v. Hammond, supra, 4 Cal.2d 31, 37, 48 P.2d 20; City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 614–615, 82 P.2d 362. This distinction between the state's sovereign and proprietary rights and duties in respect to the tidelands was not considered material for the purpose of the decision in City of Long Beach v. Marshall, supra, see pages 614–615 of 11 Cal.2d, see pages 364–365 of 82 P.2d, but as will hereinafter appear, such distinction is important in the determination of the question presented here.

Various legislative acts, other than the act of 1951, Stats.1951, p. 2443, affecting the Long Beach tidelands, have been discussed in numerous cases. City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 82 P.2d 362; Miller v. Stockburger, 12 Cal.2d 440, 85 P.2d 132; City of Long Beach v. Morse, supra, 31 Cal.2d 254, 188 P.2d 17. Such discussion will not be repeated here except insofar as it affects the particular problem before us.

In City of Long Beach v. Marshall, supra, 11 Cal.2d 609, at page 616, 82 P.2d 362, at page 365, it was said: "It remains only to point out briefly that the history of tideland grants in this state, and the actions of the various legislatures and the courts in connection therewith, show a general agreement that the tidelands were conveyed to municipalities in fee, subject only to the public trusts and the limitations and reservations specified in the acts; and that until the discovery of these valuable oil rights in the Southern California tidelands no serious doubt was ever expressed as to the title of the municipalities."

The Marshall case was brought on the theory that "the rights in oil and other minerals belonged to the state and not to the city", 11 Cal.2d at page 612, 82 P.2d at page 363, and such theory was held untenable. See, also, Miller v. Stockburger, supra, 12 Cal.2d 440, 85 P.2d 132. The court there said at page 613 of 11 Cal.2d, at page 364 of 82 P.2d, in speaking of this original grant to the city of Long Beach in 1911, Stats.1911, p. 1304: "Giving this language

its ordinary and reasonable meaning, it would seem clear that the state intended to and did convey whatever title or interest it had in these lands to the city, in fee simple, subject to certain conditions and upon certain trusts." It follows from the two cited cases that ever since the original grant in 1911, the rights in the oil and other minerals under the Long Beach tidelands and the proceeds from the extraction thereof have belonged to the city, rather than to the state, subject only to the trust under which the city held such tidelands.

In City of Long Beach v. Morse, supra, 31 Cal.2d 254, 188 P.2d 17, 18, the question of the right of the city to divert a portion of the proceeds of the production of oil and gas to the city's general " 'Public Improvement Fund' " was before this court. That case arose prior to the act of 1951, Stats. 1951, p. 2443, and before there had been any express declaration by the Legislature that such proceeds were no longer necessary for the trust purpose. This court there said at pages 257 and 258 of 31 Cal.2d, at page 20 of 188 P.2d: "If the proceeds from the sale of oil and gas are regarded as corpus (see, Rest. Trusts, sec. 238; 4 Bogert, Trusts and Trustees, §§ 789, 828), they must be used for the purposes set forth in the legislative grants in trust, for the City, as trustee, clearly has no authority to appropriate the corpus to its own uses contrary to the terms of the trust. If the proceeds are regarded as income from trust property, the trustee, *in the absence of a legislative provision to the contrary,* has no more right to them than it has to the corpus." (Emphasis added.)

Since the decision in City of Long Beach v. Morse, supra, there has been enacted such "legislative provision to the contrary". In 1951, Stats.1951, p. 2443, the Legislature released a portion of such proceeds from the trust, being the precise portion which is in controversy here. By that act the Legislature expressly found and determined that from the revenue derived from oil production from the tidelands, the city has constructed upon these lands various harbor facilities "necessary or convenient for the promotion and accommodation of commerce and navigation" at a cost of approximately $35,000,000; that from the same source the city has now available and unexpended approximately $75,000,000; that it will continue to receive from the same source for many years to come approximately $24,000,000 per annum; that in addition, the city obtains large quantities of "dry gas" derived from the natural gas produced from said lands, which it sells; that in view of the already large expenditures on these lands for harbor improvements and the available and anticipated sums, the expenditures of more than 50% of the revenue from the oil production for trust purposes would be "economically impracticable, unwise and unnecessary"; that "(50%) of all revenue" from the oil produced on these tidelands and "all of the revenue * * * derived * * * from 'dry gas' * * * is hereby declared to be free from the public trust for navigation, commerce and fisheries, and from such uses, trusts, conditions and restrictions as are imposed by any of said above-entitled acts." Stats.1951, pp. 2444–2445.

It was clearly within the power of the Legislature to release such portion of the city's income from the trust upon finding that such portion was no longer required for the purposes of the trust. Atwood v. Hammond, supra, 4 Cal.2d 31, 35–36, 39, 41–42, 48 P.2d 20; Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387, 452–453, 13 S.Ct. 110. In the Atwood case, the Legislature had made a similar declaration with respect to a portion of the San Diego tidelands, releasing them from the trust. Stats. 1929, ch. 642, p. 1058. This court there said at pages 42 and 43 of 4 Cal.2d, at page 25 of 48 P.2d: "We are of the view that it was competent for the Legislature upon finding that the 18-acre tract was 'not longer required for navigation, commerce or fisheries,' to free it from the public easement for those purposes." It was further held that the Legislature could not thereafter deal with such land upon the theory that the state owned the land so released from the trust. If then the Legislature may validly release a portion of the tidelands themselves from the trust upon finding that such lands are no longer required for trust purposes, it follows that the Legislature

may validly release a portion of the proceeds of such tidelands. Such was the necessary implication of this court in City of Long Beach v. Morse, supra, 31 Cal.2d 254, 188 P.2d 17, when it predicated its decision there on the "absence of a legislative provision" expressly finding that such proceeds were no longer required for trust purposes and releasing them from the trust.

The power of the Legislature to make such declaration under appropriate circumstances is derived from its sovereignty and the duty imposed upon it in accepting the tidelands under the act of admission, subject to the public trust. It is true that this court, in discussing the possible distinction between the state's sovereign and proprietary rights in City of Long Beach v. Marshall, supra, 11 Cal.2d 609, at page 614, 82 P.2d 362, at page 364, said: "There is neither logic in, nor practical necessity for the 'double fee' doctrine"; and on page 615 of 11 Cal.2d, on page 365 of 82 P.2d, said, in speaking of the grant to the city: "Such language cannot be distorted to mean that the *grant to the city* is only of rights of sovereignty in the sense of political or governmental power. The argument of the state's 'double fee' is met by the very statutory language which grants the land, for it conveys 'all' the 'right, title and interest' of the state. Whatever the state had by way of title or interest, however divided it may have been, it all passed under the plain words of the grant." That language should be read in the light of the problem then before the court, and it should not be interpreted so broadly as to declare that the state, acting in its sovereign capacity, did not retain the power and duty to determine when any portion of the tidelands might be declared no longer necessary for trust purposes, and therefore be released from the trust. That the state in its sovereign capacity retained such power and duty is clearly indicated in several cases. Boone v. Kingsbury, 206 Cal. 148, 184, 191, 273 P. 797; Atwood v. Hammond, supra, 4 Cal.2d 31, 38–43, 48 P.2d 20; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 29, 102 P.2d 438; Illinois Central Railroad Co. v. Illinois, supra, 146 U.S. 387, 453–455, 13 S.Ct. 110, and is clearly implied in City of Long Beach v. Morse, supra, 31 Cal.2d 254, 188 P.2d 17, which was based upon the "absence of a legislative provision" finding that the proceeds were no longer required for trust purposes. As was said in City of Newport Beach v. Fager, supra, 39 Cal.App.2d at page 29, 102 P.2d at page 441: "* * * by virtue of the prior grants to the city, the state had divested itself of all interest in such land *excepting its interests as the sovereign in protecting the public trust.*" (Emphasis added.) In other words, the only right reserved by the state with respect to the tidelands or their proceeds was its sovereign right to protect the trust and to declare when, if ever, any portion of such lands or their proceeds might no longer be required for the trust purposes and might be released from the trust without any substantial impairment of the trust purposes. In the present case the Legislature has exercised that right and has released the disputed proceeds by the 1951 enactment. Stats.1951, p. 2443.

The majority opinion declares that the solution of the present problem depends upon "the validity and effect of the 1951 statute *revoking* in part the public trust on the income derived from the lands in question. Thus, the principal issues to be resolved in the present case are whether the *revocation* was a valid exercise of the legislative power, whether the *revocation* operated as a *transfer from the state to the city* of the monies affected thereby, and, if so, whether such a *transfer* would offend the constitutional prohibition against gifts of public monies." (Emphasis added.)

Thus the entire majority opinion is based upon the theory that the Act of 1951 was a partial "revocation" of a trust created by the state and a "transfer from the state to the city of the monies affected thereby". I agree that the solution of the problem depends upon the validity and effect of the 1951 statute, but I cannot agree with the reasoning of the majority opinion. It treats the state as the "trustor" or "settlor," with the property reverting "to the settlor" upon the termination of the trust; whereas, as heretofore indicated, the state was itself only a trustee with respect to the public trust under which the tidelands were pre-

viously held by it, and it had previously conveyed all its proprietary interest to the city. This court has clearly declared that the title to the tidelands, and therefore to the proceeds thereof, was thereafter in the city, not the state, subject only to the trust, for "whatever the state had by way of title or interest, * * * it all passed under the plain words of the grant" to the city of Long Beach; and that such conveyance carried with it "the mineral rights in the lands." City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 615, 616, 82 P.2d 362, 365, 366.

It follows that the Act of 1951 was not a "revocation" of any trust in any true sense of the word. The state was not the trustor or settlor to which the lands or their proceeds would revert upon the termination of the trust. It is true that the state's grant to the city employed the words "in trust for the uses and purposes and upon the express conditions following * * *", City of Long Beach v. Morse, supra, 31 Cal.2d 254, 256, 188 P.2d 17, 19; but the grant did not create the trust, which already existed and under which the state itself held the property as trustee, and said grant merely imposed such conditions as the state deemed necessary to protect such pre-existing public trust. Following the grant to the city the tidelands and the proceeds therefrom belonged to the city of Long Beach, subject only to the trust, and hence the exercise of the sovereign power by the state in 1951, in declaring a portion of the proceeds released from the trust, did not in any sense effect a "transfer" of anything "from the state to the city." It therefore appears that the claim that the Act of 1951 was invalid under section 31 of the Constitution cannot be sustained. The majority opinion concedes that the original grants of the tidelands to the cities "do not violate the constitutional prohibition against gifts", and it follows that the exercise by the state of its power to release a part of the tidelands or the proceeds from the trust is merely an exercise of the limited power retained by the state in its sovereign capacity following the original grant of all its right, title and interest in said tidelands. The validity of such a release was sustained in Atwood v. Hammond, supra, 4 Cal.2d 31, 48 P.2d 20.

It may be conceded that the majority opinion, by starting from an erroneous premise, reads quite plausibly. The erroneous premise, however, appears to be unfortunate, for the premise itself does violence to the principles laid down in the authorities, and more particularly to those clearly enunciated in Atwood v. Hammond, supra, 4 Cal.2d 31, 48 P.2d 20, and City of Long Beach v. Marshall, supra, 11 Cal.2d 609, 82 P.2d 362. Furthermore, the conclusions reached run contrary to the principles laid down in those cases and the other authorities above cited. These authorities sustain the judgment of the trial court.

It may well be that the state, as a matter of policy, should have reserved to itself the mineral rights in the Long Beach tidelands. It has made such reservation in later grants to other cities and counties, such as Santa Barbara, Stats.1931, p. 1742, Ventura, Stats.1935, p. 869, and Santa Cruz, Stats. 1935, p. 1876. The fact remains, however, that the state did not make any similar reservation in the grant to the city of Long Beach, and I find no justification for now declaring, contrary to the principles enunciated in the prior decisions of this court, that the state has any right, title or interest therein or to the proceeds therefrom.

In my opinion, the judgment of the trial court should be affirmed.

SCHAUER, J., concurs.

SHENK, Justice (dissenting).

I concur in the dissenting opinion of Mr. Justice SPENCE and deem it unanswerable. A further word seems desirable from my standpoint.

When Boone v. Kingsbury was decided by this court in 1928, 206 Cal. 148, 273 P. 797, I expressed the view as the sole dissenter that permits proposed to be issued by the state for exploration and production of oil and gas from tidelands of the state would be inconsistent with the trust under which the state held those lands, namely, for commerce, navigation and fisheries. That case involved tidelands of the state outside of

any municipality. It was there decided by the majority that the state owns those lands in fee subject only to the limited trust and that the granting of permits there sought to be issued by the state on a royalty basis for the production of oil and gas would not be inconsistent with the trust. The holding in that case has been the law of the state without deviation since that time. It has also been the law of the state that in granting to municipalities the tidelands within their borders the state conveyed the fee subject only to the same trust under which the state owned them. If leasing directly by the state for oil and gas production is not inconsistent with the trust the same rule should apply to a municipality occupying the same position as its grantor, the state. The case of City of Long Beach v. Morse, 31 Cal.2d 254, 188 P.2d 17, specifically left the way open for further legislation on the subject. That legislation was supplied by the Act of 1951, Stats.1951, p. 2443. By that enactment there is a legislative finding that the use of the proceeds from oil and gas production by the City of Long Beach is not in any way affected by the terms of the trust. If the City of Long Beach is bound by the terms of the trust, as the majority holds, the state likewise is bound by the same trust. The only logical deduction to be drawn from the majority opinion is that the trust relationship now declared is also fastened on the state's title and right to the use of the proceeds from oil and gas development and production on tidelands.

Following the case of United States v. California in 1947, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 the United States granted to the several states bordering tidelands and to their grantees the right, title and interest of the Federal government in and to such tide lands, Public Law No. 31, 67 Stat. p. 29, approved May 22, 1953. By that enactment the government reserved from the grant the right to exercise its constitutional powers over commerce and navigation and particularly stated in section 6 of the act that the reservation should "not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act." If the title of the City of Long Beach is encumbered by the trust as the majority holds, the title of the State of California is also subject to the trust, and falls within the reservations of the act of Congress. The only way to avoid this conclusion is to declare, as we should, that the proceeds from oil and gas development here involved fall within the proprietary classification of the property of the City of Long Beach in accordance with the statutory and decisional law of the state and as contemplated by the recent Act of Congress.

Rehearing denied: SHENK, SCHAUER and SPENCE, JJ., dissenting.

44 Cal.2d 335

Joseph FRANCIS, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation) and Merle M. King, Defendants and Respondents.

S. F. 19069.

Supreme Court of California.
In Bank.
April 19, 1955.

Action by pedestrian for injuries sustained when struck by bus while in crosswalk. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment on verdict for defendants and pedestrian appealed. The Supreme Court, Shenk, J., held that instruction to effect that pedestrian was guilty of contributory negligence because he did not continue to look to either side while crossing street was erroneous, and error was not corrected by giving other proper instructions.

Judgment reversed.

Opinion, 268 P.2d 187, vacated

1. Appeal and Error ⇐110

There is no appeal from denial of motion for new trial. West's Ann.Code Civ. Proc. § 963.

2. Automobiles ⇐245(72)

It is usually a question for the jury and not for the court whether a pedestrian has used due care in crossing street and in making decision that he can cross with safety.

3. Automobiles ⇐217(5)

There is no rule of law that irrespective of existing circumstances a pedestrian while crossing a street in a crosswalk must look "continuously" in direction from which danger is to be anticipated or be arbitrarily adjudged guilty of contributory negligence.

4. Automobiles ⇐160(1), 216

Neither pedestrian nor driver of automobile has a superior right to use of street and each must exercise care required of a reasonable and prudent person under existing circumstances.

5. Automobiles ⇐171(4)
Highways ⇐175

Even where a right of way is given by statute, if conditions so require it to avoid injury to others, right of way must be yielded.

6. Automobiles ⇐245(72)

Pedestrian, who looks before leaving his place of safety on sidewalk and concludes there is no probable danger to be apprehended either because no automobiles are approaching or because none is close enough to appear to endanger his crossing, or pedestrian, who crosses in crosswalk with traffic signal and relies on assumption that any cross traffic approaching will observe traffic regulations, cannot be said to be guilty of contributory negligence as a matter of law solely because he fails to keep looking "continuously" as he crosses if evidence indicates pedestrian made reasonable observation in determining his safety.

7. Automobiles ⇐245(72)

Fact that all witnesses but one testified to fact that would justify conclusion that pedestrian, who was struck by bus while in crosswalk, was negligent at such time and place, was not sufficient to take the case from jury when pedestrian's testimony, if believed by jury, would have supported verdict in his favor. West's Ann. Code Civ.Proc. § 1844.

8. Automobiles ⇐245(72)

In action by pedestrian for injuries sustained when struck while in crosswalk by bus, which pedestrian admitted seeing but which he thought posed no danger either because of distance of bus, its speed of travel, or because of reliance on assumption bus driver would obey signal which pedestrian thought traffic officer had given, whether pedestrian was guilty of contributory negligence was a question for the jury. West's Ann.Code Civ.Proc. § 1844.

9. Automobiles ⇐246(31)

In action by pedestrian for injuries sustained when struck by bus while in crosswalk, instruction to effect that pedestrian was guilty of contributory negligence because he did not continue to look to either side while crossing street was erroneous.

10. Trial ⇐296(1)

Giving of erroneous instruction is not cured by giving of other correct instructions where effect is simply to produce a clear conflict in instructions and it is not possible to know which instruction was followed by jury in arriving at a verdict.

11. Trial ⇐296(4)

Error in instruction that pedestrian, who was struck by bus while in crosswalk, was guilty of contributory negligence because he did not continue to look to either side while crossing street, was not cured by proper instructions on ordinary care.

Jack H. Werchick, San Francisco, for appellant.

Dion R. Holm, City Atty., Joseph F. Murphy and Richard Saveri, Deputy City Attys., San Francisco, for respondents.

SHENK, Justice.

[1] This is an appeal from a judgment entered on a verdict in favor of the defendant in an action for damages for personal injuries sustained by plaintiff pedestrian in a collision with a San Francisco Municipal Railway Bus. There is also an appeal from a denial of a motion for a new trial by operation of law because of the failure of the trial court to determine the motion within the statutory period. There is no appeal from the denial of this motion, Code of Civ.Proc. § 963, and it should be dismissed.

Sutter Street runs approximately east and west and is intersected at right angles by Powell Street. A north-south pedestrian lane, the boundaries of which are painted with white lines, crosses Sutter Street just east of this intersection. There were no automatic signals at this location on April 17, 1950, but a traffic officer was stationed there to direct and control traffic. At 5 p. m. on that day the traffic was fairly heavy, the streets were dry, the weather was clear, it was daylight, and visibility was good. No cars were parked along Sutter Street because it was a "tow-away" zone from 4 to 6 p. m. Plaintiff testified that he had walked westerly on the north sidewalk of Sutter Street to Powell Street and there turned left, intending to cross to the south side of Sutter Street. He waited for a minute or so on the sidewalk about two feet west of the easterly boundary of the cross-walk. A sidewalk pole was to his left. Traffic was then flowing east-west. As soon as he saw the traffic officer raise his arms in a gesture which indicated that east-west traffic should stop and heard him blow his whistle, plaintiff looked to his left and saw the bus, some 50 to 75 feet away from where he stood, proceeding westerly up Sutter Street in the lane nearest the sidewalk. Plaintiff made no estimate of its speed. He then stepped off the sidewalk into the pedestrian lane without again looking to the left or right. He had taken but a few steps when he saw the bus close to him and was immediately struck by the right front corner of the bus on the left side of his body. He was knocked unconscious and suffered the injuries complained of.

Defendants denied negligence and pleaded contributory negligence on the part of plaintiff as a proximate cause of his injuries. The driver of the bus testified that he first saw the traffic officer when he was 50 to 75 feet away; that the bus was then travelling between 10 and 12 miles per hour; that he had an unobstructed view of the street and sidewalk ahead of him; that he saw some five or six persons waiting to cross the street but none started to cross so he proceeded through the intersection; that the officer was then motioning for traffic to go easterly and continued to do so until the bus passed the center of the intersection, and that he (the driver) did not know he had struck anyone until so informed by a passenger.

The traffic officer testified that he did not see the accident. He was standing in the center of Sutter Street at or close to the westerly line of the east pedestrian lane and thought he must have been facing south. A short time before the accident the traffic had been going east and west but he did not know how long it had been so flowing. He could not recall if there was any traffic moving in an easterly direction. He could not recall what traffic was moving westerly at that time. Nor could he recall when he first noticed the bus moving up Sutter Street towards Powell, how long the traffic had been going east-west when he last saw the bus about a quarter block from the intersection, or whether he noticed any pedestrians waiting on the sidewalk. He heard a thud and a yell and, on turning, saw a man lying on his back in the crosswalk about a foot from the north curb. The bus was then in the middle of the intersection.

A defense witness testified that she was standing on the northeast sidewalk on Sutter Street waiting for the east-west traffic to change so that she could cross the street when "all of a sudden a man came by me and walked into the side of [the bus] just near the back door of the bus." Another defense witness testified that he was standin on the sidewalk about 15 to 20 feet from

the northwest curb on Sutter Street for four or five minutes prior to the accident; that he had watched the traffic flow north and south, saw the traffic officer change the traffic to east-west and saw the bus stop or slow down prior to reaching the intersection waiting for traffic to change, and "when the traffic changed the bus came across the street * * * and as it went by the northeast intersection of Powell and Sutter Streets a gentleman walked into the side of the bus" at a point to the rear of the front door. The traffic officer made no examination of the bus to determine the point of impact. The investigating officer testified that he was not able to make an exact determination of the point of contact but "it was somewhere around the right front part of the bus."

Plaintiff contends that the court committed prejudicial error in the giving of the following instruction:

> "It is a duty devolved upon Mr. Francis, as the act of an ordinarily prudent person, that immediately before placing himself in a position of danger, to look in the direction in which danger is to be anticipated. This is a continuing duty and it is not met by looking once and then looking away. It is not a duty to look only one way and continue so to look, but rather to look in the direction or directions of anticipated danger and to continue to be alert to safeguard against injury."

[2, 3] Similarly worded instructions have been held to be prejudicially erroneous as applied to the factual situations presented in Salomon v. Meyer, 1 Cal.2d 11, 13, 32 P.2d 631; Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503; Long v. Barbieri, 120 Cal.App. 207, 212, 7 P.2d 1082; and Nickell v. Rosenfield, 82 Cal.App. 369, 373–375, 255 P. 760. Each involved a pedestrian struck down in a cross-walk who looked before leaving the safety of the sidewalk but who did not maintain a continuous lookout while crossing the street. The instruction in each case was held to have fixed for the jury as a measure of ordinary care a continuous duty while crossing to look "to the right and to the left" or "in the direction from which danger was to be anticipated" without requiring the jury to first find that an ordinary and prudent person, crossing at that time and place and under the existing conditions of traffic, would have maintained such constant surveillance. It is usually a question for the jury and not for the court whether a pedestrian has used due care in crossing the street and in making the decision that he can cross with safety. There is no rule of law that irrespective of existing circumstances a pedestrian must look "continuously" or be arbitrarily adjudged guilty of contributory negligence. Filson v. Balkins, 206 Cal. 209, 212, 273 P. 578; Long v. Barbieri, supra, 120 Cal.App. 207, 215, 7 P.2d 1082; Nickell v. Rosenfield, supra, 82 Cal.App. 369, 376, 255 P. 760; 164 A.L.R. 53 et seq.

[4–6] Neither the pedestrian nor the driver of an automobile has a superior right to the use of the street. Burgesser v. Bullock's, 190 Cal. 673, 675, 214 P. 649. Each must exercise the care required of a reasonable and prudent person under the existing circumstances. Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded. No general rule may be laid down which will fit all circumstances as to the duty of care required of a pedestrian in crossing a street. In White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, 1091, the court attempted to draw the following general rule from a consideration of the case law on this subject, namely: "Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." The difficulty in drawing such a generalization is obvious. It is not necessarily true that it is usually a question of law where a pedestrian "looks straight ahead without glancing to either

side." A plaintiff who looks before leaving his place of safety on the sidewalk and concludes from his observations that there is no probable danger to be apprehended, either because no cars are approaching or because none is close enough to appear to endanger his crossing, or a plaintiff who crosses in a pedestrian lane with the traffic signal and relies on the assumption that any cross traffic approaching will observe statutory and local traffic regulations and there is evidence that he made reasonable observations to determine his safety, cannot be said to be guilty of contributory negligence as a matter of law solely because he fails to keep looking "continuously" or "to the left and to the right" as he crosses. Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 838, 161 P.2d 673, 164 A.L.R. 1, and cases cited.

[7] Nor is it sufficient to take the case from the jury because all the witnesses but one testify to facts that would justify the conclusion that the pedestrian actually was negligent at such time and place. The direct evidence of a witness who is entitled to full credit is sufficient for proof of any fact. Code Civ.Proc. § 1844. Here the plaintiff's testimony was credible and it was not shaken or impeached. If the jury believed him, its verdict in his favor would have been supported by the evidence.

[8] The issue here is not that the plaintiff looked and did not see what was plainly visible or, seeing was indifferent to his safety. He admitted seeing the bus. It may be assumed from his testimony that he reasonably concluded that no danger was to be anticipated from that source, either because of the distance of the bus from the cross-walk, its admitted speed of 10 to 12 miles per hour, or because of his reliance upon the assumption that the bus driver would obey the signal which plaintiff thought he had seen the traffic officer give. There was no testimony as to any other traffic that constituted a source of anticipated danger at that moment to plaintiff. It is a question of fact whether a reasonably prudent person might have concluded that it was safe to enter the cross-walk under such circumstances without maintaining a constant lookout. It was for the jury to determine whether plaintiff was guilty of contributory negligence. Mann v. Scott, 180 Cal. 550, 554, 182 P. 281.

[9] Even if the jury had determined all factual issues in favor of plaintiff, it was in effect advised by the challenged instruction that plaintiff was guilty of contributory negligence because he did not continue to look to either side while crossing the street. Such negligence would be a complete bar to plaintiff's recovery. The prejudicial effect of such an instruction is readily apparent.

Defendants argue that the instruction merely states the proposition of law that before placing himself in a position of danger a pedestrian has the duty to look in the direction from which danger may be anticipated and to continue to be alert to safeguard against injury. "The vice of the instruction here complained of lies in the unqualified statement that 'this is a continuing duty, and is not met by looking once and then looking away.' Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309." Salomon v. Meyer, 1 Cal.2d 11, 15, 32 P.2d 631, 633.

The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court. Hall v. City and County of San Francisco, 188 Cal. 641, 643-644, 206 P. 459; Pullen v. Heyman Bros., 71 Cal.App.2d 444, 452, 162 P.2d 961; Long v. Barbieri, supra, 120 Cal.App. 207, 7 P.2d 1082.

[10] The giving of an erroneous instruction is not cured by the giving of other correct instructions where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict. Westberg v. Willde, 14 Cal.2d 360, 371, 94 P.2d 590; Goodwin v. Foley, supra, 75 Cal.App.2d 195, 200, 170 P.2d 503 and cases cited. An

examination of the entire charge to the jury does not convince us that the error complained of was cured by the other instructions.

[11] The court instructed the jury that "in order to avoid injury to himself, plaintiff was bound to have exercised reasonable care to avoid the same, that is, he was bound to use such care and diligence as a reasonable and prudent person would have exercised under the circumstances." It further instructed the jury that "the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person would apprehend in the situation" and that "the plaintiff * * * had the right to assume that the bus driver would exercise ordinary care and caution in the operation of his vehicle." The challenged instruction was followed by an instruction that "it is the duty of a pedestrian in crossing a city street to use such reasonable care as the conditions demand to see passing vehicles and avoid colliding with them." These instructions do not overcome the effect of the challenged instruction as to the pedestrian's "continuing duty".

The suggestion is advanced by defendants that the challenged instruction is analogous to instructions upheld in Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533 and in Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 542, 38 P.2d 193. In the Taha case the jury were advised, 81 Cal.App.2d at pages 539–540, 184 P.2d at page 534, that "the duty of a pedestrian to be vigilant and alert, and looking for approaching traffic, *at Such Times and Places as an Ordinarily Prudent Person Acting Under Like Circumstances Would Direct His Attention,* is a continuing duty and such duty is not necessarily met by a pedestrian, whether in a pedestrian crosswalk or otherwise, by merely looking once and then looking away, *Unless an Ordinarily Prudent Person Acting Under Like Circumstances Would so Conduct Himself.*" The words which we have italicized demonstrate without further discussion the saving features in the Taha instruction. Similarly, in the Morris case the jury was instructed, 2 Cal. App.2d at page 542, 38 P.2d at page 196, that a pedestrian who attempts to cross a street at other than a regular crossing place must exercise greater precautions than at an established crossing and "'that the observance of due care under such circumstances is not fulfilled by merely looking to the left and right as he steps upon the street; he must exercise that care during all the time that he was crossing.'" The jury was left free to decide what would constitute due care during the time the pedestrian was crossing the street. Most of the other cases cited by the defendants may be distinguished upon their facts or the issues involved. We find no merit in defendant's assertion that the great weight of authority is completely contrary to Salomon v. Meyer, supra, 1 Cal.2d 11, 32 P.2d 631, and Goodwin v. Foley, supra, 75 Cal. App.2d 195, 170 P.2d 503, on this question.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

44 Cal.2d 359

Fred H. MILLER, Plaintiff and Appellant,

v.

Donald GLASS and Richard Inks, Defendants and Respondents.

L. A. 23504.

Supreme Court of California.
In Bank.
April 22, 1955.

Action against fish and game wardens to recover damages for false arrest and imprisonment. The Superior Court, San Diego County, L. N. Turrentine, J., granted summary judgment for defendants, and plaintiff appealed. The Supreme Court,

Spence, J., held that, though in uniform and acting as law enforcement officers within scope of their employment, fish and game wardens were not immune from civil liability for false arrest and imprisonment without a warrant for alleged misdemeanor not committed in presence of either warden.

Judgment reversed.

Opinion, 274 P.2d 669, vacated.

1. Judgment ⇐186

In determining on motion for summary judgment whether complaint states a cause of action, allegations of complaint must be accepted as true.

2. False Imprisonment ⇐20(1)

Complaint, alleging that fish and game wardens without warrant or other process had arrested plaintiff for alleged misdemeanor of failing, neglecting and refusing to exhibit fishing license upon demand in violation of Fish and Game Code and that plaintiff had not committed such alleged violation of statute in the presence of either defendant or otherwise, stated a cause of action against wardens for recovery of damages for false arrest and imprisonment. Fish and Game Code, § 403; Pen. Code, § 836.

3. False Imprisonment ⇐7(3)

Fish and game wardens, though in uniform and acting as law enforcement officers in scope of their employment, are not immune from civil liability for false arrest and imprisonment without a warrant for alleged misdemeanor not committed in presence of wardens. Fish and Game Code, § 403; Pen.Code, § 836.

4. Arrest ⇐63(1)

A police officer has no right to arrest an individual without a warrant for a misdemeanor not committed in presence of officer. Pen.Code, § 836.

5. False Imprisonment ⇐20(1)

Complaint alleging arrest without process for a misdemeanor not committed in presence of arresting officer, imprisonment, and damage is sufficient to state cause of action for recovery of damages for false arrest and imprisonment. Pen.Code, § 836.

6. False Imprisonment ⇐20(3)

In action for malicious prosecution, malice and lack of probable cause are essential elements of pleading and proof, but they have no bearing on charge of false arrest and imprisonment, except that where offense is apparently being committed in presence of arresting officer, he may invoke by way of defense the doctrine of probable cause to justify arrest without a warrant. Pen.Code, § 836.

Fred H. Miller, in pro. per.

Reed & Kirtland, Los Angeles, Edmund G. Brown, Atty. Gen., Alexander Googooian Deputy Atty. Gen., and Robert C. Packard, Los Angeles, for respondent.

SPENCE, Justice.

[1] Plaintiff appeals from a summary judgment. The sole issue in controversy is whether plaintiff's complaint stated a cause of action. In determining this point, plaintiff's allegations must be accepted as true. Upon this premise, plaintiff contends that the trial court erred in holding that his "action has no merit" and in entering judgment in favor of defendants. The record sustains plaintiff's position.

Plaintiff alleged, among other things, that defendants "without warrant or other process of any kind" arrested him upon the "sole charge of failing, neglecting, and refusing to exhibit upon demand a California fishing license, thus violating section 403 of the Fish and Game Code, a misdemeanor"; that he "had not violated said section * * * in the presence of the defendants or either of them, or otherwise"; that he was thereafter imprisoned by defendants for said purported violation; that by reason of such arrest and imprisonment, he was deprived of his liberty for approximately six hours and thereby suffered damage in the sum of $25,000.

Defendants' demurrer to plaintiff's complaint was overruled. Defendants then an-

swered, denying generally plaintiff's allegations and asserting as an affirmative defense that they were "at all times mentioned * * * acting in their official capacities as law enforcement officers of the California Department of Fish and Game"; that when they arrested plaintiff, they "had reasonable grounds and/or probable cause to believe that plaintiff in [their] presence * * * was violating section 403 of the Fish and Game Code"; that they were then "acting within the course and scope of their employment" and, as such, were "shielded by the cloak of immunity from civil liability."

At the hearing of defendants' motion for a summary judgment, which was made solely on the ground that plaintiff's complaint failed to state a cause of action, plaintiff stipulated that defendants were "Fish and Game Wardens," were "in uniform," and were "on duty at the time" of plaintiff's arrest. Thereupon the court granted the summary judgment, and plaintiff appeals therefrom.

[2–5] Plaintiff properly maintains that his complaint stated a cause of action, for while defendants were admittedly acting as law enforcement officers and were in uniform, they were not immune from civil liability for false arrest and imprisonment. As was stated in Oppenheimer v. City of Los Angeles, 104 Cal.App.2d 545, at page 549, 232 P.2d 26, at page 28: "A police officer is without right to arrest an individual, without a warrant, for a misdemeanor not committed in his presence. Pen.Code, § 836; Collins v. Owens, 77 Cal.App.2d 713, 718, 176 P.2d 372. Where a complaint is based upon an arrest made without a warrant, for a misdemeanor not committed within the presence of an officer, as it is here, all that need be alleged to charge the unlawful arrest is 1) the arrest without process, 2) the imprisonment, and 3) the damage. Collins v. Owens, supra, 77 Cal. App.2d at page 718, 176 P.2d 372; Kaufman v. Brown, 93 Cal.App.2d 508, 511–512, 209 P.2d 156. While other matters not necessary to a cause of action for false imprisonment are here alleged, the complaint contains the vital allegations. As against a general demurrer the surplus allegations must be disregarded."

Relying upon White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636, and Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876, defendants contend that since they admittedly were law-enforcing officers, acting within the scope of their employment at the time of their alleged wrongful arrest and imprisonment of plaintiff, they are immune from civil liability for such acts. Neither of the cited cases sustains defendants' contention.

[6] In White v. Towers, supra, the alleged cause of action was for malicious prosecution, rather than for false arrest and imprisonment. It was held that the policy of "promoting the fearless and effective administration of the law" required that officers who institute criminal proceedings in pursuance of their official duties should not be liable to "vindictive and retaliatory damage suits" for alleged malicious prosecution. 37 Cal.2d 729, 235 P. 2d 211. Different principles govern actions for false arrest and imprisonment, for the law expressly limits the arresting officer's authority. When the arrest is without a warrant, the misdemeanor must have been "committed or attempted in his presence." Pen.Code, § 836. In a malicious prosecution action, malice and lack of probable cause are essential elements of pleading and proof. 16 Cal.Jur. § 2, p. 728. They have no bearing, however, on charges of false arrest and imprisonment, see 12 Cal.Jur., § 2, p. 429; Kaufman v. Brown, 93 Cal.App. 2d 508, 512, 209 P.2d 156, except in the single instance, which is not involved on this appeal from the summary judgment, predicated solely on the claimed insufficiency of plaintiff's complaint: that where the offense is apparently being committed in the presence of the arresting officer, he may invoke by way of defense the doctrine of probable cause to justify the arrest without a warrant. 5 Cal.Jur.2d § 10, p. 158.

Coverstone v. Davies, supra, involved an alleged false arrest, but there a misdemeanor was being committed in the offi-

cers' presence, and they were therefore authorized to make an arrest without a warrant. Pen.Code, § 836. In such circumstances, it was held that the arresting officers, arriving upon the scene, were "entitled to act on reasonable appearances in determining who were parties to the offense" 38 Cal.2d 320, 239 P.2d 878, and that the "doctrine of probable cause" would protect them. 38 Cal.2d 321, 239 P.2d 879.

Neither White v. Towers, supra, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636, nor Coverstone v. Davies, supra, 38 Cal.2d 315, 239 P.2d 876, supports the broad claim that a law-enforcement officer may not be held liable for an arrest, without a warrant, for a misdemeanor not committed in his presence. Such holding would do violence to the provisions of Penal Code, section 836, prescribing the conditions of a lawful arrest, and would be contrary to the settled rules established by the cases dealing with false arrest and imprisonment. See Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372; Kaufman v. Brown, supra, 93 Cal.App.2d 508, 209 P.2d 156; Oppenheimer v. City of Los Angeles, supra, 104 Cal.App.2d 545, 232 P.2d 26. The trial court therefore erred in concluding that plaintiff's complaint failed to state a cause of action and in granting defendants' motion for a summary judgment.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

CARTER, Justice.

I concur in the reversal of the judgment but disagree with the holding in the majority opinion that White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636, and Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876, were correctly decided. I am firmly of the opinion that these cases were erroneously decided as clearly pointed out in my dissenting opinions therein.

44 Cal.2d 393

AMERICAN INDUSTRIAL SALES CORPORATION, a corporation, Plaintiff and Respondent,

v.

AIRSCOPE, Inc., a corporation, Defendant and Appellant.

L. A. 23503.

Supreme Court of California.
In Bank.
April 26, 1955.

Action to recover money due under written contract made in State of Florida and to attach property which had been removed from Florida to California as permitted by the contract. Defendant moved to discharge the attachment. The Superior Court, Los Angeles County, Paul Nourse, J., denied the motion and defendant appealed. The Supreme Court, Spence, J., held that where contract was silent as to place of payment, evidence concerning a contemporaneous oral agreement was admissible to determine the place of payment.

Affirmed.

Opinion, 274 P.2d 449, vacated.

1. Evidence ⇐442(1)

When parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms.

2. Evidence ⇐442(1)

In action to recover money due under written contract made in state of Florida and to attach property which had been removed from Florida to California as permitted by contract, where contract was silent as to place of payment, evidence concerning an oral contemporaneous agreement was admissible in determining the place of payment. West's Ann.Code Civ. Proc. § 537.

3. Attachment ⇐4

The prerequisite, for use of attachment process, of payability of debt in California

could be established by producing evidence of contemporaneous oral agreement to rebut any presumption as to place of payment arising out of silence of Florida contract as to place of payment. West's Ann.Code Civ.Proc. § 537.

4. Attachment ⇐2

While the attachment statute must be strictly construed, and one seeking to enforce any right thereunder must affirmatively show that the contract agreed upon falls within its terms, still the statute must be reasonably and fairly interpreted so as to give it an efficient operation, and so as to give effect, if possible, to the expressed intent of the Legislature. West's Ann.Code Civ.Proc. § 537.

5. Statutes ⇐181(2)

A statute should never be construed so strictly as to render it absurd or nugatory.

6. Contracts ⇐175(1)

The presumptions that a contract, silent as to the place of payment, is payable at the place where the creditor resides is not conclusive, but is rebuttable by competent evidence, and such evidence may relate to a contemporaneous oral agreement which accompanies the execution of the written contract and is wholly consistent with terms thereof.

Woodrow W. Baird, Long Beach, for appellant.

Stanton & Stanton, Los Angeles, as amici curiae for appellant.

Lane & Lane, Long Beach, for respondent.

SPENCE, Justice.

Defendant appeals from an order denying its motion to discharge an attachment. The action in which the attachment was issued was brought to recover money due under a written contract made in the state of Florida. The contract was silent as to the place of payment, and the trial court admitted parol evidence to determine the place of payment. Defendant contends that this was improper, and that in the absence of a provision in the written contract indicating that the money was "payable in this State" Code Civ.Proc. § 537, the attachment was illegally issued. Neither the statute nor general principles of contract law sustain defendant's position.

Plaintiff entered into a written contract with defendant for the sale of certain airplane parts for $100,000, payable $20,000 down and the balance of $80,000 thereafter. The contract was made in Florida and the property was located in that state. There was no provision as to the place of payment. Defendant made the $20,000 down payment, and the contract provided for further payments as follows: Defendant, as owner, would sell the property, retaining 50 per cent of the moneys received and applying the other 50 per cent on its $80,000 balance owing to plaintiff; but in the event that at the end of six months, 50 per cent of the sales receipts did not amount to $80,000, then defendant was to pay the balance still owing in six equal installments, beginning at the end of the seventh month and ending with the twelfth month. Defendant was to furnish a record of sales and was to pay plaintiff the pro rata share not later than ten days after defendant's receipt of the money from the sales. Plaintiff was given the right to inspect the balance of the property on hand with defendant at any time prior to full payment of the purchase price, and also the right to examine defendant's books and records of sales. The contract further provided that because of the inability of the parties to know future market conditions, defendant might move the property to Long Beach or the Los Angeles area of California, if it deemed such removal to be more economical from an operational standpoint.

Pursuant to its option, defendant moved the property to Long Beach. A year having elapsed since execution of the contract and defendant having paid no part of the $80,000 balance, plaintiff brought this action to recover that sum, and the attachment in question was issued. Defendant moved to discharge the attachment upon the ground that the contract was made in Florida and all payments thereunder were to be made in Florida. The affidavit of defendant's secretary-treasurer was filed in support of the motion. Attached thereto was a copy of

the parties' contract, showing that no provision had been made therein as to the place of payment. Plaintiff filed counter-affidavits: one by its vice-president and general manager, and the other by its secretary-treasurer. These counter-affidavits recited that a contemporaneous oral agreement had been made by the parties providing that upon defendant's removal of the property to California for sale, payments were to be made in this state. The matter was heard upon the affidavits, pleadings and other records in the action. Thereupon, the court made its order denying defendant's motion to discharge the attachment, and defendant appeals.

Section 537, Code of Civil Procedure, provides, in part, that "plaintiff * * * may have the property of the defendant attached * * * in an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State * * *." Unquestionably, the contract here was made in Florida. Plaintiff therefore was not entitled to an attachment unless the sums to fall due were payable in this state. The contract did not specify a place of payment, and plaintiff undertook to supply this omission by evidence of the parties' contemporaneous oral agreement at the time the contract was made.

Accordingly, the above-mentioned counter-affidavit of plaintiff's vice-president and general manager recited: That he represented plaintiff in the negotiations leading up to the execution of the contract; that defendant's secretary-treasurer prepared the contract; that the latter, in the course of negotiations, requested that defendant be given the right to remove the property to a Long Beach or Los Angeles area for resale; that affiant then asked defendant's secretary-treasurer how plaintiff could enforce collection of the money payable under the contract if defendant could remove the property from Florida to Long Beach, its principal place of business; that in answer to this query, defendant's secretary-treasurer replied that under the contract plaintiff would have the right to inspect defendant's books at any time, that payments by defendant would be made to plaintiff's representative in California whenever the books disclosed money to be due, and that plaintiff was entitled to keep an agent in defendant's plant for the purpose of checking on sales. It was further recited that shortly after the contract was made the property was removed to Long Beach, California, and has remained there ever since; that plaintiff sent a duly authorized agent to California but defendant refused to pay any sum to him; that defendant has sold part of the property but has remitted none of the proceeds of sales; that plaintiff relied upon those statements and promises of defendant's secretary-treasurer and otherwise would not have entered into the contract. The counter-affidavit of plaintiff's secretary-treasurer, who was present during the negotiation of the contract, corroborated the above recitals of plaintiff's vice-president and general manager as to the parties' agreement.

Defendant did not offer any evidence contradicting the specific facts set forth in these counter-affidavits. The affidavit of defendant's secretary-treasurer in support of its motion to discharge the attachment merely recited that the contract was made in Florida and concluded therefrom, in the absence of an express provision in the contract otherwise, that "all sums which defendant * * * is to pay under the terms of said contract shall be paid in the state of Florida."

[1, 2] It has long been the rule that when the parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms. Buckner v. A. Leon & Co., 204 Cal. 225, 227, 267 P. 693; Crawford v. France, 219 Cal. 439, 443, 27 P.2d 645; Stockburger v. Dolan, 14 Cal.2d 313, 317, 94 P.2d 33, 128 A.L.R. 83; Lindsay v. Mack, 5 Cal.App.2d 491, 496–497, 43 P.2d 350; Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 631–632, 152 P.2d 774. Thus, in Sivers v. Sivers, 97 Cal. 518, 32 P. 571, 572, the contract was silent as to the time of payment, and the court held that it was competent to show by parol that "a period or event had been agreed upon

between the parties thereto at which the payment should be made". Likewise here, where the contract is silent as to the place of payment, such matter could be shown by a contemporaneous oral agreement. Upon defendant's removal of the property to its Long Beach place of business for resale, the contract became performable in California insofar as resale of the property and accounting to plaintiff on the money receipts were concerned. By the terms of the contract, plaintiff had the right to have its agent in California inspect defendant's books and determine the amount then payable on the resales. It would be entirely consistent with such arrangement that the amounts owing would be payable to plaintiff's authorized agent. Such precise understanding as to payment was the substance of the contemporaneous oral agreement, and the trial court properly considered the evidence concerning such agreement in determining the place of payment. 12 Cal.Jur.2d § 126, pp. 339–340; see Kunz v. Anglo & London Paris Nat. Bank, 214 Cal. 341, 347, 5 P.2d 417.

[3–5] It is true that "In the absence of agreement to the contrary, a debt is payable where the creditor resides, or at his place of business, if any, or wherever else he may be found * * *." 70 C.J.S., Payment, § 6, p. 217; see, also, Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 366, 99 P.2d 678. But such presumption is rebuttable, not conclusive; and plaintiff produced evidence of the contemporaneous oral agreement to rebut the presumption as to the place of payment which would otherwise prevail in view of the contract's silence on the subject. There is nothing in the attachment law, Code Civ.Proc. § 537, which would qualify the application of the parol evidence rule in this state for the purpose of establishing the prerequisites for using the attachment process. While the attachment statute must be strictly construed and one seeking to enforce any right thereunder must affirmatively show that the contract agreed upon falls within its terms (5 Cal. Jur.2d § 4, p. 598), still the statute "must be reasonably and fairly interpreted so as to give [it] an efficient operation, and so as to give effect, if possible, to the expressed intent of the Legislature. A statute should never be construed so strictly as to render it absurd or nugatory." Walters v. Bank of America, etc., Ass'n, 9 Cal.2d 46, 52, 69 P.2d 839, 842, 110 A.L.R. 1259. One of the purposes of attachment is to afford the creditor security for the payment of unsecured debts and to prevent the debtor's sequestration of funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims. (5 Cal.Jur.2d § 3, p. 597.) Manifestly in accord with such purpose would be the sustaining of the attaching creditor's right to prove, within the settled limits of the parol evidence rule, the terms of the contract which are material under the attachment law.

Defendant cites certain cases in support of the claim that where the contract was not made in this state, an attachment will not lie unless the contract itself contains some provision indicating that the money was payable in this state. Dulton v. Shelton, 3 Cal. 206; Eck v. Hoffman, 55 Cal. 501; Tuller v. Arnold, 93 Cal. 166, 28 P. 863; Drake v. De Witt, 1 Cal.App. 617, 82 P. 982; Atwood v. Little Bonanza, etc., Co., 13 Cal.App. 594, 110 P. 344. An analysis of the precise questions involved in these cases is appropriate.

In Dulton v. Shelton, supra, the contract was neither made nor payable in this state but it was argued that since the debtor resided here and the action was transitory, an attachment should lie. However, the court declared that such remedy should be denied on a contract made without the state unless it was "accompanied by a stipulation between the parties to it, that the money is to be paid here." 3 Cal. at page 208. In Eck v. Hoffman, supra, certain bills of exchange drawn and payable in Germany were dishonored, and an attachment was sought here upon the theory that they then became payable where the debtors might be found. The attachment again was denied, following the Dulton case, with the statement that "if a contract is not made in this state, there must be an express stipulation that it shall be paid in this state to authorize the issuance of an attachment in an action upon it." 55 Cal. at page 502. It is significant to note that neither of these cases holds that where there is an express stipulation between the

parties for payment in this state, parol evidence thereof is inadmissible to show that fact.

In Tuller v. Arnold, supra, a writ of attachment was issued pursuant to an affidavit stating that the contract was payable in this state. However, the invoice showed that the contract was payable in Chicago. This latter fact was shown by an opposing affidavit made on personal knowledge. The affidavit claiming that payment was to be made in California was not made on personal knowledge. Accordingly, the court declared that "the preponderance [of evidence] is decidedly in favor of the proposition that the contract was that the money should be paid at Chicago, and not at San Francisco." 93 Cal. at page 168, 28 P. at page 864. While the court cited the Dulton and Eck cases for the proposition that the contract, having been made without the state, "was presumptively to be performed there," and in such circumstances for issuance of an attachment, "the money must have been made payable in this state by the contract itself", 93 Cal. at page 168, 28 P. at page 864, nevertheless the court's rejection of the affidavit which was not based on personal knowledge suggests that the question of the place of payment can be considered and proved by parol evidence which is based on personal knowledge.

In Drake v. De Witt, supra, the contract on its face showed that it was made and to be performed without the state, "stipulations touching monthly reports" evinced the parties' intention that the money was not payable here, and "the presumption is that payment was due where the contract was made and the services were rendered." 1 Cal. App. at page 618, 82 P. at page 982. Then citing the general language of the Dulton, Eck, and Tuller cases, supra, as above noted, the court added: "* * * it is essential to such right [of attachment] that the agreement contain some provision indicating that such money was payable in this state." 1 Cal.App. at page 619, 82 P. at page 982. The earlier cases so cited in the Drake case had not stated that for an attachment to issue where the contract was made without the state, the contract itself, rather than an accompanying stipulation of the parties, must contain the provision for payment in this state. Moreover, such statement in the Drake case was not necessary to the decision and must be regarded as *obiter dictum*.

Then in Atwood v. Little Bonanza, etc., Co., supra, an attachment was issued in an action brought upon certain negotiable instruments executed without the state. The place of payment was not stated, and parol evidence was offered in an attempt to prove that the notes were to be paid in California. The court dissolved the writ of attachment on authority of the Tuller and Drake cases, supra, observing that (1) a contract is presumptively to be performed where it is made, and (2) parol evidence is not competent to change the effect of the instrument, pursuant to the rule that " 'it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state.' " 13 Cal.App. at page 596, 110 P. at page 345.

[6] It is apparent from the above analysis that the rule of the Atwood case, on which defendant relies, rests upon the misapplication of certain general language in the earlier cases. Neither reason nor settled general principles sustain such rule, and its declaration in the Atwood case, along with any language in the preceding cases which would lend support thereto, must be disapproved. See, also, Snapp v. Kidder, 200 Cal. 724, 725, 255 P. 183. Adherence to such rule would place an illogical restriction upon the use of parol evidence for the purpose of establishing attachment rights, which restriction does not prevail in fixing the terms of the contract for other purposes. See Love v. Gulyas, 87 Cal.App. 2d 608, 614, 197 P.2d 405. The presumption that a contract, silent as to the place of payment, is payable at the place where the creditor resides is not conclusive, but is rebuttable by competent evidence. Such evidence may relate to a contemporaneous oral agreement which accompanies the execution of the written contract and is wholly consistent with the terms thereof. To hold otherwise would mean that the place of payment of an oral contract made without the state could be proved by oral testimony of the parties, and yet the like fact could not be similarly established where the

contract was in writing but was silent as to the place of payment. Such an illogical distinction would frustrate the purpose of the attachment process in this state and is wholly out of harmony therewith. Rather, as the applicable principles of law have been hereinabove discussed, the court here properly considered plaintiff's counter-affidavits in proof of the place of payment of the contract and upon that evidence, denied defendant's motion to dissolve the attachment.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 459

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alfred BERGER, Defendant and Appellant.

Crim. 5664.

Supreme Court of California, In Bank.

April 27, 1955.

Rehearing Denied May 25, 1955.

Defendant was convicted in the Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., for conspiracy to commit grand and petty theft and conspiracy to solicit for charitable purposes without a permit, and he appealed. The Supreme Court, Traynor, J., held, inter alia, that preliminary motion to suppress allegedly illegally seized evidence is not essential.

Reversed.

Spence, Shenk, and Edmonds, JJ., dissented.

Opinion, 274 P.2d 514, vacated.

1. Mandamus ⇐178

Findings of fact may not be necessary to support denial of petition for writ of mandamus, but entry of judgment is necessary to make it a final decision effectual for any purpose. Pen.Code, § 1537.

2. Mandamus ⇐178

Judgment, entered in mandamus proceeding, quashing warrant and ordering defendant's property returned to him, was not affected by court's announcement in subsequent proceeding, that it would deny petition for writ directing that photostats, made of such documents by district attorney, also be delivered to defendant, where no judgment in accordance with such announcement was ever entered. Pen. Code, § 1537.

3. Criminal Law ⇐394

Photostats of illegally seized documents, made while they were in possession of district attorney, were likewise inadmissible in prosecution of defendant from whose possession documents had been seized. Pen.Code, § 1537.

4. Criminal Law ⇐394

Preliminary motion to suppress allegedly illegally seized evidence is not essential. Pen.Code, §§ 182, 1537.

Morris M. Grupp, San Francisco, for appellant. Charles R. Garry, Norman Leonard, George Olshausen and Leo R. Friedman, San Francisco, as Amici Curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., San Francisco, (City and County of San Francisco), William B. Acton and Irving F. Reichert, Jr., Asst. Dist. Attys., San Francisco, for respondent.

TRAYNOR, Justice.

Defendant was indicted for conspiracy to commit grand and petty theft and conspiracy to solicit for charitable purposes without a permit. Pen.Code, § 182; San Francisco Police Code, § 590. He appeals from the judgment of conviction entered on a jury verdict finding him guilty on both counts and from the order denying his mo-

tions for new trial and in arrest of judgment.

Defendant employed several solicitors to obtain money for a publicity campaign for blood donations for wounded members of the armed services. Introducing themselves as representatives of patriotic and veterans organizations, the solicitors telephoned thirty to fifty persons a day and asked for money to print newspaper advertisements, open a blood collection center, sponsor radio and television shows, buy blood, and provide cab fare for blood donors. In response to these calls, contributions totalling over $65,000 were made to defendant. He kept for his own use most of the money received.

On March 12, 1952, members of the San Francisco Police Department and the District Attorney's Office entered defendant's place of business, identified themselves, and showed the office manager a search warrant. She asked them to wait for defendant, but the investigator from the District Attorney's Office replied, "Well, while we are waiting here there is no use wasting the time, we will just start looking into things and getting them ready to take what we want." For five hours the investigator, the police and an assistant district attorney ransacked defendant's files, desks, and wastebaskets. The investigator testified: "We were looking around for evidence of the commission of the alleged crime * * * anything that showed the commission of the crime charged." They read letters, cards, and records, and, according to the investigator, seized "thousands; tens of thousands" of cards, letters, files, and other documents "that seemed relevant to the commisson of the crime." Over defendant's protests, they loaded the seized papers on a van and took them to the District Attorney's Office.

Upon the return of the warrant to the Municipal Court that issued it (see Pen. Code, § 1537), the court entered an order that the District Attorney could retain the seized property as evidence. Defendant contended that the warrant was void and made a motion to quash it. The motion was denied, and defendant then petitioned the Superior Court for a writ of mandamus directing the Municipal Court to return the seized property. In hearings on the motion the District Attorney and defendant's counsel thoroughly argued the question of the validity of the warrant and the legality of the search and seizure pursuant to it. The warrant placed no restrictions on the area to be searched or the things to be seized and was strikingly similar to the general warrant authorizing unlimited searches and seizures that was condemned when the right of privacy first received legal protection. See Huckle v. Money, 2 Wills K.B. 206, 207, 95 Eng.Rep. 768, 769 (1763); Entick v. Carrington, 19 Howell's State Trials 1029 (1765); Lasson, The History and Development of the Fourth Amendment to the United States Constitution, pp. 43–50. The court held that the warrant was void and that the search and seizure pursuant to it were illegal and entered a judgment quashing the warrant and ordering defendant's property returned to him. No appeal was taken and the judgment became final. The District Attorney returned the seized papers to defendant, but during the proceedings, and unknown to either the court or defendant, he had been making photostats of them. As soon as defendant learned of the photostats, he petitioned the Superior Court for a writ of mandamus directing their delivery to him. Although the record does not disclose the result of this proceeding, counsel agreed at oral argument that the court announced from the bench that it would deny the writ and asked that findings of fact and a formal judgment be prepared. Neither defendant nor the prosecution, however, prepared findings or a judgment, and no judgment was entered. At defendant's trial, the District Attorney offered the photostats in evidence to show the nature and extent of defendant's operations. Defendant's objections to their admission on the ground that they had been obtained by a flagrant abuse of the judicial process and in violation of his right to be secure against unreasonable searches and seizures were overruled.

[1, 2] Although findings of fact may not be necessary to support a denial of a petition for a writ of mandamus, see Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d

307, 328, 74 P.2d 761; Brownell v. Superior Court, 157 Cal. 703, 709, 109 P. 91; Matter of Danford, 157 Cal. 425, 430, 108 P. 322; In re Adoption of Pitcher, 103 Cal.App.2d 859, 864, 230 P.2d 449, the entry of a judgment is necessary to make it a final decision effectual for any purpose. Berri v. Superior Court, 43 Cal.2d 856, 279 P.2d 8; Phillips v. Phillips, 41 Cal.2d 869, 874, 264 P.2d 926; Southern Pac. R. Co. v. Willett, 216 Cal. 387, 390, 14 P.2d 526; Brownell v. Superior Court, 157 Cal. 703, 708, 109 P. 91; Crim v. Kessing, 89 Cal. 478, 489, 26 P. 1074; see State Board of Equalization of State of California v. Superior Court, 20 Cal.2d 467, 475, 127 P.2d 4. Thus, the second mandamus proceeding, not having been terminated by entry of a judgment, has no effect on the judgment in the first mandamus proceeding, and that judgment therefore stands as a binding determination that the warrant was void, that the search was illegal, and that defendant's papers were unlawfully seized. See Dillard v. McKnight, 34 Cal.2d 209, 214, 209 P.2d 387, 11 A.L.R. 2d 835; Krier v. Krier, 28 Cal.2d 841, 843, 172 P.2d 681; Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Steele v. United States, No. 2, 267 U.S. 505, 507, 45 S.Ct. 417, 69 L.Ed. 761; State ex rel. Campo v. Osborn, 126 Conn. 214, 218, 10 A.2d 687; State ex rel. Warren v. City of Miami, 153 Fla. 644, 649, 15 So.2d 449; People ex rel. Barclay v. West Chicago Park Com'rs, 308 Ill.App. 622, 629, 32 N.E.2d 323.

[3] Since the photostats are as much a product of the illegal search and seizure and are as tainted by it as the original papers themselves, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319, the deception practiced by the prosecution in this case cannot circumvent the rule adopted in People v. Cahan, Cal., 282 P.2d 905.

[4] The Attorney General contends, however, that the objection made by defendant at the time the photostats were offered in evidence came too late. He argues that if illegally seized evidence is to be excluded, the defendant should be required to present his objections in advance of trial by a motion to suppress. A preliminary motion of this kind was required by the United States Supreme Court when it announced the rule excluding illegally obtained evidence, Weeks v. United States, 232 U.S. 383, 396, 34 S.Ct. 341, 58 L.Ed. 652; see Segurola v. United States, 275 U.S. 106, 111–112, 48 S.Ct. 77, 72 L.Ed. 186,[1] and it has been justified on the ground that it avoids the necessity of interrupting the trial to determine the collateral issue of the admissibility of the evidence. If the motion was denied, however, the trial court was required to consider de novo an objection to introduction of the evidence at the trial, Gouled v. United States, 255 U.S. 298, 312–313, 41 S.Ct. 261, 65 L.Ed. 647; Amos v. United States, 255 U.S. 313, 316, 41 S.Ct. 266, 65 L.Ed. 654, and since the defendant was thus afforded two opportunities to litigate the issue of whether the evidence was admissible, the objective of avoiding an unnecessary interruption of the trial was largely defeated. Moreover, appellate review of the decision on the motion might be sought by either the prosecution or the defendant, see Essgee Co. of China v. United States, 262 U.S. 151, 152, 43 S.Ct. 514, 67 L.Ed. 917; United States v. Kirschenblatt, 2 Cir., 16 F.2d 202, 51 A.L.R. 416, even though defendant could raise the question again on appeal from the final judgment against him. In recent years therefore, the federal courts have modified the requirement by allowing the trial court to entertain the motion for the first time at the trial. Fed.Rules Crim.Proc. Rule 41(e), 18 U.S.C.A.; Panzich v. United States, 9 Cir., 285 F. 871, 872; United States v. Leiser, D.C., 16 F.R.D. 199, 200; United States v. Johnson, D.C., 76 F.Supp. 538, 542; see United States v. Asendio, 3 Cir., 171 F.2d 122, 125, and by affording

1. For similar requirements in state courts, see State v. Lock, 302 Mo. 400, 429–432, 259 S.W. 116; Dalton v. State, 230 Ind. 626, 632, 105 N.E.2d 509, 31 A.L.R.2d 1071; People v. Grod, 385 Ill. 584, 592, 53 N.E.2d 591; cf. Rickards v. State, 6 Terry 573, 585, 45 Del. 573, 585, 77 A. 2d 199.

appellate review in most cases[2] only on appeal from a final judgment of conviction. Cogen v. United States, 278 U.S. 221, 224, 49 S.Ct. 118, 73 L.Ed. 275; see United States v. Jeffers, 342 U.S. 48, 49, 72 S.Ct. 93, 96 L.Ed. 59; Lustig v. United States, 338 U.S. 74, 75, 80, 69 S.Ct. 1372, 93 L.Ed. 1819; McDonald v. United States, 335 U.S. 451, 453, 69 S.Ct. 191, 93 L.Ed. 153; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; Rent v. United States, 5 Cir., 209 F.2d 893; Janney v. United States, 4 Cir., 206 F.2d 601; Fraenkel, Recent Developments in the Federal Law of Searches and Seizures, 33 Iowa L.R. 472, 488–489; cf., United States v. Edmonds, D.C., 100 F. Supp. 862.

Ordinarily preliminary questions of fact that govern the admissibility of evidence are determined by the trial court when objection is made to the introduction of the evidence at the trial, and the experience of the federal courts indicates that there are no compelling reasons why an exception to the general rule should be made in the case of illegally obtained evidence. See Youman v. Commonwealth, 189 Ky. 152, 169–170, 224 S.W. 860, 13 A.L.R. 1303; Goodwin v. State, 148 Tenn. 682, 687, 257 S.W. 79; see also, 9 Wigmore on Evidence [3rd ed.] § 2550; McCormick on Evidence §§ 52, 53.) The issues involved will ordinarily be no more time consuming or complicated than those presented to the trial court when it must rule, for example, on the admissibility of confessions, business records, or evidence claimed to be privileged, or on the qualifications of expert or other witnesses. On the other hand, a requirement that a preliminary motion be made to suppress the evidence would inevitably result in delaying the criminal trial while the motion was being noticed, calendared, heard, argued, and determined.

The judgment and order are reversed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

The majority opinion rests entirely upon the exclusionary rule this day adopted by the majority in People v. Cahan, Cal., 282 P.2d 905.

The only material difference between the Cahan case and the present one is that in Cahan the illegality resulted from the absence of any warrant while in the present case a warrant was issued which was subsequently found to be technically defective. Here again the record contains abundant evidence to show the guilt of the defendant, see People v. Berger, Cal.App., 274 P.2d 514, and the trial court properly admitted all of the challenged evidence in accordance with the settled rule in this state prior to the decision in the Cahan case.

For the reasons stated in my dissent in People v. Cahan, Cal., 282 P.2d 905, I would affirm the judgment.

SHENK and EDMONDS, JJ., concur.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

2. For the instances in which the preliminary motion still is deemed a separate action and appealable as such, see Cogen v. United States, 278 U.S. 221, 225–226, 49 S.Ct. 118, 73 L.Ed. 275; Matthews v. Correa, 2 Cir., 135 F.2d 534; Cheng Wai v. United States, 2 Cir., 125 F.2d 915.

132 Cal.App.2d 473

Josie Elizabeth DE FALLA, a minor, by her Guardian ad litem, Paul M. De Falla, Plaintiff and Appellant,

v.

Preston TUTTLE, Mildred Maxwell Tuttle, Richard Sandoval, Saint Taribus Catholic Church, Defendants and Respondents.

Civ. No. 20649.

District Court of Appeal, Second District, Division 2, California.

April 21, 1955.

Rehearing Denied May 12, 1955.

Action arising out of automobile collision. From a judgment in favor of defendant after trial in Superior Court, Los Angeles County, before Frank G. Swain, J., without a jury, the plaintiff appealed. The District Court of Appeal, McComb, J., held that the plaintiff, who was only ten years of age, was not as matter of law incapable of being a "guest" within the meaning of the guest statute.

Affirmed.

1. Appeal and Error ⇐931(1)

An appellate court will view evidence in light most favorable to respondent.

2. Automobiles ⇐245(24)

In action arising out of automobile collision, it was question of fact for trial court whether ten-year-old plaintiff had voluntarily entered automobile in which she rode, so as to be within guest statute. Vehicle Code, § 403.

3. Automobiles ⇐244(20)

In action arising out of automobile collision, evidence sustained trial court's implied finding that ten-year-old plaintiff was of sufficient age and intelligence to know what she was doing, and voluntarily accepted invitation to ride in automobile, thereby becoming "guest" within guest statute. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Guest".

4. Automobiles ⇐245(24)

Girl who was ten years of age was not, as matter of law, incapable of being "guest" within meaning of guest statute. Vehicle Code, § 403.

M. C. Schrager, Los Angeles, for appellant.

Belcher, Kearney & Fargo, Lester E. Olson, Los Angeles, of counsel, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants in a trial before the court without a jury in an action to recover damages for personal injuries suffered in an automobile accident, plaintiff appeals.

[1] *Facts:*[1] On March 29, 1952, plaintiff, a child of 10 years of age, was injured in an automobile accident which occurred when the automobile in which she was riding and which was driven by defendant Mildred Tuttle, struck the rear end of a bus owned and operated by defendant Saint Taribus Catholic Church, and driven by defendant Sandoval.

The trial court found that (1) defendant Mildred Tuttle was negligent and her negligence was the sole and proximate cause of the accident, and (2) plaintiff was a guest at the time of the accident in the car driven by defendant Tuttle, and rendered judgment in favor of defendants.

The appeal is prosecuted solely as to the defendants Tuttle.

[2, 3] *Question: Does the evidence support the trial court's finding that plaintiff was a guest within the scope of section 403*[2] *of the Vehicle Code?*

Yes: The record discloses that plaintiff, a girl of 10 years of age, was enrolled in the

1. The evidence is viewed in the light most favorable to defendant (respondent) pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.

2. Section 403 of the Vehicle Code reads: "Liability for Personal Injury to or Death of 'Guest.' No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation

public schools of the City of Los Angeles. She was a member of a group of Camp Fire Girls, and as a part of the social program of this group for the month of March, 1952, there was arranged a series of Symphony Concerts for the days of March 1, 15 and 29, at thirty cents per concert. Transportation was to be by school bus.

Plaintiff took a copy of the program home and showed it to her parents. Her mother gave her consent to plaintiff's attending the concerts and signed a written permit for her to go by school bus. Plaintiff attended the concert March 1, 1952, being transported on a school bus. She also attended a concert on March 15, 1952, being transported in a station wagon owned by Mrs. Atwater. After the latter date plaintiff's parents learned that she had been transported in the station wagon and not in a school bus. They made no objection or complaint to this method of transportation.

On the day in question Mrs. Atwater found that more girls were waiting to ride in her car than there was room to accommodate, and she asked plaintiff if she would ride with Mrs. Tuttle. Plaintiff indicated to Mrs. Atwater that she wanted to ride with her girl friend Helen, who was already seated in the Atwater car. Mrs. Atwater asked Helen if she would ride in the other car; this Helen declined. Thereupon plaintiff entered the Tuttle car and rode in the back seat with the other children until the time of the accident.

Except for the desire to ride with Helen, plaintiff expressed to Mrs. Atwater no objection or disapproval of riding in the Tuttle car and nothing further relevant occurred until the accident in which plaintiff was injured.

The record further disclosed that plaintiff, her parents and other persons connected with the Blue Birds, Camp Fire and other girls' organizations had followed a definite pattern of conduct which was as follows:

Plaintiff had been active in the Blue Bird organization and later the Camp Fire Girls organization for a period of over two and one half years before the accident. During this time Mrs. Betty Atwater was her group leader for most of the period. Various group activities were held which required automobile transportation for the children. Mrs. Atwater furnished this sometimes; at other times plaintiff's father transported the girls at the request of Mrs. Atwater. On different occasions other parents volunteered their services. No specific or express authority or permission of the parents of the children was ordinarily required.

It is clear the foregoing evidence supports the trial court's finding that plaintiff was a guest in the Tuttle car at the time of the accident. Under the provisions of section 403 of the Vehicle Code, in the absence of evidence "intoxication or wilful misconduct", plaintiff did not have a cause of action against the defendants Tuttle.

It was a question of fact for the trial court to determine from the evidence whether plaintiff voluntarily entered the automobile and the evidence sustains the trial court's implied finding that plaintiff was of sufficient age and intelligence to know what she was doing, and voluntarily accepted the invitation to ride in the Tuttle car.

Rocha v. Hulen, 6 Cal.App.2d 245, 44 P.2d 478, relied on by plaintiff, is clearly inapplicable to the facts of the present case. In the Rocha case a five-year-old child was injured and was taken in an automobile without the child's consent and was thereafter injured. Clearly the child was an involuntary passenger and not a voluntary one. In the present case plaintiff was a voluntary guest in defendants' automobile.

In Ceikin v. Goldman, 5 Cal.App.2d 162, 42 P.2d 719; Rawlins v. Lory, 44 Cal.App.

> for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

2d 20, 111 P.2d 973; Mosconi v. Ryan, 94 Cal.App.2d 227, 210 P.2d 259; Fairman v. Mors, 55 Cal.App.2d 216, 130 P.2d 448, and Smith v. Fall River Joint Union High School, 118 Cal.App. 673, 5 P.2d 930, the children involved were of tender years, approximately the same age as that of plaintiff herein. The court in each instance assumed that under the facts they were capable of being voluntary guests within the meaning of section 403 of the Vehicle Code.

[4] It is thus apparent that because plaintiff was a child of only 10 years of age she was not, as a matter of law, incapable of being a guest within the meaning of the guest statute.

Affirmed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 539

Kathleen WINN, Plaintiff and Respondent,

v.

Jessie Yvonne FERGUSON and G. R. Ferguson, Defendants and Appellants.

Civ. 8542.

District Court of Appeal, Third District, California.

April 26, 1955.

Rehearing Denied May 13, 1955.

Hearing Denied June 23, 1955.

Action for injuries suffered by occupant in automobile accident. From a judgment of Superior Court, Placer County, Lowell L. Sparks, J., entered upon the verdict in favor of the occupant, driver appealed. The District Court of Appeal, Finley, J. pro tem., held that where a driver's attention was momentarily diverted so the driver failed to see a stop sign and was struck in the middle of an intersection, such driver was not guilty of wilful misconduct within automobile guest statute.

Reversed with directions.

1. Automobiles ⇐181(1), 246(9)

Where automobile driver was proceeding with care and just before entering an intersection her attention was diverted by her small child who was climbing about in automobile and driver failed to observe a stop sign and was struck in intersection by another automobile, driver was not guilty of "wilful misconduct" within automobile guest statute, and in guest's action against host it was error to instruct jury that guest could recover if jury found host guilty of wilful misconduct. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

2. Automobiles ⇐181(1)

A finding of wilful misconduct of automobile host cannot be predicated on mere inadvertence or even gross negligence. Vehicle Code, § 403.

3. Automobiles ⇐181(1)

Momentary inattention of automobile host is not such wilful misconduct as would enable guest to recover. Vehicle Code, § 403.

4. Appeal and Error ⇐1068(2)

In action by automobile occupant against driver where, under the facts, it was error to instruct jury that occupant could recover as a guest if the jury found the driver guilty of wilful misconduct, but the jury might have based their verdict for occupant on finding that she gave driver compensation for the ride and as a passenger she could recover for ordinary negligence, there was no means of determining which of two inconsistent theories was relied on by jury, and judgment on the verdict must be reversed. Vehicle Code, § 403.

5. Automobiles ⇐245(24)

Whether an automobile occupant has given compensation for a ride within guest statute is ordinarily for the trier of fact, however, where all facts lead to but one conclusion it is a question of law. Vehicle Code, § 403.

6. Automobiles ⇐181(2)

Where an automobile driver had previously arranged to attend religious services

with a friend and both the driver's and friend's automobiles were at hand, but because the driver's automobile was parked in a more accessible place that automobile was used, the friend had not given "compensation" within automobile guest statute and she was not entitled to recover for ordinary negligence. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

Fitzwilliam & Memering, Frances Newell Carr, Sacramento, for appellants.

J. Adrian Palmquist & George W. Hauer, Oakland, for respondent.

FINLEY, Justice pro tem.

This appeal is by defendants from a judgment entered upon the verdict of a jury awarding plaintiff $15,000 damages for personal injuries sustained by plaintiff in an intersection collision while she was riding in an automobile driven by appellant Jessie Ferguson with the knowledge and consent of its owner, G. R. Ferguson.

There are two points to be passed upon herein. The first: Was respondent a passenger or a guest in the automobile? The second: If respondent was a passenger was appellant Jessie Ferguson, the driver, guilty of actionable negligence, or if respondent was a guest was said driver guilty of wilful misconduct?

The collision occurred on a Saturday morning about 9:40 a. m. at the intersection of Fulton Avenue and El Camino Avenue on the outskirts of the city of Sacramento. The automobile in question was proceeding westerly on El Camino Avenue, approaching Fulton Avenue. Appellant Jessie Ferguson was driving and respondent was sitting alongside her in the front seat. Also in the front seat was the appellants' 21 months old child, and in the rear seat were respondent's two sons aged 10 years and 8 years, and also appellants' son aged about 4 years. Appellant driver had just shifted into high gear and was traveling between 10 to 25 miles per hour when her 21 months old son started climbing over the back of the front seat. Appellant's attention was attracted to this episode and while her attention was thus diverted she drove into the intersection without observing the stop sign. There her automobile was struck broadside on its right by another vehicle which had the right of way. Appellants' car was completely demolished and respondent rendered unconscious for approximately a week. The seriousness of respondent's injuries is not disputed. Neither is it contended that the amount of damages awarded is excessive. However, appellants maintain that respondent is barred from recovery by section 403 of the Vehicle Code, which provides:

> "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of said driver."

[1–4] We are in accord with appellants' theory that they are liable for respondent's injuries only if respondent gave "compensation" for the ride. There is no evidence from which it could sensibly be found that appellant Jessie Ferguson was guilty of wilful misconduct unless we are to pervert the plain meaning of the statute. It is one thing to leave questions of fact upon which reasonable minds might differ to the decision of a jury, but quite another where there is only one possible reasonable answer. Certainly the term "reasonable minds" would here lose all significance as a practical, ordinary and common sense measure of conduct were we to so far stray from reality as to hold that a mother's protective glance at her young child could be considered as wilful misconduct even at the time and place where the hazard was considerable. Courts have sometimes held that law is reason, which we take to mean reason according to the standards of ordinary people in everyday life. Although appellant turned her head to look at the child and disregarded or failed to see

the stop sign, there is no evidence that her inattention to her driving was more than momentary or that it was done or continued for any appreciable distance over the warning or protest of respondent as in the case of Frank v. Myers, 16 Cal.App.2d 16, 60 P.2d 144, upon which respondent relies. Appellant driver of the car did testify that respondent screamed "Stop" but this was apparently as they were about to be struck, as will be indicated by the following question and appellant's answer: "Q. The whole thing happened very fast? A. Yes. She screamed and then we got it." Neither were appellant's actions coupled with excessive speed and reckless driving as in Allen v. Robinson, 85 Cal.App.2d 617, 193 P.2d 498. It is admitted that prior to her momentary inattention to her driving appellant was proceeding slowly and in a cautious and careful manner. A finding of wilful misconduct cannot be predicated upon mere inadvertence or even gross negligence. It was, therefore, error to instruct the jury that respondent was entitled to recover if they found that appellant was guilty of wilful misconduct. It is true that the jury may not have so found but may have based the verdict on a finding that respondent had given "compensation" for the ride and could, therefore, recover upon a finding that appellant was negligent. "But we have no means of determining which theory prompted the jury to return its verdict" and the judgment must, therefore, be reversed. Wright v. Sniffin, 80 Cal.App.2d 358, 365, 181 P.2d 675.

[5] A further determination to be made is whether upon such reversal judgment should be directed in favor of appellants pursuant to section 629 of the Code of Civil Procedure. This depends upon whether from the whole of the evidence a verdict should have been directed in favor of appellants, as requested, or whether their motion for judgment notwithstanding the verdict should have been granted. Both such motions were made and denied. As already noted, the verdict in favor of respondent cannot be sustained on the count of the complaint based on the alleged wilful misconduct of the appellant. However, there was sufficient evidence to take the case to the jury on the issue of appellant's negligence if the facts would permit a finding that respondent "gave compensation" for the ride and that her status was that of a "passenger," and not a "guest." Therefore, the question is whether there was any evidence from which it could reasonably be deduced that respondent had given "compensation" for the ride within the meaning of section 403 of the Vehicle Code. Ordinarily, "It is for the trier of fact to determine whether the rider conferred a benefit or whether the ride was merely of a social nature." Follansbee v. Benzenberg, 122 Cal.App.2d 466, 471, 265 P.2d 183, 186. That is, it is for the jury to resolve any conflict in the evidence, or any reasonable inferences which may be drawn therefrom. Kruzie v. Sanders, 23 Cal.2d 237, 241–243, 143 P.2d 704; Roberts v. Craig, 124 Cal.App.2d 202, 211, 268 P.2d 500; Malloy v. Fong, 37 Cal.2d 356, 376–378, 232 P.2d 241. However, if the admitted facts can give rise to but one reasonable conclusion, the question as to whether or not "compensation" was given for the ride becomes one of law. Haney v. Takakura, 2 Cal.App.2d 1, 7–9, 37 P.2d 170, 38 P.2d 160; Druzanich v. Criley, 19 Cal.2d 439, 442–444, 122 P.2d 53; Henry v. Henson, Tex.Civ. App., 174 S.W.2d 270, 275; see also Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87, 10 A.L.R.2d 1351. After review of the entire record, we are satisfied that the latter rule obtains herein. There is no conflict in the following evidence.

[6] Appellant Jessie Ferguson and respondent are very close friends. Their husbands are cousins and grew up together in Roseville where appellants now live. Respondent's home is in the Town and Country area outside of the city of Sacramento. The two families visited each other frequently and appellant greatly admired and was impressed with respondent's way of life which she attributed in a large measure to her religious devotion. Due to the interest appellant expressed, respondent had taken her to at least two meetings of the Seventh Day Adventists in Roseville. However, appellant had never been to the church in Sacramento which respondent attended

regularly. On the day before the accident appellant told respondent she would like to accompany her to the religious services to which respondent was going in Sacramento on the following day. It was arranged that they would meet at respondent's home. Pursuant to this plan, appellant and her two children arrived at respondent's home shortly after nine o'clock on the morning of the accident. They immediately prepared to leave for Sacramento for the church services. Respondent intended to use her own automobile, but appellant suggested that it would be more convenient to use hers since is was in the driveway and would have to be moved before respondent could back out her car. Therefore, simply for convenience the parties used appellant's automobile instead of respondent's. Appellant did not induce respondent to attend church in order to accommodate her or introduce her to members of the congregation. Respondent planned to attend church, as was her weekly custom, regardless of whether or not appellant accompanied her. Respondent did not discommode herself for appellant's benefit. Disregarding the accident, respondent would not have conferred any benefit upon appellant nor suffered any detriment by riding in appellant's automobile instead of her own. In fact, respondent would have been spared the expense and trouble of furnishing her own transportation. It was she who was the recipient of appellant's extended social courtesy of providing the ride. Respondent did not give "compensation" therefor by permitting appellant to accompany her to the religious services. Respondent undoubtedly entertained the hope that by so doing appellant would be led to join her church and share the spiritual comforts which she derived therefrom. However, such personal satisfaction realized by respondent would not be the "giving of compensation" for the ride to appellant. Appellant's gaining peace of mind, happiness, or other intangible benefits by her possible acceptance of respondent's faith was not dependent upon respondent's riding in appellant's car, rather than her own. The same is true as to the consideration given by appellant to embracing the tenets of the Seventh Day Adventist Church in order to be able to later avail herself of its educational and training facilities for her then pre-school age children. Any such future benefits to appellant and her family were not to be acquired by her on condition that she drive respondent to the church services on the morning of the accident. To the contrary, respondent was prepared to drive her own automobile and did not do so merely because it was decided it would be easier to take appellant's. Respondent's acquiescence in appellant's suggestion to use her automobile did not amount to giving "compensation" for the ride. Respondent's act of permitting appellant to accompany her to church was not conditioned upon appellant's conveying her and her children thereto. Respondent was not dependent upon appellant for transportation and had no reason to offer or give appellant any compensation to take her to church. Respondent was willing and able to drive the party in her own vehicle. That she did not do so was merely for mutual convenience. The purposes of the trip would have been as readily accomplished if respondent's automobile had been used. Appellant did not drive her automobile in order to compensate respondent for allowing her to accompany her to church no matter what benefits she may have felt might be gained by becoming a member thereof. Appellant's motives in attending the services in no way influenced the perchance choice of vehicles. See Born v. Matzner's Estate, 159 Neb. 169, 65 N.W.2d 593, 598. Respondent's concurrence in appellant's request to accompany her was an incident of their social and friendly relations. Whose automobile was used for the trip was of no significance. Under such circumstances, there can be no support in law or reason for finding that respondent gave "compensation" for the ride. It was, therefore, erroneous to permit the jury to so find.

The judgment will therefore be reversed with directions to enter judgment for the appellant notwithstanding the verdict.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; CARTER, J., dissenting.

132 Cal.App.2d 564

ASSOCIATED INDEMNITY CORPORATION, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Gerald Pollinger, a minor, by his guardian ad litem, Elizabeth S. Ritchie, and Joseph Pollinger, trustee, Respondents.

Civ. 8759.

District Court of Appeal, Third District, California.

April 27, 1955.

Hearing Denied June 23, 1955.

Proceeding on a petition for review of an order of the Industrial Accident Commission. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that death benefits claimant had been a member in good faith of decedent's household and dependent upon him for support at time of decedent's death, notwithstanding fact that claimant's parents had not in any sense abandoned him or yielded legal parental control over him.

Award affirmed.

1. Workmen's Compensation ⇐1713, 1715

Whether claimant is dependent and degree of dependency are questions of fact for Industrial Accident Commission to determine. Labor Code, §§ 3502, 3503.

2. Workmen's Compensation ⇐1469

Evidence sustained finding that death benefits claimant had been a member in good faith of decedent's household and dependent upon him for support at time of decedent's death, notwithstanding fact that claimant's parents had not in any sense abandoned him or yielded legal parental control over him. Labor Code, § 3502.

Mullen & Filippi, San Francisco, for petitioner.

T. Groezinger, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

Elizabeth S. Ritchie filed an application with the respondent commission for adjustment of claim on behalf of herself and Gerald Pollinger, a minor, and grandson of Elizabeth. Both claimed as dependents of Sydney E. Braden who was accidentally killed in the course and scope of his employment. Petitioner, as insurance carrier for the employers, contested the claims upon the ground that neither applicant was a dependent of Braden. Respondent denied the application of Elizabeth and awarded a $7,000 death benefit to Gerald. Elizabeth has not sought a review, but petitioner seeks a review of the order granting the award to Gerald.

The facts are these: Gerald, who was 13 years of age at the time of Braden's death, was the son of Joseph and Elizabeth Pollinger, who at all times herein material resided in New Jersey. They had a family of four children, including Gerald; and Joseph was steadily employed, earning about $90 a week. Gerald from infancy had been afflicted with rheumatic fever and his health had been bad. Medical advice had been given that the climate of California, where his maternal grandmother Elizabeth resided, would be beneficial, and Elizabeth journeyed to New Jersey with the idea of bringing him to California. She had been living with Braden in meretricious relationship, which fact was unknown to Gerald and his parents until after Braden's death. She and Braden had publicly assumed the relationship of husband and wife. Both were unmarried. When Elizabeth returned from New Jersey she brought Gerald with her under an arrangement with his parents that he would stay with her for an indeterminate period, with the hope that the California climate would cure his affliction. While he was here he was to be supported by Elizabeth, and this for the reason that, although his parents could provide for him at the family home, yet they could not send money for his separate maintenance in California. Braden met them at the train and Elizabeth introduced him to Gerald as "your new grandfather". The two adults

continued their relationship up to the time that Braden was killed, and during that period Braden supported the three, although for some time Elizabeth was in receipt of a weekly disability indemnity on account of an industrial injury which she had suffered. She testified that Braden had been the sole support of Gerald for the year and a half which ensued between his arrival in California and the death of Braden; that Braden had turned over his weekly paycheck to her and she had paid all the bills, being able to save some money. Gerald was placed in school. His health condition improved, but no determination to return him to New Jersey had been arrived at when Braden died. Braden apparently lived on terms of affection with both Elizabeth and Gerald, spending considerable time with the minor when not working, buying him presents and giving him some spending money. Elizabeth estimated that Braden's support, which she stated to be the sole support of Gerald, consumed over $100 a month of Braden's money. Braden earned a little over $250 per month as a laborer on the farms. There is no claim that Gerald was in any wise aware of wrongful relations between Elizabeth and Braden and he apparently accepted his position in the new menage and was content with the arrangements. There was no hint in the record that Braden was dissatisfied with the situation or contemplated a change; and while the Pollingers both testified that Gerald's going to California with his grandmother did not constitute an abandonment of him by them and that their New Jersey home was open to receive him back, yet they gave no testimony that they contemplated any change so long as Elizabeth cared for Gerald and his health improved, which it did. They contributed nothing during the period of his absence to Gerald's support, save a dollar at his birthdays, although they corresponded regularly with him. Within a few months after Braden's death Gerald did return to the Pollinger home in New Jersey with his health much improved. It appears that an ultimate return was anticipated by the parents and the grandmother, although nothing definite was arranged about it.

[1, 2] Petitioner contends that the evidence does not support respondent's finding that Gerald was a dependent of Braden. In considering this contention we are governed by sections of the Labor Code. Section 3503 provides that: "No person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee, or unless the person bears to the employee" certain specified relationships, none of which apply to Gerald. This section does not require relationship by blood or marriage between the alleged dependent and the employee.

> "The two classifications here, one of persons who are in good faith members of the employee's family or household, and the other of persons having specific relations of kinship, are clearly used in the alternative, and are to be separately considered." Moore Shipbuilding Corp. v. Industrial Accident Comm., 185 Cal. 200, 206, 196 P. 257, 259, 13 A.L.R. 676; Federal Mutual Liability Ins. Co. v. Industrial Accident Comm., 187 Cal. 469, 474, 202 P. 664.

Whether the claimant is a dependent and the degree of dependency are alike questions of fact for the respondent commission to determine, for Section 3502 of the Labor Code provides:

> "In all other cases [that is, cases not governed by specified relationships], questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee."

Interpretative of the foregoing, it has been said that the power of the legislature to determine what classes of dependents shall come within the Workmen's Compensation Act is not measured by common-law rules of kinship, inheritance and liability for maintenance and support. Moore Shipbuilding Corp. v. Industrial Accident Comm., supra. Also it has been said that dependency does not mean absolute dependency for the necessities of life, but that

it is sufficient that the contributions of the workman are looked to for support and the maintenance of the dependent's accustomed mode of living. Larsen v. Industrial Accident Comm., 34 Cal.2d 772, 215 P.2d 16. The statute expressly declares that the death benefit must be computed on the rate of contributions at the time of the injury which causes the death. California Casualty Indemnity Exchange v. Industrial Accident Comm., 211 Cal. 218, 295 P. 34. We think that respondent commission was justified in finding that Braden had, in fact, established and was maintaining a household or family and that Gerald was a member in good faith thereof. In Moore Shipbuilding Corp v. Industrial Accident Comm., supra, the employee had been living in meretricious relations with the mother of the minor claimant. On the question of whether or not the minor was a member of the employee's household, the Supreme Court said, 185 Cal. at page 207, 196 P. at page 260: "There can be no doubt that Bauer, Mrs. Miller, and the little girl [Ida Miller] constituted a family or household. They were living together in all the interdependency and intimacy of man and wife and their legitimate offspring." In Federal Mutual Liability Ins. Co. v. Industrial Accident Comm., supra, 187 Cal. at pages 470, 474, 202 P. at page 665, while considering a relationship similar to that involved in the instant case, the Supreme Court said: "From that time Thompson and Mrs. Gnash lived together openly as husband and wife. Mrs. Gnash used the name 'Mrs. Thompson', and Bertha [her minor child] was called 'Bertha Thompson'. Thompson supported them entirely, giving the money to Mrs. Gnash, who bought what she wanted for Bertha. * * * We think the facts of the case at bar, as already brought out, show that the three people were living together as a family and were members of one household." The case last cited further held it to be clear from the wording of the act that the benefit of the statute does not depend upon legal liability for support and that, although the minor in that case, Bertha Gnash, had a father who was legally liable for her support, yet within the meaning of the act she was at the time the employee received the injury from which he died "already dependent upon him". Said the court: "[I]f she were in fact a dependent of Thompson, the effect of his death upon her is the same whether she had a father who was legally liable for her support or not. If she was in fact a dependent of Thompson, and was in good faith a member of his household, she was entitled to compensation, whether or not her father was living."

We are expressly required by Labor Code Section 3502, supra, to confine our considerations on the question of dependency to the date of the injury to Braden, for to construe the section otherwise "would be to give no effect to the words 'questions as to who are dependents' and 'the facts as they exist at the time of the injury to the employee.'" Granell v. Industrial Accident Comm., 25 Cal.2d 209, 214, 153 P.2d 358, 361.

Petitioner contends that the stay of Gerald in California was intended to be temporary and that in view of the existence of the family home maintained by his parents in New Jersey he could not, therefore, become a member of Braden's household. We think that, in view of the indefinite arrangements under which Gerald came to California with his grandmother, in view of the fact that he had been living in the home of the grandmother and Braden for a year and a half, in view of the further fact that there was no indication that these arrangements were to be terminated any time within the immediate future, and in view of the fact that, so far as the arrangements made be concerned, Gerald might have continued to reside in California for years had Braden lived, the commission was justified in holding that, notwithstanding the Pollinger home was in New Jersey, notwithstanding the willingness upon necessity of the Pollingers to have Gerald return there, and notwithstanding they had not in any sense abandoned him or yielded legal parental control over him had they wished to assert it, he was yet a member in good faith of Braden's household and dependent upon him for support at the time of Braden's death.

Petitioner contends further that, even if there was dependency, the record will not support the respondent's finding that Gerald was wholly dependent upon Braden. We cannot sustain the petitioner in this. At the time of Braden's death, Elizabeth was not working, and for quite some time prior thereto she had not been working, and the indemnity payments she had been receiving had ceased. When Braden was injured, therefore, and that is the pivotal date, he and he alone wholly supported the minor.

The award is affirmed.

SCHOTTKY and PEEK, JJ., concur.

132 Cal.App.2d 560

Elizabeth T. BALDWIN, Plaintiff and Appellant,

v.

Jennie DANIELS, James Harney, as Administrator with the will annexed of Shull H. Daniels, deceased, and Honorable Daniel R. Shoemaker, Judge of the Superior Court, Defendants and Respondents.

Civ. 8652.

District Court of Appeal, Third District, California.

April 27, 1955.

Action for equitable relief based upon extrinsic fraud in obtaining judgment. The Superior Court, Solano County, Harlow V. Greenwood, J., rendered judgment adverse to plaintiff, after entry of order sustaining demurrer to her amended complaint without leave to further amend, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that equitable relief from effect of judgment or decree can only be obtained on allegation and proof of extrinsic and collateral fraud, and alleged fact that claimed fraud was rooted in furtiveness did not justify pleading it as an ultimate fact.

Affirmed.

1. Judgment ⇐443(1)

Equitable relief from effect of judgment or decree can only be obtained on allegation and proof of extrinsic and collateral fraud.

2. Judgment ⇐460(4)

Alleged fact that claimed fraud, upon which prayer for equitable relief from effect of judgment was predicated, was rooted in furtiveness did not justify pleading it as an ultimate fact.

3. Pleading ⇐225(2)

Where leave to amend is asked and complaint is susceptible of amendment, refusal of such leave on sustaining demurrer to pleading is an abuse of discretion; but there is no hard and fast rule that leave to amend must be granted.

4. Pleading ⇐225(2)

Where plaintiff's pleading, in action for equitable relief based upon extrinsic fraud in obtaining judgment, was obviously defective, and such defect had been clearly pointed out before pleading was first amended as of course, but amended pleading made no attempt to cure defect, counsel's position being that fraud could be pleaded as an ultimate fact, and no request for leave to further amend was made or intimation given to trial court that plaintiff could amend to plead fraud specifically, it was not an abuse of discretion to sustain demurrer without leave to amend.

John P. Doran, San Francisco, for appellant.

Doyle & Clecak, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff below appeals from a judgment rendered after the entry of an order sustaining a demurrer to her amended complaint without leave to further amend. By her first complaint appellant alleged that

respondent Jennie Daniels was the widow of Shull H. Daniels, deceased, and that appellant brought the action as an heir of said decedent in behalf of herself and all other heirs; that "through extrinsic fraud" respondent and her codefendants caused to be entered a court decree adjudging Jennie Daniels to be the sole owner of real and personal property; "that the court decree and judgment mentioned * * * was and is void ab initio and altogether null. That it was and is the result of collusion, extra judicial and in violation of a trust and confidence." To this pleading a general demurrer was filed and the points and authorities appearing in the record here and filed in the court below in support of the demurrer specifically pointed out the obvious defects in the pleading. Respondents' counsel quoted the following from Scafidi v. Western Loan & Bldg. Co., 72 Cal.App. 2d 550, 553, 165 P.2d 260, 262:

> "* * * 'It is essential that the facts and circumstances which constitute the fraud should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called on to answer, and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'"

There was included in said points and authorities also the following from Meyer v. Selggio, 80 Cal.App.2d 161, 164, 181 P.2d 690, 692:

> "Allegations of fraud in general terms are merely allegations of conclusions of law, and present no issuable facts."

[1, 2] After service of the demurrer, appellant elected to amend as of course prior to the hearing of the demurrer. Her amended complaint repeated her first pleading in that it merely alleged fraud as a conclusion without any attempt to plead the facts constituting the claimed fraud. Honorable Daniel R. Shoemaker, Judge of the Superior Court in and for the City and County of San Francisco, had been named as a party defendant in the first pleading, but the pleading contained no allegations concerning him. In the amended complaint, however, it was alleged: "That no act of the Honorable Daniel R. Shoemaker, Judge of the Superior Court, defendant and conspirator herein, was or is a judicial act but that each and every act of the said Honorable Daniel R. Shoemaker, defendant, was and is a personal, private, unofficial act, not done pursuant to any law or in any purportedly legal way or manner, but clandestinely and furtively and as part of a common design with his fellow conspirators to encompass plaintiff in the prosecution and assertion and presentation of her legal rights in which design carried on like all conspirators under cover of darkness defendants did and do succeed all to the damage of plaintiff as aforesaid." It was further alleged: "That the purported decree and judgment in the first sentence of this fourth paragraph mentioned was and is only a purported decree and constituted a device fashioned by the Honorable Daniel R. Shoemaker, Judge of the Superior Court to effectuate the aim and intent of the said conspiracy, the said Honorable Daniel R. Shoemaker being one of the agents referred to as agents of Jennie Daniels, defendant, in the first sentence of paragraph three hereof." A reading of the pleading demonstrates that it presents the same fatal defects as were presented in the first pleading, notwithstanding that the pleader had been specifically advised of the nature of that defect. Again, a general demurrer was filed. This demurrer was supported by points and authorities, with numerous citations of decisions affirming and reaffirming the rule that fraud must be pleaded specifically, and the following was quoted from Huron College v. Yetter, 78 Cal.App.2d 145, 149, 177 P.2d 367, 370: "A veritable forest of authorities indicate that equitable relief from the effect of a judgment or decree may only be obtained upon allegations and proof of extrinsic and collateral fraud." Hammell v. Britton, 19 Cal.2d 72, at page 82, 119 P.2d 333, at page 338, was cited, in which decision the following appears: "It is elementary that in an action for equitable relief based upon extrinsic fraud in obtaining a judgment, the facts constituting

the fraud must be pleaded with particularity and specifically." Appellant's counsel responded by filing with the trial court a written reply to the points and authorities submitted in support of the demurrer. Therein no attempt was made to excuse the failure to specifically plead the claimed fraud, the position being taken that "fraud being rooted in furtiveness can be pleaded as an ultimate fact." No authorities were cited in support of this statement. The judgment of the trial court entered after it had ordered the demurrer to the amended complaint sustained without leave to amend recites: That the demurrer came on regularly for hearing, that demurring defendants appeared through counsel and that no appearance was made on behalf of plaintiff, she having submitted points and authorities.

[3] Usually, and particularly where leave to amend is asked, refusal of such leave on sustaining a demurrer to a pleading is an abuse of discretion where it appears that the complaint is susceptible of amendment. Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal.App.2d 796, 804, 167 P.2d 518. However, there is no hard and fast rule that leave to amend must be granted. The code specifically provides that where a demurrer is sustained, after a trial upon issues of law therein raised, leave to amend may (not must) be granted. The question on this appeal, therefore, is whether or not the order sustaining the demurrer without leave to amend constituted an abuse of discretion. Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 194 P.2d 775.

[4] We find no abuse of discretion in the trial court's action. No request for leave to further amend was made. Plaintiff's pleading was obviously defective and this defect had been clearly pointed out before the pleading was first amended as of course. The amended pleading not only made no attempt to cure the defect, but counsel's position was that fraud could be pleaded as an ultimate fact notwithstanding the "veritable forest of authorities" to the contrary. No intimation was given to the trial court that plaintiff could amend to plead fraud specifically or that if given leave to amend further she would have done so. Under these circumstances the ruling and judgment of the trial court ought to be sustained. Werner v. Hearst Publications, Inc., 65 Cal.App.2d 667, 673–674, 151 P.2d 308.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

132 Cal.App.2d 484

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

David FUENTES and Ronald Mack Lamberson, Defendants,

Ronald Mack Lamberson, Defendant and Appellant.

Cr. 5295.

District Court of Appeal, Second District, Division 3, California.

April 21, 1955.

Hearing Denied May 18, 1955.

Defendant was convicted of armed robbery. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment and denied new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that record on appeal from judgment of conviction for armed robbery was adequate to permit reviewing court to review cause and determine whether there was error and whether there had been a fair trial or a miscarriage of justice, even though parts of reporter's notes had been lost without fault of either party and record was composed in part of judge's notes.

Judgment affirmed.

1. Criminal Law ⇐1104(1)

Rules make no provision for a situation where compliance with rule requiring that reporter prepare transcript has become

impossible without fault of any party and where defendant has not chosen to appeal on agreed statement. Rules on Appeal, rule 35(b).

2. Criminal Law ⇐1189

Impossibility of procuring a reporter's transcript is not ground for new trial. West's Ann.Pen.Code, § 1181.

3. Criminal Law ⇐1104(6)

Defendant-appellant has burden of furnishing reviewing court with statement on appeal where transcription of reporter's notes cannot be had, and he has no right to a transcript prepared in a particular manner. Rules on Appeal, rules 35(b), 36(a, b).

4. Criminal Law ⇐1109(1)

Where record for appeal can be prepared in such a manner as to enable court to pass upon questions sought to be raised, no injustice is worked to appealing defendant even though verbatim record certified by official court reporter cannot be supplied. Rules on Appeal, rules 35(b), 36(a, b).

5. Criminal Law ⇐1109(1)

Inconsequential inaccuracies or omissions in a record cannot prejudice a party and defendant-appellant must show that there exists some consequential inaccuracy or omission. Rules on Appeal, rules 35(b), 36(a, b).

6. Criminal Law ⇐1144

Reviewing court, in case where part of reporter's notes had been lost without fault of either party, must presume that defendant had been accorded a fair trial and that judgment was valid, and presumption was buttressed by fact that trial judge had denied motion for new trial.

7. Criminal Law ⇐1141(2)

Defendant had burden in reviewing court of showing either prejudicial error in record or that record was so inadequate that he was unable to show such error.

8. Criminal Law ⇐1088(20)

Record on appeal from judgment of conviction for armed robbery was adequate to permit reviewing court to review cause and determine whether there was error and whether there had been a fair trial or a miscarriage of justice, even though parts of reporter's notes had been lost without fault of either party and record was composed in part of judge's notes. Rules on Appeal, rules 35(b), 36(a, b); West's Ann.Pen.Code, § 1181.

9. Robbery ⇐24(1)

Evidence sustained conviction for armed robbery.

10. Criminal Law ⇐673(4)

In prosecution of two defendants for armed robbery, testimony as to the conversation between appealing defendant's codefendant and an officer wherein officer referred to codefendant's "hype friends" was not error where word "hype" was stricken and jury was instructed not to consider testimony as against appealing defendant.

11. Witnesses ⇐269(12)

In prosecution for armed robbery, wherein defendant's wife testified to an alibi, cross-examination intended to show that wife's memory was faulty was not improper as beyond scope of direct examination.

12. Witnesses ⇐345(1)

In prosecution for armed robbery wherein a witness who had appeared beside defendant in police line-up testified that a victim, while purportedly identifying defendant, had pointed at witness, witness could be interrogated as whether he had been convicted of a felony. West's Ann. Code Civ.Proc. § 2051.

13. Witnesses ⇐345(1)

A witness may be impeached by the party against whom he is called by interrogation on cross-examination as to whether he has been convicted of a felony. West's Ann.Code Civ.Proc. § 2051.

14. Criminal Law ⇐1120(3)

Where original complaint in prosecution for armed robbery was not included in record, reviewing court could not predicate error upon its exclusion from evidence.

Ivan R. Wainer, Los Angeles, for appellant.

Edmund G. Brown, Atty Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Lamberson and Fuentes were convicted by a jury on two counts of armed robbery. Lamberson was also found by the jury to have suffered a prior conviction of robbery. Lamberson, referred to as defendant, appeals from the judgment and from the order denying his motion for a new trial.

Defendant's principal ground for reversal is that due to the loss of part of the reporter's notes covering some of the defense, he has been placed in a position where he cannot show "by the reports of the evidence" that the judgment appealed from has resulted in a miscarriage of justice.

The reporter's transcript on appeal consists of the evidence in chief of the prosecution, the testimony of defendant's wife on defense, the testimony of a witness for the defense on direct and part of her cross-examination, and a transcript of the judge's notes "as to a portion of the Reporter's notes, which have been lost."

The record shows that after the notice of appeal was filed proceedings were had for "Settlement of Statement on Appeal" at which the deputy district attorney who tried the case and the attorney who had represented defendant at the trial were present. At that hearing the trial judge stated that the reporter had misplaced or lost a notebook which contained a part of the testimony, "the latter portion of the testimony taken at the trial," and that he was unable to find it. The judge stated he had taken notes and had gone over them with the reporter and with both counsel; that the reporter had told him the notes coincided with his recollection and that the reporter "was unable to add anything to the narrative statement, other than a few words which he did add, by way of correction or addition"; that he had "gone through these notes with both counsel. They have both made suggestions to me regarding objections, rulings, and so forth, which we have all agreed upon and which I have added on this copy of the notes which were typed up from my handwritten notes"; that "The Court's notes were fairly complete in this case" and "I feel in this case all of the substance of the testimony is set forth in narrative form and all of the rulings are set forth, and I have gone through it with counsel, invited additions or corrections or deletions or anything counsel might suggest in an effort to secure an adequate and complete record"; that "There were no objections made by either counsel to the argument of the other."[1] On suggestion of counsel for

1. The judge further stated:

"I want the record to show that the Court's notes were made in narrative form, not in the form of questions and answers. The Court did not write shorthand but wrote longhand. My notes are not verbatim notes and do not purport to be, but merely are in narrative form showing the substance of the testimony. In some places where it was deemed important I took a few words verbatim, and in most cases when I took statements verbatim I put quotation marks before and after such statements and there are a number of such statements throughout these eight pages with quotation marks, and where those appear they are verbatim. They are not completely verbatim; the entire record is not verbatim, only those portions bearing quotation marks. For the most part, the notes are a narrative of what occurred, a narrative boiled down from both the questions and the answers. Sometimes the substance of the testimony is contained in a question which might be answered with a 'yes' or a 'no'. Other times a question might be very brief and the answer might be lengthy and the substance of the testimony would be found in the answer rather than in the question. But in all cases where no quotation marks appear it is a brief narrative giving the substance and the effect and the purport of the testimony. I have also noted certain objections, rulings, and since going over these further this morning with both counsel, I have added two other—that is in two other places I have added notations regarding rulings which all three of us recall, that is both counsel and the Court. And I think now that we have all of the rulings, or at least all of the rulings of any consequence, which occurred during this period of testimony which occurred and was reported in the notebook which has been lost by the reporter."

both parties a number of matters were added to the judge's notes.

Counsel for defendant objected to the settling of the record on the ground "it is impossible to present an adequate record on appeal based purely upon the memory of counsel and upon the notes that the Trial Judge was able to take at the time of the trial." The court then settled the notes and the additions as a partial statement on appeal to supplement the reporter's transcript. The trial judge has certified:

> [T]hat the objections made to the transcript herein have been held and allowed and the same is now corrected in accordance with such determination within the time allowed by law and the same is now therefore approved by me this *21st* day of *October, 1954.*

[1] Rule 35(b) of the Rules on Appeal provides, "The reporter shall prepare * * * the reporter's transcript * * * and shall append * * * a certificate that it is correct." Rule 36(a) provides, "The parties may present the appeal on an agreed statement" and rule 36(b) provides, "If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement in place thereof." The rules make no provision for a situation such as the present where literal compliance with rule 35(b) has become impossible without fault of any party and where the defendant-appellant has not chosen to appeal on an agreed statement.

[2–5] The impossibility of procuring a reporter's transcript is not a ground for granting a new trial. Pen.Code, § 1181. An appellant has no right to a transcript prepared in a particular manner. The burden of furnishing the reviewing court with a statement on appeal where a transcription of the reporter's notes cannot be had is on the appellant. People v. Chessman, 35 Cal.2d 455, 457–458, 218 P.2d 769, 772, 19 A.L.R.2d 1084. If a record can be " 'prepared in such a manner as to enable the court to pass upon the questions sought to be raised' ", then there is no rational likelihood or legally cognizable possibility of injustice to the appealing defendant even though a verbatim record certified by the official court reporter cannot be supplied. Idem, 35 Cal.2d at page 460, 218 P.2d at pages 771, 772. "Inconsequential inaccuracies or omissions in a record cannot prejudice a party; if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is consequential." Idem, 35 Cal.2d at page 462, 218 P.2d at page 773.

[6, 7] The trial judge has determined that the record is adequate. We may not presume that defendant did not have a fair trial because part of the reporter's notes had been lost without fault of either party. People v. Botkin, 9 Cal.App. 244, 249, 98 P. 861. On this appeal we must presume that defendant has been accorded a fair trial and that the judgment of conviction is valid. This presumption is buttressed by the fact that the trial judge denied defendant's motion for a new trial. The burden is on defendant of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error. People v. Chessman, supra, 35 Cal.2d 455, 462, 218 P.2d 769. No such showing is made in the case at bar.

[8, 9] Our examination of the record in the light of defendant's contentions discloses that it is adequate to permit this court to perform its function of reviewing the cause and determining whether there was error in the court below and, if so, whether such error requires reversal. The record is sufficient to enable us to ascertain whether there was a fair trial and whether there has been a miscarriage of justice. The record contains ample evidence to support the verdict. Defendant does not claim otherwise. His contentions are that the court erred with respect to various rulings made during the course of the trial.

As to count I, Mrs. Dolores Gallegos testified that defendant and Fuentes held her up and robbed her of about $100 in her grocery store on the night of Decem-

ber 30, 1953. She was positive of the identification. Defendant had a gun pointing at her.

As to count II, Mrs. Wilma Rice testified that defendant and Fuentes held her up and robbed her of about $547 in cash and checks in her place of business on the morning of January 8, 1954. She was positive of the identification. A Mr. Latchford who was present testified to the same effect. He also was positive as to the identification. Defendant forced his commands with a gun. There was evidence of admissions by defendant as to both offenses. The defense as to both counts was an alibi and error in identification.

[10] A police officer called by the People testified to a conversation with Fuentes and that another officer said to Fuentes: "All we want is to get the gun so that some of your friends, some of your hype friends won't get it and go out and pull some more robberies." Defendant and Fuentes were represented at the trial by the same attorney. On motion of defendant's counsel the word "hype" was stricken. Defendant asserts that the making of the statement by the officer was error. There was no error. The testimony of the officer was offered and received as against Fuentes only and the jury was instructed not to consider it at all as against defendant.

[11] It is contended that the court erred in permitting cross-examination of Mrs. Lamberson, wife of defendant, beyond the scope of the direct. Mrs. Lamberson, whose testimony in full is part of the reporter's transcript, testified on direct that defendant was in her presence and not at the scene of the robberies at all times during which they were committed. On cross she was asked numerous questions for the purpose of showing that her memory was faulty. Defendant does not point to any part of the cross-examination that went beyond the scope of the direct. We have examined the entire testimony of Mrs. Lamberson and find no error.

[12, 13] One Kobzeff was called as a witness by defendant. On direct he testified he was in a line-up at a police station, at which time Mrs. Gallegos and Mrs. Rice identified defendant and Fuentes as the robbers. He said he stood by defendant as Mrs. Gallegos said, "This is the one," and that it looked as if she pointed at him (Kobzeff). On cross Kobzeff was asked if he had been convicted of a felony. Defendant's objection was overruled. He answered that he had been. Defendant claims the ruling was error. There was no error. A witness may be impeached by the party against whom he is called by interrogation on cross-examination as to whether he had been convicted of a felony. Code Civ.Proc. § 2051; People v. Peete, 28 Cal. 2d 306, 321, 169 P.2d 924.

[14] Defendant offered the original complaint in the action in evidence. The People's objection to its reception was sustained. Defendant asserts error. Apparently the complaint was not marked for identification. It is not included in the record. There is no reason why, if it was marked for identification, it could not have been included in the record. In the absence of the complaint, its exclusion is no ground on which to predicate error.

The case is simply one in which the jury believed the witnesses for the prosecution and disbelieved the defendant and his witnesses. The claims of defendant are entirely without merit. There is no showing of prejudicial inadequacy in the content of the record or of prejudice in the record. We are of the opinion that defendant had a fair trial and that there was no error in the rulings of which defendant complains.

The judgment and the order denying a new trial are affirmed.

PARKER WOOD, Justice.

I concur.

SHINN, Presiding Justice (concurring).

I concur in the judgment upon the ground that the record discloses no miscarriage of justice. But I take this occasion to state my opinion that the inability of a defendant desiring to appeal to obtain a reporter's transcript should be made a ground for granting a new trial, as it is in

a civil case. It is far better that a defendant be re-tried than that the state should permit itself to be subject to the criticism that it has denied an appellant a fair and adequate record on appeal.

Hearing denied; CARTER, J., dissenting.

132 Cal.App.2d 522

In the Matter of the ESTATE OF William James BERTIE.

William James BERTIE, Jr., and Annie Bertie, Contestants and Appellants,

v.

Ann Marie NEWMAN, Proponent and Respondent.

Civ. 20549.

District Court of Appeal, Second District, Division 1, California.

April 25, 1955.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment adverse to son and widow of deceased testator, and they appealed. The District Court of Appeal, White, P. J., held that where there was no showing that court abused its discretion in appointing sole legatee and devisee, who was not related to deceased testator, but who had visited testator almost every day for a number of years, administratrix with will annexed rather than testator's son, District Court of Appeal would not substitute its opinion for that of the Superior Court.

Judgment affirmed.

1. Executors and Administrators ⇐21(2)

On appeal from judgment appointing administratrix with will annexed, it will not be presumed that trial court abused its discretion. Probate Code, §§ 409, 422, 422(10), 423, 425.

2. Executors and Administrators ⇐21(2)

In absence of proof of abuse of discretion on part of trial court in appointing administratrix with will annexed, and in absence of showing that such abuse has resulted in a miscarriage of justice, District Court of Appeal will not substitute its opinion for that of the trial court. Probate Code, §§ 409, 422, 422(10), 423, 425.

3. Executors and Administrators ⇐21(2)

Where there was no showing that court abused its discretion in appointing sole legatee and devisee, who was not related to deceased testator, but who had visited testator almost every day for a number of years, administratrix with will annexed rather than testator's son, District Court of Appeal would not substitute its opinion for that of the trial court. Probate Code, §§ 409, 422, 422(10), 423, 425.

Wallace & Wallace, W. W. Wallace, A. W. Wallace, Los Angeles, for appellants.

Albert G. Bergman, Los Angeles, for respondent.

WHITE, Presiding Justice.

The instant appeal was taken by decedent's son and wife from the judgment dated March 15, 1954, which overrules their contest of decedent's will and codicil presented for probate by Ann Marie Newman; admits to probate decedent's will dated February 23, 1949 and his codicil thereto dated October 3, 1952; appoints said Ann Marie Newman administratrix with the will annexed; revokes the order made on or about April 21, 1953, admitting to probate decedent's will of August 12, 1948 and appointing decedent's said son as administrator with the will annexed and revokes the letters of administration with the will annexed issued to said son thereunder; and provides that said Ann Marie Newman "recover from the contestants * * * her costs of contest herein incurred * * *".

The findings of the trial court discloses facts as follows: That at the time the will and codicil were made by decedent, he was about 75 years of age and "was of sound and disposing mind and not acting under duress, menace, fraud or undue influence and was in every respect competent

by last will to dispose of his estate". That appellants "are the only heirs at law of the said decedent". That for many years decedent was visited almost every day by Ann Marie Newman and part of the time he lived in the Newman home with said Ann Marie Newman, her husband and baby. That decedent did not become dependent upon said Ann Marie Newman and he neither asked for nor received from her advice or assistance in the handling of his business or the making of his will or codicil or in connection with his changes of residence. The court further found:

"That it is true that the above named proponent Ann Marie Newman is not related in any manner to decedent. That it is not true, as alleged, that she is not entitled to Letters of Administration with the Will Annexed of the said estate, or to succeed to any interest therein as an heir at law, or otherwise.

"The Court further finds in said respect that although the contestant, Annie Bertie is the widow of William James Bertie, deceased, and the contestant, William James Bertie, Jr., is the only son of William James Bertie, deceased, they were not by or under the terms or provisions of the Last Will and Testament of William James Bertie, deceased of February 23, 1949, and his Codicil thereto of October 3, 1952, entitled to succeed to his estate or any portion thereof, but that the proponent, Ann Marie Newman was and is the sole legatee and devisee thereunder and therein and that said Last Will and Testament and Codicil devised and bequeathed the entire estate of said decedent to said Ann Marie Newman, who is entitled to Letters of Administration with the Will Annexed of and in said estate."

Large portions of the briefs on this appeal consist of discussions of alleged "facts" outside the record. Although the trial before the court without a jury consumed seven days, the "Reporter's Transcript on Appeal—(Partial)" is only 41 pages, six of summation by the court at the end of the trial, and 35 of discussion of the law respecting the appointment of respondent as administratrix with the will annexed.

Appellants' Opening Brief "presents the following points supporting his contention that the judgment should be reversed.

"1. Annie Bertie was entitled to succeed to some portion of the estate, and therefore had the right to request that her son be appointed administrator.

"2. If Annie Bertie did not succeed to some portion of the estate of her deceased husband, then she was a creditor, and as a creditor had a right to letters herself or to nominate someone in her stead." A careful examination of the entire record on this appeal fails to disclose that Annie Bertie was or is entitled to succeed to any portion of decedent's estate. Likewise, the record before us contains no showing that Annie Bertie was or is a creditor of said estate.

The administration of the estate of a person dying intestate *must be granted* to persons of certain classes in a certain order, *"the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof"*. Probate Code, § 422. Administration *may be granted* to other competent persons at the written request of the person entitled to the same. Probate Code, § 423. "* * * Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators * * *." Probate Code, § 409.

Ignoring the "statement of facts" of appellants and respondent alike, in so far as such "facts" have no basis in the record on appeal, all of the parties to the appeal are of the same class under said section 422, expressed as "(10) Any person legally competent." "When there are several persons equally entitled to administer, the court may grant letters to one or more of them * * *." Probate Code, § 425.

"'The court is thus given an opportunity in such instances to exercise discretion in selecting its appointee.'" In re Estate of Selb, 93 Cal.App.2d 788, 792, 210 P.2d 45, 47. Therefore, the question for determination on this appeal is whether the trial court's appointment of respondent, instead of appellant, was an abuse of discretion.

[1–3] On appeal it will never be presumed that the trial court has abused its discretion. In the absence of proof of an abuse of discretion and a showing that such abuse has resulted in a miscarriage of justice, this court will not substitute its opinion for that of the trial court. In re Estate of Knowlton, 118 Cal.App.2d 374, 378, 257 P.2d 1031; Berry v. Chaplin, 74 Cal.App. 2d 669, 672, 169 P.2d 453. No such showing has been made by appellants in the instant appeal.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 525

Mary Anne ALVAREZ and Sidney C. Alvarez, Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES, a corporate body politic, Defendant and Appellant.

Civ. 20753.

District Court of Appeal, Second District, Division 1, California.

April 25, 1955.

Hearing Denied June 23, 1955.

Action against county by motorist for injuries sustained in automobile accident allegedly caused by defective condition of county road. From adverse judgment of the Superior Court, Los Angeles County, Samuel R. Blake, J., and from order denying a motion for judgment notwithstanding the verdict, the county appealed. The District Court of Appeal, Doran, J., held that evidence supported verdict of liability against the county.

Judgment and order denying motion for judgment notwithstanding the verdict, affirmed.

1. Appeal and Error ⇐1001(1)

Findings supported by substantial evidence will not be disturbed by reviewing court.

2. Automobiles ⇐306(4)

In action against county for injuries sustained by motorist in accident allegedly caused by defective condition of county road, verdict in favor of motorist was supported by adequate evidence. Government Code, § 53051.

3. Automobiles ⇐308(7)

In action against county for injuries sustained by motorist in automobile accident allegedly caused by defective condition of county road, which had been worked on by county day preceding accident, whether county had adequate notice of condition and danger and that work done by county aggravated the danger was a question of fact for the jury. Government Code, § 53051.

4. Automobiles ⇐308(11)

In action against county for injuries sustained by motorist in automobile accident allegedly caused by defective condition of county road, whether motorist was guilty of contributory negligence was a question for the jury. Government Code, § 53051.

5. Evidence ⇐145, 150

In action against county by motorist for injuries sustained in automobile accident allegedly caused by defective condition of county road, court did not abuse its discretion in excluding as to remote evidence as to tracks observed two days after the accident and tests made almost two years after the accident. Government Code, § 53051.

6. Trial ⇐251(1), 260(1)

Refusal of instructions on issues already covered by other instructions or unnecessary under the issues of the case does not constitute error.

7. Trial ⇐314(1)

While urging jury to arrive at verdict is ordinarily permissible, it should be done only where there is no danger of the court's urging jury to arrive at a particular verdict.

8. Trial ⇐314(1)

In action against county for injuries sustained by motorist in automobile accident allegedly caused by defective condition of county road, record did not disclose that jury was "coerced" by trial court into bringing in verdict of liability against county. Government Code, § 53051.

Harold W. Kennedy, County Counsel, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for appellant.

Goodstein, Moffitt & Weisman, Gerald L. Rosen, Los Angeles, for respondents.

DORAN, Justice.

After a trial by jury, plaintiffs recovered judgment for personal injuries alleged to have resulted from the maintenance of an unpaved gravel road known as 80th Street East, which road served as a means of access to a small number of ranches located to the northeast of the community of Lancaster in Antelope Valley.

The liability of the County was predicated on the Public Liability Act, Government Code, § 53051, making it incumbent to prove, (1) that the highway was in a dangerous or defective condition; (2) that the damages were proximately caused by such condition; (3) that the defendant had notice or knowledge of the dangerous condition; and (4) that having such knowledge, the defendant failed within a reasonable time, to remedy the condition, or to take such action as might be reasonably necessary to protect the public against such condition.

The section-line road in question had existed for many years, and in January, 1952, Mr. and Mrs. Alvarez purchased a ranch located at the intersection of 80th Street East and Avenue C. Mrs. Alvarez used 80th Street East in driving to and from the ranch on weekends, retaining employment as Assistant Superintendent of Nurses at St. John's Hospital in Santa Monica. There was evidence that the road was rough, "washboardy", and covered with loose gravel; that Mrs. Alvarez knew the road was rough, and that Mr. Alvarez had "cautioned me. He said, 'During the winter months, if you should come up, remember it is a rough road and slick' ".

On Friday, May 16, 1952, the road was dragged by the County Road Department as a part of its regular maintenance. On Saturday morning, May 17, 1952, Mrs. Alvarez, driving a 1951 Ford Sedan, proceeded towards the ranch on 80th Street East. Shortly before the accident plaintiff noticed gravel on the road, "and a considerable amount of rock with it or heavy gravel", and slowed down. The road then "appeared smooth again, and I continued on my way", at a speed of "about 25 or 30 miles an hour". Mrs. Alvarez then "saw another rough spot, * * * on the right-hand side of the road, and the thought in my mind was to avoid it and get into the middle of the road and my car just went out of control. * * * my car just seemed to lurch. * * * I remember a terrible crash. I remember also trying to keep my hands on the wheel and trying to right my car, but nothing I could do seemed to help it any". There was evidence that plaintiff's car skidded 146 feet down the road and off the road into a power pole 15 feet from the roadway.

A Mr. Rhodes, who lived in the vicinity and appeared on the scene immediately after the accident, testified that at this point there was a dip in the road some ten or twelve inches deep, with "four, or five inches, or six inches" of loose gravel in the bottom of it. This witness often drove over this road, and "the same thing nearly happened to me once myself, driving a pickup truck. I nearly lost control of it in the loose gravel after it had been dragged, the same as it had at this time".

There was evidence given by a Mr. Blake, a civil engineer, in response to a hypothetical question, that the methods employed in this case, "would not be quite in the usual safe procedure for maintaining such gravel roads". There was also evidence to the effect that loose gravel would apparently conglomerate in the dip after dragging, and that this loose gravel would disguise the magnitude of the dip. The skid marks or zig zag marks indicating that the car was out of control, appeared to begin at the dip.

It is appellant's contention that the verdict in favor of plaintiffs is not sustained by the evidence, and that the trial court improperly denied the defendant's motions for non-suit, directed verdict and for judgment notwithstanding the verdict. Appellant's brief concedes that on an appeal such as this, "the evidence most strongly favoring the respondent", must be considered. Appellant also affirms that "There is no dispute that the road was rough and was covered with loose gravel", but argues that

"The road had been maintained in a manner which was customary for the type of road involved", and that "The County is not an insurer of the safety of users of public highways".

[1, 2] A survey of the record indicates that there was the usual conflict of evidence in respect to the existence, size, condition, etc. of the road surface and the dip alleged to have caused plaintiff's accident. The defendant's theory that Mrs. Alvarez' excessive speed rather than a defective roadway was the proximate cause of the damage, was duly presented to the jury for its decision. These questions of fact, present in almost every case of this type, were resolved in favor of the plaintiffs. It cannot be said that there is not substantial evidence in support of this finding; such being the case, there can be no appellate interference. And certainly, since the verdict of liability finds adequate support in the evidence, it cannot be said that the trial court erred in denying motions for non-suit, directed verdict, and judgment notwithstanding the verdict.

It may be noted that the verdict and judgment herein do not subject a county to a "crushing burden", nor make the defendant an insurer of safety. The jury could well believe that with such a dip in the road, the dragging of loose gravel thereon might effectually mask and hide the depression resulting in a dangerous situation which was the real cause of the injury. Cases cited by appellant are not factually similar, and supply no ground for reversal.

[3, 4] Since the County had worked on the road on the day preceding plaintiff's accident, the jury might reasonably conclude that there was adequate notice of the condition and danger, and that the work done aggravated such danger. Nor does the evidence establish as a matter of law, that Mrs. Alvarez was guilty of contributory negligence; this also, was a question of fact for the jury to determine.

[5] The record fails to support appellant's contention that the County was precluded from introducing competent evidence in support of its defense. Certain evidence as to tracks observed two days after the accident was excluded as too remote; likewise tests made almost two years thereafter, were excluded. As respondents note, a trial court "has a wide discretion in this regard", and it does not appear that any abuse of that discretion occurred. Defendant's theory of the accident seems to have been fully presented to the jury.

[6] Nor can it be said that any prejudicial error occurred in reference to the giving or refusing of instructions to the jury. Such matters as the Public Liability Law, actual and constructive notice, etc., were adequately covered, and reading the instructions as a whole it is impossible to believe that the jury could have gained an erroneous concept of duty. Defendant's requested instructions which were refused, were either covered by other instructions given, or unnecessary under the issues of the case.

[7, 8] Appellant contends that the jury was "coerced" by the trial court into bringing in the verdict of liability. As conceded in appellant's brief, "a trial court must be given wide latitude in determining the length of time that jurors may be required to deliberate", and there appears to have been no abuse of this discretionary latitude. The jury deliberated some 15 hours, certain instructions were re-read; after being sent home over the weekend, a verdict of 10 to 2 was rendered in favor of plaintiffs. The present case is nowise similar to People v. Crowley, 101 Cal.App.2d 71, 224 P.2d 748, cited by appellant, where the trial judge clearly indicated a belief in the defendant's guilt and gave the jury half an hour to bring in a verdict. As appellant says, "While urging a jury to arrive at a verdict is ordinarily permissible, it should be done only where there is no danger of the court's urging the jury to arrive at a particular verdict". Nothing of that kind was present in the instant case, and no prejudice to appellant's rights is apparent either in respect to this matter or any other.

The judgment, and order denying a motion for judgment notwithstanding the verdict, are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 529

Alice M. ESTES, Plaintiff and Appellant,

v.

Harry M. SMITH and Claude Saunders, Defendants and Respondents.

Civ. 20436.

District Court of Appeal, Second District, Division 3, California.

April 26, 1955.

Hearing Denied June 23, 1955.

Action against riding academy for injuries sustained when plaintiff was thrown from horse. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that where plaintiff sought recovery on theories of negligence, breach of implied warranty, and known viciousness of horse, and instructions on first issues were long, complex and difficult to understand, failure to give instruction that theories were alternative and the giving of a short and clear formula instruction which related to last theory and which stated that plaintiff must prove that horse was mean, vicious and untrustworthy and that defendants had knowledge of this, was prejudicial error.

Judgment reversed.

1. Appeal and Error ⇐1063

Whether failure of formula instruction to contain all elements essential to recovery is prejudicial depends on whether jury is misled by instruction.

2. Appeal and Error ⇐1067

Livery Stable Keepers ⇐11

In action against riding academy for injuries sustained when plaintiff was thrown from horse, wherein plaintiff sought recovery on theories of negligence, breach of implied warranty, and known viciousness of horse, and instructions on first issues were long, complex and difficult to understand, failure to give instruction that theories were alternative and the giving of a short and clear formula instruction which related to last theory and which stated that plaintiff must prove that horse was mean, vicious or untrustworthy and that defendants had knowledge of this, was prejudicial error.

Eleanor V. Jackson, Los Angeles, for appellant.

Spray, Gould & Bowers and Robert E. Ford, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained when plaintiff was thrown from a horse which she had rented from El Rancho Stables, a riding academy that was owned by defendant Saunders and operated by defendant Smith.

The complaint alleged two causes of action. The first cause of action was based upon the alleged negligence of defendants in renting a horse to plaintiff which was not suitable for her to ride. The second cause of action was based upon the alleged breach of an implied warranty of fitness of the horse for the purpose for which it was rented. Defendants, in their answers, denied the allegations of negligence and breach of warranty, and as affirmative defenses they alleged that plaintiff was contributively negligent and that she assumed the risk "attendant" in horseback riding. At the beginning of the trial the court granted defendants' motion to file an amendment to their answers for the purpose of setting forth a purported release, signed by plaintiff, which allegedly released defendants from liability in the event of an accident. The court stated that the amendment should be in writing. It does not appear, however, from the record herein that such an amendment was filed. Trial was by jury and the verdict was for defendants. Plaintiff appeals from the judgment.

Appellant contends that the jury was not instructed properly.

Evidence on behalf of appellant was in substance as follows: About 8 a. m. on October 19, 1952, appellant and Mr. Frazier went to the El Rancho Stables, and Mr. Frazier asked defendant Smith for a certain horse which he had ridden on a previous occasion. He then told Smith that

appellant was not an experienced rider, and he asked him to give her a horse that she could handle. Appellant, who had rented a horse from the stables on a previous occasion, told Smith that she did not want the horse she had ridden previously because it was very difficult for her to handle. Smith then selected a horse named "Bull Dog," and said that it was "a good horse" and would give appellant a good ride if she would think for it. Appellant and Mr. Frazier signed a sheet of paper which was referred to as a "register." The sheet was attached to a board by means of a clamp which was at the top of the board. About 1½ inches below the top of the sheet there were printed words as follows: "I, the undersigned assume all responsibility for horse and equipment, and all liability. It is understood that the management is not liable in case of accident. I also agree to pay for damage to horse or equipment and special charge for overridden horse." Appellant testified that she did not see the printing on the paper, that it was not called to her attention, that the clamp or the paper was at an angle and the printing "was obscured." After appellant and Frazier left the stable, they rode along a trail which extended through a canyon to picnic grounds. Appellant took the lead because she was familiar with the surrounding country. As they started through the canyon, appellant began having difficulty controlling her horse. When riders passed her on the trail, the horse "would want to break loose and run." When she "held the horse in" it would snort and throw its head, and it worked up a tremendous sweat. She had great difficulty in directing the horse. When there were divisions in the trail, sometimes the horse would respond to the rein and sometimes it would not. When they were near the picnic grounds they decided to take the horses back to the stable because appellant could not control her horse. As she went around a curve, toward the return trail, her horse suddenly "broke loose," spun around, got between two trees which were about five feet from the path, and threw appellant into the trunk of a tree. Appellant's head struck the tree, and the next thing she remembered was that she was on the ground and covered with blood. The horse was about 25 feet away. Frazier told appellant that the only way they could get help would be for her to get on her horse and for them to return to the stables. They got on their horses, and Frazier rode in front in order to keep appellant's horse from breaking away, and they returned to the stables.

There was further evidence on behalf of plaintiff that on October 6, 1952, Norman Green, who was 17 years of age and had been riding horses about 7 years, went to the El Rancho Stables and rented Bull Dog from Smith. Smith told Norman that Bull Dog was "plenty horse and hard to ride." On that occasion the horse would not go across a bridge and some one from the stables led it across. It "wanted" to turn around, wanted to run, and was hard to hold back, and kicked at a horse. When Norman was returning to the stables the horse tried to throw him and then it ran into some "bamboo weeds." When Norman got the horse back to the stables he told Smith what had occurred and Smith stated that Bull Dog would not do that—he was a nice horse. Norman testified that he had rented horses from the El Rancho Stables about five times; that he signed a registration sheet each time but he had never seen the top part of it. When he signed the register on October 6, the top part of the sheet (referring to alleged release) was "either turned over or the clamp was there, or something was on it."

Evidence on behalf of defendants was in substance as follows: El Rancho Stables acquired Bull Dog in August, 1952. Prior to that time Bull Dog was owned by another stable and he was ridden by children of all ages. Defendant Smith, who then taught riding at that stable, used the horse in teaching classes of children—in one class there were 48 children ranging from 5 to 9 years of age. Bull Dog was also rented at said stable for trail riding, and no one complained that he was vicious or mean. Smith rode the horse about 40 times before it was sold to El Rancho, and during those rides the horse displayed no bad habits. After El Rancho acquired the horse, Smith received complaints from some riders that they did

not like to ride him because he was a "poor ride." Smith did not remember any complaints to the effect that Bull Dog was an ill-mannered horse and he did not remember any conversation with Norman concerning Bull Dog. On September 9, 1952, a girl 14 years of age, rode Bull Dog. She testified that he was not "real gentle" but that she had no trouble with him and he was easy to rein. Smith testfied that he did not know whether something obscured the printing at the top of the register when appellant signed it; he did not tell appellant that she would have to think for Bull Dog; when appellant and Frazier returned the horses to the stable both horses were sweating; appellant returned to the stables about two minutes after Frazier returned; Smith saw her approach the stables and at that time the horse was walking.

The court instructed the jury to the effect that if it found that defendants were negligent and their negligence was a proximate cause of injury to plaintiff, the plaintiff was entitled to a verdict unless she was guilty of negligence proximately contributing to the injury. It also gave an instruction that in a contract for hiring a horse for riding purposes there is an implied warranty that the horse is safe and suitable for the purpose for which it is hired, and the owner is liable for a breach of the warranty. It also gave an instruction to the effect that if injury is done by a vicious or dangerous animal, known to be vicious or dangerous by its owner, the owner is liable unless the injured person knowingly and voluntarily brought the injury upon herself; and that this principle does not require a finding that the owner was negligent.

[1, 2] Appellant contends that the court erred in refusing to instruct the jury that there were three separate theories of recovery on any or all of which a verdict could be based, which theories were as follows: (1) negligence of defendants in renting a horse to plaintiff which was not suitable for her; (2) breach of implied warranty of fitness of the horse for the purpose for which it was rented; and (3) liability on the ground that the horse was vicious and such fact was known to defendants. She concedes that the court gave proper instructions as to each of those theories, but she asserts the court erred in failing to instruct the jury that the theories were alternative theories, upon any or all of which a verdict could be based. Appellant requested an instruction which was to the effect that there were three theories of liability, those above-mentioned, and that appellant might recover on any one or all of them. She argues that, in view of the failure to give such an instruction, it was prejudicial error to give the following instruction: "In order for the plaintiff to recover against the defendants, the owner of the horse, Bulldog, she must prove by a preponderance of the evidence that the horse was a mean or vicious or untrustworthy animal and that defendants had knowledge or in the exercise of reasonable care should have had knowledge of such vices. If you do not find such to be true, from a preponderance of the evidence, it is your duty to return a verdict in favor of the defendants." Appellant argues that said instruction "cancelled" the instructions which were given on the theory of negligence and breach of warranty; that it stated in effect that the only theory upon which plaintiff could recover was that the horse was vicious or untrustworthy, and if the jury found that the horse was not vicious or untrustworthy the verdict must be for defendants. That instruction purported to state certain conditions or circumstances which were necessary in order for plaintiff to recover damages. It is the kind of instruction that is sometimes referred to as a formula instruction. In Douglas v. Southern Pacific Co., 203 Cal. 390, at page 393, 264 P. 237, at page 238, it was said: "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery * * *." In Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, at pages 169–170, 153 P.2d 338, at page 341, it was said that a certain instruction therein required the jury, under certain stated circumstances, to a return a verdict for appellant, and that it "therefore includes a formula and may be justified only if it contains all of the ele-

ments essential to a recovery [citations], and the absence of any one of the necessary elements may not be compensated for or cured by the fact that other instructions state the omitted factors required to sustain the verdict directed." The said instruction, in the present case, did not include any reference to the other two theories upon which plaintiff sought damages, namely, negligence and implied warranty. It is true that there were instructions regarding those other two theories, but there was no instruction that the three theories were alternative theories and that she could recover upon any one or all of those theories. The said instruction was not a complete statement of the law upon which a verdict in favor of plaintiff might be based under the different theories of the case. By that instruction the jury was told that plaintiff could not recover damages unless she proved by a preponderance of the evidence that the horse was mean or vicious or untrustworthy, and that the defendants knew or should have known that the horse had such habits; and that unless plaintiff made such proof the verdict must be for defendants. As stated in Warwick v. Maneely, 40 Cal. App.2d 235, at page 245, 104 P.2d 831, at page 836, "[T]he basic question in such a case is whether or not the jury may have been misled by the instruction." It was also said in that case, 40 Cal.App.2d at page 245, 104 P.2d at page 836: "A large number of instructions were here given, some of which are very lengthy. The one in question is short and concise and one which might easily attract the attention of, and be remembered by, the jury. Without qualification, the jurors were told that unless the defendants affirmatively established their defense of contributory negligence the verdict should be for the plaintiff. The instruction was express and not general, and a verdict for the plaintiff was directed upon one condition." In the present case there were 48 instructions. The instruction as to the issues to be determined with respect to negligence was long, complex, and difficult to understand. Four issues were referred to therein, namely, whether defendants were negligent, whether negligence of defendants was a proximate cause of injury, whether plaintiff was negligent, and whether negligence of plaintiff contributed proximately to her injury. After stating each of those issues there was a direction as to how the jury should proceed with respect to other issues, depending upon whether the previously referred to issues in that instruction had been answered in the affirmative or negative. As to the first and second issues, the direction was that if the jury answered in the negative the verdict should be for defendants, but if it answered in the affirmative then it should determine another issue. As to the third issue, the direction was that if the jury answered in the negative, after having found in favor of plaintiff on the two prior issues, the verdict should be for plaintiff, but if it answered in the affirmative then it must determine a fourth issue. As to the fourth issue, the direction was that if the jury answered in the affirmative the verdict should be for defendants, but if it answered in the negative and if it had found that negligence of defendants proximately caused the injury, the verdict should be for plaintiff. The so-called formula instruction herein was short and clear. Certainly, in comparison with said instruction on negligence, it could be more easily understood and applied. That instruction (formula) was not qualified so that the jury was advised therein that the other theories, upon which plaintiff sought recovery, must also be considered in determining whether plaintiff was entitled to a verdict. That instruction would tend to cause the jury to believe that plaintiff could not prevail unless the horse was vicious. In this respect it was erroneous. The jury could have found that the defendant agreed to furnish a horse that was gentle and easy to handle and that Bull Dog was not such a horse even though he was not mean or vicious or untrustworthy. It was prejudicial error to give that instruction.

By reason of the above conclusion, it is not necessary to discuss other contentions.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

132 Cal.App.2d 554

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Luke Patrick GUARINO, Defendant and Appellant.

Cr. 5266.

District Court of Appeal, Second District, Division 3, California.

April 27, 1955.

Hearing Denied May 25, 1955.

Defendant was convicted in the Superior Court, Los Angeles County, Mildred L. Lillie, J., for grand theft and burglarly, and from the judgment and an order denying a motion for new trial, he appealed. The District Court of Appeal, Shinn, P. J., held that defendant had been afforded a fair trial.

Affirmed.

1. Constitutional Law ⇐268

In order to constitute deprivation of due process, denial of right must have so fatally infected regularity of defendant's trial and his conviction as to have violated fundamental aspects of fairness and resulted in miscarriage of justice. West's Ann.Pen.Code, § 825; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

2. Criminal Law ⇐1166½(1)

On appeal from convictions for grand theft and burglary, record would not sustain defendant's contention that he had been prejudiced by 5 day refusal of officers to allow him to obtain counsel. West's Ann.Pen.Code, §§ 654, 825.

3. Criminal Law ⇐1166(1)

Absent showing that defendant had thereby been deprived of fair trial, mere fact that he had been held for seven days before being taken before magistrate would not require reversal of convictions for grand theft and burglary. West's Ann. Pen.Code, § 825.

4. Criminal Law ⇐1169(12)

Admission of testimony as to statements defendant had made to police with regard to his being "a master burglar" would not require reversal of convictions for grand theft and burglary, absent showing that such admissions had resulted from his confinement or because of deprivation of opportunity to obtain counsel. West's Ann.Pen.Code, §§ 654, 825.

5. Witnesses ⇐337(5)

It was proper to elicit on cross-examination fact that defendant had previously been convicted of felony.

6. Burglary ⇐2

Larceny ⇐1

The crime of burglary is complete on entering of building with intent to commit felony, though intended felony be not committed; and larceny is a separate act and involves unlawful asportation of personal property of another, with intent to deprive him thereof; and if larceny is actually perpetrated after the burglarious entry, second crime is committed. West's Ann.Pen.Code, § 654.

James O. Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Theodore S. Tabah, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Luke Patrick Guarino appeals from convictions of grand theft and burglarly and from an order denying his motion for a new trial. He was accused of having suffered three prior convictions, which he admitted.

It was alleged in the Information that on or about December 5, 1953, defendant unlawfully and feloniously entered a shop in the store of I. Magnin and took about $15,000 worth of jewelry from two showcases. Defendant was arrested on the evening of January 11, 1954, in the Mitchell Hotel, located in Los Angeles, and was booked at the Wilshire Police Station at about 4:00 a. m., January 12, 1954. His bail was fixed prior to the time he was arraigned before a magistrate on January 19, 1954.

The jewelry was taken from the cases of Laykin & Co., jewelers, on the main floor of the store. On December 5th at

6:30 p. m., Mr. Laykin, the owner, checked his three showcases and found them to be locked. He was the last one in his department to leave the building. On the following Monday morning, it was discovered that the showcases had been broken open. A gold ring was found on the bottom landing of the fire escape. This ring was identified by a tag as having come from the jewelry showcases. An inventory of the missing items was made and they were found to be of the value of $15,000.

According to officers' testimony, defendant Guarino was arrested on January 11, 1954, about 10:30 p. m. in his hotel, and was taken to his room for about 10 minutes and searched. At the time of the arrest a woman's diamond wristwatch was found in defendant's coat pocket, wrapped in a piece of tissue paper. It was subsequently identified by the serial number of the watch movement and the case as having come from Laykin's. Defendant also had about $1,200 in large bills in his possession. He gave a gold key watch and key holder to a friend, Shirley Johnson, shortly before Christmas, which she gave to the police and which were subsequently identified by Mr. Laykin by the watch movement number as having come from his store. Alice Rienhart, a salesgirl for Laykin, testified she waited on defendant on December 4th, shortly prior to the theft, and that she remembered his mannerisms, nervousness and speech, and noted a scar on his forehead. Mr. Bugel, the store night watchman, saw a man at about 7:10 p. m., December 5, 1953, standing on the porte cochere of the roof 8 or 9 feet away from him. The witness asked him what he was doing on the roof and the man answered "just investigating." He then fled. The witness later at the police station identified the voice of the defendant as the voice he had heard from a group of several men. He also identified the blue topcoat he had on.

Officer Carey testified that while enroute to the Hall of Justice for arraignment, defendant had stated, "* * * this is the kind of day I like to hit residences * * * all the cops are holed up drinking coffee * * *" and that defendant had said he was "* * * a master burglar"; that he had gambled and lost, but that he planned to get a woman jury and have them in the palm of his hands at the trial, and "Tell all your friends, and tell the newspapers * * * because I am going to put on a big show for you." Officers testified that at the time of the arrest defendant was questioned as to whether there was any more jewelry in his room and stated, "There is no use looking any further. There is no more jewelry in this room. * * * What are you worrying about more jewelry for? You have got the piece. That is enough." They further testified that at 11:30 p. m. the same evening, defendant was taken to the detectives' room of the Wilshire Police Station for further questioning. At about 2:00 a. m. he was taken to be booked, but when observed to be limping was taken to a Receiving Hospital where the examining physician advised him to obtain an elastic bandage and gave no other treatment. Defendant was booked at 4:00 a. m. January 12th.

Defendant testified he was abused while being questioned by the officers; the officers extended his legs until they rested on another chair and then sat on them three or four times with each incident lasting fifteen to twenty minutes, which caused him to limp; that one of the officers hit him with a "judo smack" on the back of his neck and one of the officers knocked him to the floor in his hotel room before he was taken to the station. He claimed Officer O'Mara hit him on the chest several times with his fist and another officer slapped him on the side of the face. The officers categorically denied these abuses. Defendant testified that the officers would not let him call his attorney or see an attorney for five days; that he was unable to make a telephone call or send a telegram during this period and that he was not taken before a magistrate until seven days after arrest, when bail was set. Although he had possession of stolen articles he claimed to have purchased them.

On appeal defendant claims he was prejudiced by the refusal of the arresting officers to permit him to obtain counsel; that

he was illegally detained for seven days before being taken before a magistrate as required by law (Pen.Code § 825), and that error was committed in the admission of certain prejudicial statements of his among which was one to the effect he was "* * * a master burglar." A further assignment of error is that a conviction of burglary and grand theft cannot be sustained since it would be a double punishment for one act or transaction in violation of section 654 of the Penal Code.

[1, 2] Appellant's first ground of appeal is that he was prejudiced by refusal of the officers to allow him to obtain counsel. He testified that he asked leave to call his attorney, but that he was refused permission. He testified that he was unable to see counsel for at least five days. Seven days elapsed before he was brought before a magistrate after his arrest. He claimed that one Johnny Gungus and one Mono Tepoes perpetrated the crime and that he wished to obtain counsel in order to locate such persons. At the arraignment and at all times during the trial defendant had competent counsel.

The due process clause of the Fourteenth Amendment of the Constitution and Article I, § 13, California Constitution, have been interpreted to guarantee the defendant the right to be represented by counsel in every stage of the proceedings; deprivation of this guarantee may be a violation of the due process clause of the Fourteenth Amendment. (14 Cal.Jur.2d 382, 383.) Section 825 of the Penal Code also provides that at any time after arrest any attorney may, at the request of the accused or his relatives, visit the prisoner. However, in order to constitute deprivation of due process the denial of the right must have so fatally infected the regularity of the appellant's trial and his conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166. In the Lisenba case, the court stated: "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial."

A similar question was presented in People v. Boyden, 116 Cal.App.2d 278, 253 P.2d 773, 778, where the accused was denied the right to obtain counsel, as here. The court said, citing People v. Stroble, 36 Cal.2d 615, 618, 226 P.2d 330: "'* * * it is not the function of this court to reverse a judgment solely as a rebuke to "law enforcement" officers for their own lawless acts, and improper administration of law, independent of the trial which resulted in that judgment.'" In the present case the conduct of the officers in refusing to allow accused to obtain counsel immediately was reprehensible and may not be condoned but it did not affect the fairness of the trial of the accused. He was ably represented by counsel, who had almost three months to prepare the case for trial.

[3] Appellant urges next that his being held for seven days before being taken before a magistrate violated the due process guarantees of the federal and state constitutions, and as such was prejudicial to his defense. Section 825 of the Penal Code requires that one placed under arrest must in all cases be taken before a magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays, but the violation of defendant's rights in this respect does not require a reversal. Defendant must show that through this wrongful conduct he was deprived of a fair trial.

In the Boyden case a similar situation was presented. Defendant there was held incommunicado from the time of his arrest, February 29th, until March 6th before being brought before a magistrate. There, as here, there was a complete lack of any admissions obtained during this period, use of which at the trial would have constituted a denial of due process or which would have prevented a fair trial.

In United States v. Mitchell, 322 U.S. 65, 70, 71, 64 S.Ct. 896, 88 L.Ed. 1140, it was held that holding the defendant for eight days before the arraignment did not render oral confessions made by him short-

ly after arrest inadmissible where the same were unrelated to the detention. And in People v. Zammora, 66 Cal.App.2d 166, 222, 224, 152 P.2d 180, where defendants were held in custody from four days to a week before they were arraigned, statements and admissions made within two days after the arrest were held admissible notwithstanding the wrongdoing of the officers.

[4, 5] A police officer testified that defendant had stated while in a police car enroute to the Hall of Justice for arraignment that "he was a master burglar * * * when he got out * * * would go back east and pull big safe jobs," and that defendant said: "Tell all your friends, and tell the newspapers, get all your friends up there, because I am going to put on a big show for you." Further the officer testified that he said: "I have been a burglar all my life * * * you know that." These and some similar statements were claimed to have been made by defendant long after his arrest but he does not claim that he made any admissions as a result of his confinement or because he was deprived of an opportunity to obtain counsel. On cross-examination defendant admitted his former convictions. He contends that error was committed in receiving evidence of his admissions to the officers and in his cross-examination. There is no merit in these contentions. No objection was made to the questions which elicited testimony of the alleged admissions and in fact the statements were no more damaging than those made upon the occasion of the arrest. It was proper to elicit on cross-examination the fact that defendant had previously been convicted of a felony.

[6] As the last assignment of error, it is contended that defendant has been subjected to double punishment. He cites People v. Logan, 41 Cal.2d 279, 260 P.2d 20, in which the court held that robbery and assault with a deadly weapon used in the commission of armed robbery constitute a single crime for which only one punishment could be inflicted. This holding is not in point. Defendant also cites section 654 of the Penal Code which prohibits double punishment for one act. It is contended that the theft was not a separate crime from the burglary. The point is without merit. The crime of burglary is complete on the entering of the building with intent to commit a felony, though the intended felony be not committed. Larceny is a separate act and involves the unlawful asportation of the personal property of another, with intent to deprive him thereof; and if a larceny is actually perpetrated after the burglarious entry a second crime is committed. 14 Cal.Jur.2d 287; People v. Devlin, 143 Cal. 128, 129, 76 P. 900; People v. White, 115 Cal.App.2d 828, 832, 253 P.2d 108.

Defendant was afforded a fair trial; there was no violation of due process and defendant's contentions are without validity.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 476

In the Matter of the ESTATE of Florence MacAlpine McAULIFFE, Deceased.

THE FIRST CHURCH OF CHRIST, SCIENTIST, OF BOSTON, MASSACHUSETTS, Petitioner and Appellant,

v.

FIRST TRUST AND SAVINGS BANK OF PASADENA, Trustee under the Will of Florence M. McAuliffe, Deceased,

Catherine Smith Pritchard, and Robert C. Kirkwood, State Controller, Respondents.

Civ. 20744.

District Court of Appeal, Second District, Division 2, California.
April 21, 1955.

Rehearing Denied May 17, 1955.
Hearing Denied June 16, 1955.

Proceeding in the matter of the estate of deceased testatrix. The Superior Court

of Los Angeles County, Kenneth C. Newell, J., entered orders determining residuary interest under will and overruling objections to inheritance tax report and fixing inheritance tax, and charity appealed. The District Court of Appeal, Fox, J., held that where will provided that all federal estate and state inheritance or estate taxes should be paid by executor, and that all expenses and taxes payable by reason of demise of testatrix should be paid by her estate and should not be chargeable to beneficiaries, case was taken out of proration provision of section of the Probate Code providing that when executor has paid federal estate tax on or with respect to any property required to be included in gross estate of decedent under provisions of any federal estate tax law, amount of tax so paid, except in case where testator otherwise directs, in his will or in specified cases, shall be equitably prorated among persons interest in the estate.

Orders affirmed.

1. Internal Revenue ⇐1743

No specific language or formula is necessary to take case out of proration provision of section of the Probate Code providing that when executor had paid federal estate tax on or with respect to any property required to be included in gross estate of decedent under provisions of any federal estate tax law, amount of tax so paid, except where testator otherwise directs in his will and in certain specified cases, shall be equitably prorated among persons interested in estate, and any language that clearly shows that testator does not intend proration is sufficient. Probate Code, § 970.

2. Internal Revenue ⇐1746

Testator's intention to be derived from language of will, if it is clear, is controlling factor in taking case out of proration provision of section of Probate Code providing that when executor had paid federal estate tax on or with respect to any property required to be included in gross estate of a decedent under provisions of any federal estate tax law, amount of tax so paid, except in case where testator otherwise directs in will or in specified cases, shall be equitably prorated among persons interested in estate. Probate Code, §§ 102, 970.

3. Evidence ⇐5(2)

It is common knowledge that funeral, and last illness expenses, administration and other expenses, are paid out of estate of deceased.

4. Wills ⇐462

Courts cannot re-write a will by reading into the will a qualification that is not therein stated.

5. Internal Revenue ⇐1746
Wills ⇐736

Where will provided that all federal estate and state inheritance or estate taxes should be paid by executor, and that all expenses and taxes payable by reason of demise of testatrix should be paid by her estate and should not be chargeable to beneficiaries, case was taken out of proration provision of section of the Probate Code providing that when executor has paid federal estate tax on or with respect to any property required to be included in gross estate of decedent under provisions of any federal estate tax law, amount of tax so paid, except in case where testator otherwise directs, in his will or in specified cases, shall be equitably prorated among persons interested in the estate. Probate Code, §§ 970, 972.

Lindstrom & Bartlett, Los Angeles, for appellant.

John Mellen, Los Angeles, for respondent Catherine Smith Pritchard.

Campbell, Smith & Campbell and William B. Etheridge, Pasadena, for respondent First Trust and Savings Bank of Pasadena.

James W. Hickey, San Francisco, Walter H. Miller, Myron Siedorf, Los Angeles, for respondent Robert C. Kirkwood, State Controller.

FOX, Justice.

This is an appeal by The First Church of Christ, Scientist, of Boston, Massachusetts, from two orders of the probate court: (1)

determining residuary interest under will and overruling objections to inheritance tax report; and (2) fixing inheritance tax.

Testatrix, a widow, made her will in May, 1952, and passed away the following October. She left surviving no children or lineal descendants. Her nearest relatives are two cousins. The will was probated in November, 1952. The estate was appraised at more than $500,000 and consists principally of cash and securities.

Paragraph First of testatrix' will reads as follows:

"*First:* I direct that my Executor hereinafter named, shall pay all my funeral and last illness expenses as soon after my demise as may be convenient, and all Federal estate and State inheritance or estate taxes, it being my direction that all expenses and taxes payable by reason of my demise, be paid by my estate and not chargeable to the beneficiaries."

By paragraph Fourth of her will testatrix incorporated therein specific bequests of household furniture, furnishings, jewelry, and wearing apparel to twelve designated persons. The total appraised value of these items is $3,605.40. Each has been distributed to the specific legatee and this appeal does not affect those gifts.

The other dispositive provisions of the will, by separately numbered paragraphs (seven through ten) give the remainder of her estate and property over which she had power of appointment to the following legatees in the proportions indicated:

Catherine Smith Pritchard, a friend,	one-eighth
The First Church of Christ, Scientist, in Boston, Massachusetts	one-eighth
First Church of Christ, Scientist, of Rochester, New York	one-eighth
First Trust and Savings Bank of Pasadena, in trust for N. R. Potter, Jr., a second cousin	five-eighths.

Federal estate tax in excess of $90,000 has been paid by the executor. This proceeding was brought to determine before final distribution the impact or ultimate thrust of death taxes.

In the orders appealed from the court found: "that by the provisions of said Testatrix' will she intended to and did provide that the Federal Estate Tax be paid by her estate and be not prorated among the beneficiaries; that the proportionate shares of the residuary beneficiaries in the residuary estate be determined and based on the residue remaining after the payment of Federal Estate Taxes; and that the Testatrix by her will provided that there be no proration of Federal Estate Taxes among the beneficiaries." As a consequence of this finding the court ordered "that the Federal Estate Tax, as the same may be finally determined, be paid by the Executor from said estate; that the residue of said estate distributable to the residuary beneficiaries be determined after deduction of Federal Estate Taxes; and that the Federal Estate Taxes shall not be prorated among the residuary beneficiaries."

Only one of the charitable beneficiaries has appealed from these orders.

The question here is: Was the trial court correct in holding that the testamentary direction "that all expenses and taxes payable by reason of my demise, be paid by my estate and not chargeable to the beneficiaries" fairly indicated an intention that taxes be paid from the estate and that they not be prorated or directly charged against the beneficiaries? The position of the trial court must be sustained.

[1, 2] Section 970 of the Probate Code provides that when an executor has paid a federal estate tax "upon or with respect to any property required to be included in the gross estate of a decedent" under the provisions of any federal estate tax law, the amount of the tax so paid, except in a case *where the testator otherwise directs* in his will (and except in specified cases not here material) "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." The problem here then is one of construction of paragraph First of the testatrix' will.

In other words, does the direction of the testatrix that "all expenses and taxes" that accrue because of her passing "be paid by my estate and not chargeable to the beneficiaries" present a situation "where a testator otherwise directs in his will" as to the payment of estate taxes so as to take the case out of the proration provision of section 970 of the Probate Code? To accomplish this result no specific language or formula is necessary. Any language that clearly shows that the testator does not intend proration is sufficient. In re Estate of Hotaling, 74 Cal.App.2d 898, 901, 170 P.2d 111. The intention of the testator is the controlling factor. Such intention must be derived "from the language of the will, where it is clear". In re Estate of Phelps, 182 Cal. 752, 756, 190 P. 17, 18; In re Estate of Watson, 32 Cal.App.2d 594, 598–599, 90 P.2d 349. There is also the legislative injunction that "The words of a will are to receive an interpretation which will give to every expression some effect * * *." Probate Code, § 102.

[3] With these principles in mind, we must now examine the language the testatrix used and ascertain what she meant by what she said. At the outset it will be observed that the testatrix placed "expenses *and* taxes" payable by reason of her passing in the same category. (Italics added.) This she was privileged to do. In re Estate of Atwell, 85 Cal.App.2d 454, 460, 193 P.2d 519. She thereupon directed that these items "be paid by my estate." She then adds, pointedly, that such payments are "not chargeable to the beneficiaries" under her will. The testatrix has thus given her executor a single direction with respect to expenses *and* taxes, and placed both on the same footing. The language she has used is simple, clear and specific. There can be no doubt about the testatrix' intention that her estate is to pay "all expenses and taxes" when she directs that these items "be paid by my estate." Then she proceeds to tell her executor that he is not only to pay these items but that they are not to be charged to the beneficiaries. That direction, too, is simple, clear and specific. Thus both expenses and taxes are to be paid by and charged to the estate under the testatrix' direction in her will. It is a matter of common knowledge that funeral and last illness expenses, administration and other expenses, are paid out of the estate. By placing death taxes in the same category, as "all expenses" and giving a single direction as to the payment and charging of all such items, the testatrix makes her intention clear that proration was not intended. She has *otherwise directed* within the meaning of section 970 of the Probate Code.

Appellant takes the position that the testatrix intended to direct that proration of taxes should not be applied to the beneficiaries of the 12 specific bequests, thereby shifting to the residue as a whole the burden of death taxes. It then argues that these taxes must be borne solely by the noncharitable residuary beneficiaries since the amount that goes to the charitable institutions is deducted from the estate in computing the tax. Hence the charitable bequests do not contribute in any way to the creation of such taxes but in fact serve to reduce the amount thereof.

[4, 5] This argument is fallacious for two reasons: (1) It attributes to the testatrix an intention which she did not express in the language she used in her will. It would mean the insertion of the word "specific" before the word "beneficiaries" in the testatrix' direction not to charge expenses and taxes to "the beneficiaries." This is not what she said in her will. She made no distinction between specific and residuary beneficiaries. She placed all beneficiaries in the same category, referring to them as "the beneficiaries." To read into this clear and unambiguous direction of the testatrix a qualification that is not therein stated would involve re-writing the will and frustrating the testatrix' expressed intent. This the courts cannot and will not do. Furthermore, appellant's position is negatived not alone by the direction of the testatrix not to charge taxes to "the beneficiaries" but by her further express direction that they should be paid by her estate. (2) Since the testatrix has unequivocally directed that the estate taxes should be paid from the estate and not chargeable to any beneficiaries as such, the proration provisions of section 970 are rendered inoperative. In

re Estate of Hotaling, 74 Cal.App.2d 898, 170 P.2d 111. In that case, the court stated, 74 Cal.App.2d at page 901, 170 P.2d at page 113: "The statute simply provides for proration 'except in a case where a testator otherwise directs in his will.' Any language fairly indicating that he does not intend proration would suffice, without further elaboration 'as to which legatees or devisees shall be charged', *for as long as it is clear that he 'otherwise directs', the tax burden will remain,* * * * *where it has always rested, i. e., on the corpus or residue.*" (Emphasis added.) This being so, the Inheritance Tax Appraiser was clearly correct in deducting the federal estate tax from the residuary estate before determining the residuary shares. In re Estate of Bauer, 59 Cal.App.2d 152, 159–160, 138 P.2d 717; Rogan v. Taylor, 9 Cir., 136 F.2d 598.

In re Estate of Bauer, supra, hearing denied, is squarely decisive of the issue here involved and provides a complete answer to appellant's contention that the entire tax should be paid from the share of the noncharity residuary beneficiaries alone. In the Bauer case, two-thirds of the residuary estate was to go to one individual and the remaining one-third to a tax-exempt charity. One of the questions on appeal was whether the federal estate tax was to be deducted before determining the amount of the distributable estate. There, as here, no proration statute was involved. The charity argued that inasmuch as its bequest was exempt from the federal estate tax and was not, therefore, a responsible cause of the estate tax imposed, the entire tax should be assessed on the individual's share. It argued that to deduct the tax out of the estate would have the practical effect of reducing its distributive share though it was an exempt institution and did not contribute to the imposition of the tax burden. This argument was rejected by the court, which held in accordance with the prevailing rule, absent an applicable proration statute, that the "federal estate tax is a charge against the whole estate, is in the nature of an expense of administration, and is one of the items to be deducted from the gross estate in determining the amount of the distributable estate." 59 Cal.App.2d at page 160, 138 P.2d at page 721. In the course of arriving at this holding, the court stated, 59 Cal.App.2d at pages 158–159, 138 P.2d at page 720: "* * * In the case of Young Men's Christian Association v. Davis, 1924, 264 U.S. 47, 44 S.Ct. 291, 68 L.Ed. 558, the residue of an estate, after specific bequests, was given to a charitable institution and the question was whether the estate tax should be paid from the specific bequests or from the residuary estate. The residuary legatees contended that since the tax was upon the net estate and since the charitable bequests were excluded from the net estate, Congress could not have intended that the tax should be paid out of the very gifts which, by federal statute, were excluded from the net estate and that the purpose of Congress was to exempt the charitable beneficiaries from the tax. The federal statute then under consideration, Revenue Act of 1918, 40 Stat. [at L.] 1057, 1096, was substantially the same as the present statute insofar as it related to the present question. The court stated, in an opinion by Chief Justice Taft, 264 U.S. at page 50, 44 S.Ct. at page 292, 68 L.Ed. at page 560: 'What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.' * * * 'Congress was thus looking at the subject from the standpoint of the testator, and not from the immediate point of view of the beneficiaries. It was intending to favor gifts for altruistic objects, not by specific *exemption* of those gifts, but by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him: "If you will make such gifts, we'll reduce your death duties and measure them not by your whole estate, but by that amount, less what you give."' * * * 'There is nothing in subdivision (3) of section 403 which *exempts* the recipients of altruistic gifts from taxation; it only requires a deduction of them in calculating the

amount of the estate which is to measure the tax. It exempts the estate from a tax on what is thus deducted * * *.' (Italics added.)" This states the law here applicable. The testatrix was obviously aware that the taxes here in question would be collectible from the share of the persons who received the bequests, and wishing to prevent the brunt of such taxes from falling on her relatives and friends alone, directed that the estate pay the taxes and that none of the beneficiaries be directly charged. The determination below is in exact accord with the testatrix' general and specific intent as disclosed by the scheme and language of her will.

Appellant makes reference to In re Estate of Buckhantz, 120 Cal.App.2d 92, 260 P.2d 794, 795. No claim is made that the Buckhantz case is decisive of the issue here involved, nor could such claim legitimately be advanced. In that case, all the property in which decedent had an interest belonged to the *community*. The will purported to dispose of all such property to various legatees, including the decedent's widow, sister and others, and required the widow to elect whether she would take under the will or under "'the rights * * * given her by law.'" The widow accepted the provisions of the will. The will made no provision or direction regarding payment of the federal estate tax. Upon appeal, the court affirmed an order directing the executor to exclude the widow's community interest in the estate from its computation when prorating the amount of the federal estate tax apportioned to the beneficiaries. The court noted that it would be paradoxical to require the widow to pay a tax on that property merely because she elected to receive it under the will rather than as her share of the community property, since only one-half of the community property was required to be included in the decedent's gross estate. In addition, the effect of the proration provisions of the Probate Code was there involved. The Buckhantz case holds that under the California proration statutes, estate taxes are apportioned only among those interested in the estate who receive property which has been included in the taxable estate, thus excluding from proration those whose bequests or devises have not been included in determining the amount of the tax. Such a rule is just, since proration statutes seek to achieve an equitable apportionment among those takers whose gifts create the tax thrust. This is the object reflected in section 972 of the Probate Code which reads: "*In making a proration* allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate." (Emphasis added.) But that is not the situation in the case at bar, since the testatrix has by direction in her will expressly precluded the application of the proration statutes and has designated the estate as the source of payment of the taxes. The court's function is to effectuate such direction against proration. In re Estate of Hotaling, supra. This the trial court has properly done. In re Estate of Bauer, supra.

Appellant relies on In re Bayne's Will, Sur., 102 N.Y.S.2d 525, In re Pratt's Estate, Sur., 123 N.Y.S.2d 425, and In re Campe's Estate, 205 Misc. 699, 129 N.Y.S.2d 362. None of these cases is helpful, for the direction by the testator in each was less comprehensive and less specific than in the instant matter. The direction in the above cases was simply that the taxes be paid out of the general or residuary estate. None of them has the further direction that such payments are "not chargeable to the beneficiaries." Appellant also relies on In re Pepper's Estate, 307 N.Y. 242, 120 N.E.2d 807. Paragraph Third of the will in that case, standing alone, doubtless contained a clear direction against apportionment of taxes, but when read in conjunction with other paragraphs there were apparent contradictions which created uncertainty and ambiguity relative to just what the will meant on the subject of taxes. No such situation is present in the instant case.

The orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

132 Cal.App.2d 545

Frances ESTRADA, Plaintiff and Respondent,

v.

Phillip GARCIA, Defendant and Appellant.

Civ. 20612.

District Court of Appeal, Second District, Division 1, California.

April 27, 1955.

Rehearing Denied May 23, 1955.

Hearing Denied June 23, 1955.

Action to obtain constructive trust in favor of plaintiff upon property to which defendant had record title and to obtain judicial declaration determining rights of parties under alleged oral agreement concerning purchase of such property. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, White, P. J., held that, where defendant's promise to purchase house for plaintiff was made in contemplation of marriage and upon understanding that he was to be relieved of obligations to support child which plaintiff had allegedly born him, constructive trust would be imposed against defendant to enable plaintiff to obtain the recognition of her beneficial interest in undivided one-half of house purchased by defendant title to which was in defendant's name, even though none of plaintiff's money went into the purchase price.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

Upon appeal, evidence must be considered most strongly in favor of the prevailing party.

2. Appeal and Error ⇐989

Upon appeal, reviewing tribunal will not attempt to weigh the evidence but will only determine whether there is evidence of sufficient substantiality, contradicted or not, to support trial court's conclusion.

3. Trusts ⇐95

The constructive trust rests upon fraud or wrongdoing, not parties' intention, and is, by equitable principles and operation of law, forced upon conscience of the trustee. West's Ann.Civ.Code, §§ 2217, 2223, 2224.

4. Trusts ⇐91

In creation of a constructive or involuntary trust, only conditions necessary are those set out in Civil Code provisions relating thereto. West's Ann.Civ.Code, §§ 2217, 2223, 2224.

5. Trusts ⇐95

Constructive trust, which is based upon fraud or wrong, is founded on principle that no one can take advantage of his own wrong and extends to practically any case where there is a wrongful acquisition or detention of property to which another is entitled. West's Ann.Civ.Code, §§ 2217, 2223, 2224.

6. Trusts ⇐362

Fact that parties were living in an unlawful relation would not affect validity of constructive trust imposed upon one party in favor of other, in view of fact that immoral relation was not made a consideration of and did not affect relative rights of parties to contract upon which trust was based.

7. Trusts ⇐99

Where defendant's promise to purchase house for plaintiff was made in contemplation of marriage and upon understanding that he was to be relieved of obligations to support child which plaintiff had allegedly borne him, constructive trust would be imposed against defendant to enable plaintiff to obtain the recognition of her beneficial interest in undivided one-half of house purchased by defendant title to which was in defendant's name, even though none of plaintiff's money went into the purchase price. West's Ann.Code Civ.Proc. §§ 1973, 2055; West's Ann.Civ.Code, §§ 852, 1091, 1624, 2217, 2223, 2224.

8. Trusts ⇐110

In proceeding to impress constructive trust in favor of plaintiff upon property to which defendant had record title and to obtain judicial declaration determining rights of parties under alleged oral contract pertaining to purchase of such party, evidence was sufficient to establish that parties had orally agreed that the property would be their home and belong to each

and that defendant would make all monthly payments thereon and pay taxes and upkeep in return for plaintiff's assumption of sole responsibility for cost of caring for parties' child. West's Ann.Civ.Code, §§ 2217, 2223, 2224.

Theodore E. Bowen, William Mayhew, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by defendant from a judgment that plaintiff is the beneficial owner of an undivided one-half interest in certain real property, the record legal title of which stands wholly in the name of defendant, and ordering that the latter convey an undivided one-half interest therein to plaintiff.

The complaint contains two causes of action, the first of which seeks to impress a trust in favor of plaintiff upon the property in question, while the second prays for a judicial declaration determining the rights of the respective parties under an oral agreement and contract pleaded in the first cause of action and concerning the property here in question.

In his answer defendant generally denied the allegations of plaintiff's complaint and also set up separate defenses that the complaint did not state a cause of action; that the contract and agreement as set forth in the complaint was oral and therefore in violation of the statute of frauds; that the defendant received no consideration for the oral agreement and contract alleged in the complaint, and that the plaintiff was guilty of laches and undue delay in filing her complaint.

The defendant filed a cross-complaint to quiet his title to said real property, and asked for a restitution of possession of the premises and damages for the withholding of possession, together with reasonable rent.

An answer to the cross-complaint was filed by plaintiff denying in substance the allegations of the cross-complaint and reasserting her claim to the real property as set forth in her complaint.

Trial before the court resulted in a judgment as aforesaid, from which defendant prosecutes this appeal.

As to the factual background surrounding this litigation, the record discloses the following to be a fair epitome of the testimony adduced at the trial.

Called as a witness under Section 2055 of the Code of Civil Procedure, defendant testified that he first became acquainted with plaintiff during the early part of 1947 at Los Angeles and that he kept company with her "on and off" from 1947 to 1951; that he kept company with her during the entire year of 1947, approximately six months in 1948, about nine months in 1949, eight months during the year 1950, and until March of 1951. That during the years 1947, 1948, 1949 and 1950 he had sexual relations with plaintiff. That in June, 1950 they became engaged to be married and at that time he told her that he "was going to buy her a G.I. home since I am a veteran and I am entitled to that, so we are going to move away from that district there and I was going to buy her a home for her and the baby and for all the family".

The defendant further admitted that when plaintiff became pregnant she told him that he was the father and that the baby was named "Johnnie" Garcia. The child was born August 20, 1948, and during this period of time he was going with the plaintiff. The defendant denied he was living on the premises where the plaintiff resided, but admitted that he came to the home most every day. The defendant stated he was going to buy her a G.I. home where she and the whole family could live; that they had been to visit several places at Compton during 1948 and 1949; that he had taken her to view different parcels of property after the child was born. "The kid was about 18 months old; the kid was born in 1948 and I purchased the property in 1950". The following testimony appears in the record:

"Q. By Mr. Marcus (attorney for plaintiff): And you knew the child?

A. Yes, I know him as Johnnie Garcia.

"Q. And you knew that she had stated to you that the child was yours? A. Yes, she did.

"Q. Do you remember when you moved her into premises with the baby? A. November 1950.

"Q. That was shortly after the property was purchased? A. Yes."

The defendant was shown the deed and escrow papers and admitted that he had received them; that the documents indicated that they were addressed to Phillip Garcia, 450 West 83rd Street, Los Angeles, California, which are the premises in litigation, although he denied that he lived there. He admitted he had directed the deed be mailed to him at the address of the premises. He admitted keeping his working clothes on the premises but denied ever sleeping there. He stated he placed the deed and papers in the rear house but since November or December of 1950 he had not seen them.

With reference to his intention to marry plaintiff the defendant testified,

"Q. You never talked to her about getting married? A. Yes, but it was going to be in June.

"Q. June? A. June of 1951."

With reference to the deed to the property here in question, defendant testified that plaintiff was "saving the documents until (they) were married". That in March, 1951 he terminated his engagement to marry plaintiff and on June 30, 1952 was married to another woman. That he made no payments for the support of the child.

As a witness in her own behalf, plaintiff testified substantially, as did defendant, concerning their relations with each other up to the time of the termination thereof. That she became pregnant with child from defendant in December, 1947, and the child was born August 20, 1948. That she continued to have sexual relations with defendant and that he purchased clothing, a crib, highchair and a play pen for the child. That defendant stated to her "he was going to buy me a home and right after that we were to be married and the house was to be mine." That on several occasions they went to look for a home in the Compton area. That when he purchased the house here in issue he told her, "Honey, this is the home. This is your home. This is what you wanted, a three bedroom house." He stated "the house was mine".

On September 17, 1950, the date of her birthday, he gave her a ring at their engagement party. Then they started to look for a home. She went to see the house before they moved into it. After she moved into the house he handed her the deed and said, *"This is yours" and he said he was not to give support for the child but the house was the means for the support of the child "and I could stay there all the time". On that occasion "he gave me all the papers. I had them all; the house deed, the insurance," and the escrow papers.* (Emphasis added.)

That at that time he was living with her on the premises. At the time he handed her the deed he stated *"That the house was mine and that he could not give me any support for the child because he had to pay for the payments on the house".* (Emphasis added.)

She testified that she and the defendant occupied the front bedroom and he continued to live there until March of 1951. At that time they had an argument, and "he just said he was through and he wanted the engagement ring back, and I gave it back to him". He then moved from the premises. He continued to make the payments on the house. He gave her no money for the support of the child. She was employed and continued to work and support the child. In November of 1952 he returned to the house, played with the baby and handed her a paper.

Plaintiff further testified that she was employed continuously for the preceding three years and had supported herself and the child.

On cross-examination plaintiff admitted she did not know she had any claim on the property until after service upon her of a notice to quit the premises, and when she consulted with a lawyer. That on August

25, 1952, before receiving the notice to quit she wrote a letter to defendant wherein she made no claim of any interest in the property, but stated, "So I'm doing my packing so I can find a house. So as soon as I get out I let you no. So I thank you very much for everything."

Called as a witness in his own behalf, defendant contradicted most of the testimony given by plaintiff with reference to the acquisition of the property. He denied any conversation with her concerning the purchase of the property in question, and particularly denied that he had ever delivered the deed or escrow papers to her. In this regard he testified as follows:

"Q. Is it not a fact that when the deeds arrived at the house at 450 West 83rd Street you were there? A. Yes, I was there working.

"Q. And you received this deed and the other documents, now marked Exhibit 2? A. Yes.

"Q. At that time did you hand those papers and the deed to your intended wife, the plaintiff in this action? A. No, I didn't.

"Q. Did you take the papers with you? A. No, I took them to the back house. The back house was furnished, and I left them there.

"Q. At that time did you tell her, 'Here is the property and the deed to the premises; I am giving them to you for the baby and yourself?' A. No, I didn't.

"Q. This document has been in her possession, has it not, ever since the date it was sent through the mails until the hearing in the Municipal Court case? A. No, it hasn't. It was in the back house."

The evidence reflects that the property in question was purchased for the sum of $8,900, with $3,500 as a down payment and deferred payments of $55 per month. It is unquestioned that the money involved in the purchase and monthly payments belonged to defendant who was earning about $66 per week gross, with a weekly "take home" of approximately $49. At the time defendant first met plaintiff she was working as a seamstress earning from $60 to $70 per week, out of which she was supporting herself and her three children.

Dora Dominguez, generally corroborated the testimony of plaintiff as to her keeping company with defendant from 1947 to 1951; the birth of the child and defendant sleeping on the premises, the engagement of plaintiff to defendant, termination of the engagement and the returning of the engagement ring. The witness testified that on numerous occasions she heard defendant state to plaintiff, "Now, we are happy here. We have got a home. And this home is yours. He always did say that in front of us all the time." Interrogated by the court as to these conversations with defendant concerning the house, the witness replied, "Well he always did say that in front of us, that the house was for Frances, that he had bought it for her. He told us a lot of times."

Based on the foregoing testimony the court made findings here under attack, as follows:

"II

"The court finds that for a period of years, embracing a considerable time before the birth of said child and a few years thereafter, the plaintiff and defendant lived and resided together as husband and wife, although not living together in the same household continuously, and that the plaintiff and defendant orally agreed, while participating in said relationship, that they would be married and would purchase the property hereinafter described, said property to be their home, and that said property would belong to both of said parties, it being further agreed that the defendant would make all monthly payments when due on the property, pay the taxes, upkeep and maintenance thereon, and that the plaintiff and minor child would reside thereon and have possession thereof, and that the defendant, to whatever extent he might choose to abide on the place, would have possession jointly with the plaintiff and said child, it being further agreed between

the parties that the payments on the purchase price and for the upkeep and maintenance of said property, together with payments for taxes, would constitute defendant's contribution toward the support of said child; that the defendant would not be required to make any separate or other payments for said child, and that all of the remainder of the cost of caring for said child would be borne by the plaintiff, who was throughout nearly all the times herein mentioned gainfully employed.

"III

"The court further finds that said property was purchased by the defendant pursuant to said agreement and that, without the knowledge or consent of plaintiff, title to said property was taken by defendant in his own name only.

"VI

"The court finds that on or about the 1st day of December, 1950, the defendant delivered to the plaintiff the grant deed that he had received to said property, pretending in so doing, and with the intent of causing her to believe, that the title to said property was vested in her. That the plaintiff was not proficient in reading the English language and had no understanding concerning the delivery of title to said property to defendant or to her, and believed at the time the defendant delivered said original deed to her that the title had been vested in her name and that she was the owner of a half interest therein; that she had no knowledge concerning the necessity for the execution of any further deed or document in order to convey such an interest to her; that she accepted the said document in good faith and belief upon her confidence in the honesty of the defendant in so delivering said deed to her and upon his representations that she was the owner of an interest in said real property.

"VIII

"The court further finds that because of said oral agreement and the said representation made to plaintiff by defendant and because of her reliance on said agreeement and said representations, the plaintiff, Frances Estrada, has maintained and supported said minor child since his birth, and does now continue to support and maintain him, all at her own expense and by her own gainful employment, without having made any demand upon the defendant for any contribution toward such support, except only that he perform the obligations undertaken by him in said oral agreement."

[1, 2] The sole ground urged by appellant for reversal of the judgment is that the foregoing findings are not sustained by the evidence. He concedes that in an appeal on the ground here urged the evidence must be considered most strongly in favor of the prevailing party. That an appellate tribunal will not attempt to weigh the evidence and that our duty begins and ends with a determination of whether there is in the record evidence of sufficient substantiality, contradicted or uncontradicted, to support the conclusion reached in the trial court, and that it must be made clearly to appear that upon no reasonable hypothesis whatever is there sufficient substantial evidence to sustain that conclusion.

[3–7] However, appellant insists that viewed in the light of the foregoing rules, the facts here established lack some of the elements essential to impress a trust upon the real property involved, purchased by appellant with his own funds and standing in his own name. It is first contended that the agreement being an oral one, the transfer of the real property thereunder is forbidden by the Statute of Frauds, Civil Code, §§ 1091, 1624, 852; Code Civ.Proc. § 1973. But here, the constructive trust rests upon fraud or wrongdoing, and trusts of this nature are not primarily based on the intention of the parties, but by equitable principles and operation of law are forced on the conscience of the trustee. In the creation of a constructive or involuntary trust, as defined by Section 2224 of the Civil Code, the only conditions necessary are those stated in that section. Conceding that some facts essential to a resulting

trust, as that term is usually applied, are lacking in the case at bar, the facts shown in the record before us are amply sufficient, under long recognized equitable principles to establish that form of constructive trust based upon fraud or wrongdoing. Founded on the principle that no one may take advantage of his own wrong, the rule just enunciated extends to practically any case where there is a wrongful acquisition or detention of property to which another is entitled. Rankin v. Satir, 75 Cal.App.2d 691, 694, 695, 171 P.2d 78; Civil Code, §§ 2217, 2223, 2224; Blair v. Mahon, 104 Cal. App.2d 44, 49, 50, 230 P.2d 832; West v. Stainback, 108 Cal.App.2d 806, 809, 810, 240 P.2d 366. And the fact that the parties hereto were living in an unlawful relation did not affect the validity of the trust since such immoral relation was not made a consideration and in no way affected the relative rights of the parties to the contract. Here, the evidence clearly shows that the promise to purchase the property by appellant for respondent was made in contemplation of marriage and in further consideration that appellant be relieved, which he was, of his obligation to support his child. Trutalli v. Meraviglia, 215 Cal. 698, 700, 701, 12 P.2d 430. On the facts shown in the record before us it would be unconscionable for a court of equity to refuse relief to respondent. While it is true, as claimed by appellant, none of respondent's money at the time of purchase went into the purchase price, there is evidence that a part of the consideration for appellant's promise was, as heretofore pointed out, the assumption by her of appellant's bounden duty to support their child.

[8] Appellant's challenge to the sufficiency of the evidence to support the findings heretofore set forth is answered by what we have herein set forth based upon a review of the evidence. Appellant earnestly insists that the finding that he purchased the property pursuant to an oral agreement is totally bereft of evidence to sustain it. Without here repeating the evidence, suffice it to say that the preceding factual narrative contains much evidence to reasonably warrant the inference that the property was purchased by appellant pursuant to an oral agreement with respondent that they would be married; that the property would be their home, and belong to both of them. That appellant would make all monthly payments on the property, pay the taxes and upkeep, and that respondent's contribution toward the purchase of the property was her agreement to assume sole responsibility for the cost of caring for the child. That when the property was purchased, appellant delivered to respondent the deed hereto who, relying upon her confidence in appellant's honesty and being deficient in reading or understanding the English language, accepted the deed in good faith and upon appellant's representation that she was the owner of an interest in the real property. We are satisfied that the evidence supports the findings and that the judgment is supported by the findings.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 512

Connie M. FIFIELD and Frances Irene Coffin, Plaintiffs and Appellants,

v.

Ross GREELEY, as Executor of the Estate of Vena J. Scott, Deceased, and Grace M. Taylor, Defendants,

Grace M. Taylor, Respondent.

Civ. 20419.

District Court of Appeal, Second District, Division 1, California.

April 25, 1955.

Rehearing Denied May 23, 1955.

Hearing Denied June 23, 1955.

Action for declaratory relief as to legal effect of certain joint tenancy deeds. From an adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., the plaintiffs appealed. The District Court of Appeal, White, P. J., held that evidence

sustained the trial court's finding that the deceased grantor had intended by execution and delivery of the joint tenancy deeds to vest title in herself and in her daughter as joint tenants with right of survivorship, notwithstanding decedent had provided in her will that her half would go to her other daughters.

Affirmed.

1. Appeal and Error ⇐931(1), 989, 1010(1), 1012(1)

Generally, an appellate court will view evidence in light most favorable to respondent and will not weigh evidence but will indulge all intendments and reasonable inferences which favor sustaining finding of trier of fact and will not disturb trier's finding if there is substantial evidence in record in support thereof.

2. Appeal and Error ⇐989, 1011(1)

It is not reviewing court's province to analyze conflicts in evidence but rather, when finding of fact is attacked as being unsupported, appellate court's power begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding.

3. Joint Tenancy ⇐3

In action for declaratory relief relating to legal effect of certain joint tenancy deeds, evidence sustained finding that deceased grantor had intended by execution and delivery of joint tenancy deeds to vest title in herself and in her daughter as joint tenants with right of survivorship, notwithstanding decedent had provided in her will that her half would go to her other daughters.

4. Joint Tenancy ⇐6

Principal and distinguishing incident of "joint tenancy" is right of survivorship, and title by survivorship occurs only when property is held in joint tenancy.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Tenancy".

5. Joint Tenancy ⇐6

Joint tenant cannot by agreement change legal incident of right of survivorship without necessarily changing nature of estate.

6. Husband and Wife ⇐262(2)

Form of joint tenancy conveyance itself raises rebuttable presumption that property is as described in deed, and places burden on party claiming property to be community to prove that fact.

7. Husband and Wife ⇐266

Mere fact that one of joint tenants would like to will away more than her share, and other party orally acquiesces, is not sufficient to convert property from joint tenancy to community.

Kenneth D. Holland, Los Angeles, for appellants.

Harvey, Rimel & Johnston, Santa Ana, A. P. G. Steffes, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an action for declaratory relief whereby plaintiffs seek a declaration of the legal effect of certain joint tenancy deeds. The complaint contains two causes of action, each relating to separate parcels of real property, the allegations of both causes of action are substantially similar as are the answers of the respective defendants.

Plaintiffs Bonnie M. Fifield and Frances Irene Coffin with defendant Grace M. Taylor are the daughters and sole heirs-at-law of Vena J. Scott who died December 24, 1951. At that time decedent Vena J. Scott and defendant Grace M. Taylor were the record owners as joint tenants, of two parcels of real property, one in Los Angeles County (hereinafter referred to as the "Gardner Street property"), and the other in Orange County (hereinafter referred to as the "Balboa Beach property").

The Gardner Street property is the subject matter of plaintiffs' first cause of action, while the Balboa Beach property constitutes the subject matter of the second cause of action.

As to the first cause of action, it was alleged that an actual controversy exists between plaintiffs and defendant Grace M. Taylor with respect to the following:

1. Whether or not said deed is invalid because of the grantor's mental infirmity or because of any undue influence brought to bear upon the grantor by defendant Grace M. Taylor.

2. Whether or not the grantor intended by said conveyance to create a tenancy in common with the said defendant Grace M. Taylor.

At the trial of the action plaintiffs based their claims that the deed conveying title to the Gardner Street property was invalid as a joint tenancy deed, on three grounds:

First: That defendant Grace M. Taylor had exerted *undue influence* on her mother, Vena J. Scott;

Secondly: That Vena J. Scott was of *unsound mind* at the time she executed said deed; and

Thirdly: That "Vena J. Scott erroneously believed and understood that said deed would have the effect of vesting title to said real property in herself and Grace M. Taylor as *tenants in common*, rather than as *joint tenants* * * *" (Emphasis added.)

The foregoing allegations also formed the gravamen of plaintiffs' second cause of action concerning the Balboa Beach property.

The trial court found adversely to plaintiffs on all three theories as to both causes of action. However, on this appeal we are confronted with only one theory and but one cause of action for the following reason:

In the appellants' opening brief we find this concession:

"* * * On the state of the record, Grace having acquired her interest in the Balboa property by purchase and not by gift, the legal principles hereafter expounded do not apply and Appellants therefore abandon their appeal as to Count 2 of the Complaint.

"Likewise, Appellants concede that the court having found adversely to them on the issues of unsound mind and undue influence, on the evidence they are bound by those findings."

Therefore, the single remaining issue presented to us is the correctness of the trial court's determination (contrary to appellants' contention) that Vena J. Scott, in executing the joint tenancy deed to the Gardner Street property, intended to create a joint tenancy and not a tenancy in common.

The trial court found as follows:

"II

"At the time of the execution and delivery of said deed, Vena J. Scott acted freely and voluntarily, and the defendant Grace M. Taylor did not exercise any undue influence whatsoever on the said Vena J. Scott either before or at the time said deed was executed and delivered by the said Vena J. Scott. That said Grace M. Taylor was not the confidential and fiduciary agent of the said Vena J. Scott at the time of the execution of said deed. Defendant Grace M. Taylor did not violate or betray any trust or confidence which the said Vena J. Scott reposed or may have reposed in her, and the execution and delivery of said deed by Vena J. Scott was her own free and voluntary act, and reflected her true will, desire and intent.

"III

"At the time of the execution and delivery of said deed, Vena J. Scott was not mentally impaired, but she had full and complete possession of all her mental faculties and understood the nature and consequences of her acts in executing and delivering said deed. Vena J. Scott did not believe or understand, either before or at the time of executing and delivering said deed, that said deed would have the effect of vesting title to said real property in herself and defendant Grace M. Taylor as tenants in common or that she would have the right to dispose of her undivided one-half interest, or any interest therein by will; but the said Vena J. Scott understood and believed at all times that the execution and delivery of said deed would have the effect of vesting title to said real property in herself and defendant Grace M. Taylor as joint-tenants, with the right of survivorship, and that upon the death of one joint-tenant, the surviving joint-tenant would be the sole owner of said real property in fee."

[1, 2] The rules governing an appellate tribunal in the determination of an appeal such as the one now before us are thus succinctly stated in the case of Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, 561:

"As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (Citing cases.) It is not the province of the reviewing court to analyze conflicts in the evidence. Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559. Rather, when a finding of fact is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689."

With the foregoing rules in mind we proceed to a review of the evidence. The record reflects that Vena J. Scott, a widow, aged sixty-nine years, died December 24, 1951, leaving as her survivors and only heirs-at-law three daughters, appellants Bonnie M. Fifield, and Frances Irene Coffin, and respondent Grace M. Taylor. Defendant Ross Greeley was named and qualified as executor of decedent's estate. On June 1, 1950, Mrs. Scott was the sole owner of a dwelling house on North Gardner Street in the city of Los Angeles (the property involved in this appeal). On that day she executed a deed to said property as grantor to herself and Grace M. Taylor as joint tenants. This was a deed of gift wholly without any cash consideration. This property had been purchased by Mrs. Scott in 1934 and placed in the name of appellant Bonnie M. Fifield. In 1939 Bonnie deeded the property back to her mother. Some time later Mrs. Scott took this unrecorded deed to O. L. Montgomery, a notary public, who added to the deed at Mrs. Scott's request the following words after the name of the grantee: "and Grace M. Taylor, a married woman, mother and daughter, as joint tenants". The notary initialed this alteration and the deed was recorded in October, 1944. Thereafter, on May 21, 1948, Grace executed a grant deed to the property to her mother. Grace testified that this deed and the one of June 1, 1950, were executed to correct any possible invalidity in the 1939 deed because of the alteration.

There was testimony that Grace and her husband, Robert, had lived in this home from about 1942. Mrs. Scott lived with the Taylors part of that time but for three or four years before her death she lived in her Balboa cottage. Bonnie testified that in 1939, when contemplating major surgery, she had a conversation with her mother with respect to her (Bonnie's) property, which she held in joint tenancy with her husband. She asked her mother if she could make a will leaving her half of her property to her son. Her mother advised her that half the property was hers and that she could make such a will. This witness also testified that in 1945 or early in 1946, when her mother was convalescing from a stroke of paralysis, she had a further conversation with the latter wherein her mother stated that as soon as she was able to get around she was going to make a will; that she wanted to leave everything divided equally between the girls but that she could not as some of the property was "tied up"; that she would have to leave the Gardner Street home to Grace but that she would leave her (Bonnie's) name on it to protect Grace so she couldn't sell it, otherwise she, Grace, and her husband would run through the money; that she was sorry she had put Grace's name on the deed but she would remedy it in a will as best she could.

Subsequently, on December 7, 1950, Mrs. Scott executed a will which was admitted to probate. She used a printed form commonly sold in stationery stores, filling in the blank spaces in her own handwriting. As to the Gardner Street property here in question, the will contains the following provision:

"Secondly: The property at 1421 No. Gardner St., Hollywood 46, Calif. is in joint

tenancy with myself Vena J. Scott and Grace M. Taylor the deed must never be changed out of her name and at her death my half will go to Bonnie M. Fifield 7717 Hampton Ave., Hollywood 46, Calif. and Francis Irene Coffin." Appellants do not contend that Mrs. Scott's will had any effect whatsoever on the legal effect of the joint tenancy deed. They concede that a person could not revoke right of survivorship by will. Appellants however argue that the will has evidentiary value going to the understanding of the testatrix as to the legal effect of joint tenancy and of her intent. That, even though invalid as regards the joint tenancy, the will is indicative of the understanding and intent of the maker thereof. To this contention we shall later give consideration.

Evidencing support for the findings of the trial court we find in the record testimony that in December, 1942, Grace had a conversation with her mother concerning the execution by the former of the joint tenancy deed to herself and her mother as joint tenants. As to this conversation Grace testified:

"Q. At that time did you have a discussion with your mother as to what would happen to the property in the event either one of you would die? A. Yes. Mother told me that she would like to have that property put over in joint tenancy so that if anything should happen while I was away to either one of us, that the property would go to the other, to the other one."

With reference to the aforesaid addition of her name as a grantee in the deed Grace testified as follows:

"The Witness: I would like to just explain in my own words that my husband was going into service, and I wanted to go follow him around as much as I could and be with him, and before I left my mother told me that she had spoken to the real estate agent at the corner and he—

"Q. By Mr. Holland (Attorney for plaintiffs): Is that Mr. Montgomery? A. Mr. Montgomery.

"Mr. Steffes (Attorney for defendants): Who is also the notary public.

"The Witness: And he said he had put my name on the deed. My mother said she had had my name put on the deed.

"Q. By Mr. Holland: And then did you see it after it was put on? A. Yes, I did. I saw it afterwards.

"Q. Do you recall when it was recorded? A. I believe it was in 1944 before it was recorded.

"The Court: Well, do you know whether your name was on that deed before it was recorded?

"The Witness: Yes, it was on before it was recorded.

"Q. By Mr. Holland: Do you know who had possession of this deed from the date it was executed in 1939 up until the time it was recorded in 1944? A. Well, I believe my mother had possession of it."

In answer to a question by counsel for appellants, Grace identified the deed dated June 1, 1950, as the instrument which she said her mother was going to make and that the subject of executing this deed came about as follows:

"A. Mother was staying down at the beach in Balboa, and my husband and I were down there, too, for Memorial Day.

"Mother told us she wanted to come back up home with us because she had some business to take care of. When we got her home, just a day or so afterwards, she asked me to go to Mr. Montgomery's office so that she could have these joint tenancy papers made out properly.

"Q. Did she ask you to go with her? A. Yes, indeed she did.

"Q. Did she execute this deed in your presence? A. Yes, sir.

"Q. Do you recall the conversation you had, if any, with Mr. Montgomery at the time? A. I don't recall the exact conversation, except that just the conversation about having it made out properly and legally."

Grace had a later conversation with her mother concerning the latter's reason for putting the Gardner Street property in joint tenancy, as shown by the following testimony by Grace:

"Q. * * * Now, with reference to the other property which your mother deeded later to the two of you in joint tenancy, at that particular time did you have any discussion with your mother about holding that property and what would happen to it in the event of the death of either of you? A. Yes.

"Q. Where did that conversation take place? A. That was in the Gardner house just a week or so later.

"Q. I see. What was said at that time by your mother? A. Mother said she had put my name on the Gardner Street property because since I was going away, clear across the country and everything, that *if anything happened to me she would get the property, or vice versa. It would be in joint tenancy.*

* * * * * *

"Q. With reference to Plaintiffs' Exhibit 1, which is this deed of June 1, 1950, at that time did you have a discussion with your mother about the execution of that deed, and what would happen if one of you died? A. Well, mother told me at that time that she wanted this paper made out correctly and legally.

* * * * * *

"Q. Was there any discussion about the possible death of one or the other of you? A. Well, only that she said she wanted it made out correctly and legally *so that if anything happened to any one of us, the property would go to the other.*" (Emphasis added.)

Mr. Montgomery, the notary public, who inserted in the deed before recordation the words, "and Grace M. Taylor, a married woman, mother and daughter, as joint tenants" testified:

"Q. Mr. Montgomery, when this language was added to Plaintiffs' Exhibit 3, which you initialed as the notary public, Mrs. Scott did tell you at that time that she did want the property to be vested in herself and her daughter Grace Taylor as joint tenants, did she not? A. Well, she would have to or I wouldn't have put it here. I can't—I don't know. I wouldn't have done it voluntarily, of course. I know that."

Although respondent Grace M. Taylor did not actually pay any money to her mother for placing the Gardner Street property in joint tenancy, she and her husband "paid all utilities on the place and all the upkeep of the property, plus adding a great many new things." They also did considerable improvement work such as painting, roofing, patios and carpeting. They also paid the taxes on the property and purchased all the food for decedent Mrs. Scott and themselves while they resided there. Considerable evidence appears in the record that the mother reposed trust and confidence in her daughter Grace, and there is no showing that the latter ever betrayed or violated her mother's faith and confidence in her.

[3] We are satisfied that, viewed in the light of the rules hereinbefore enunciated, the record contains ample evidence of sufficient substantiality to support the foregoing findings to the effect that Vena J. Scott at all times believed and understood that the execution and delivery of the deed here in question did have the legal effect of vesting title to said real property in herself and her daughter Grace as joint tenants with the right of survivorship, and that such was Mrs. Scott's intention.

[4, 5] The principal and distinguishing incident of joint tenancy is the right of survivorship, and title by survivorship occurs only when property is held in joint tenancy. And the parties by their agreement cannot change this legal incident of joint tenancy without necessarily changing the nature of the estate. McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810. That Mrs. Scott intended to create a joint tenancy is evidenced by her will wherein she used this language: "The property * * * is in joint tenancy with myself Vena J. Scott and Grace M. Taylor the deed must never be changed out of her name".

In the instant case survivorship was clearly declared in the conveyance, thereby evidencing an intention to create a joint tenancy in fee, and not a joint life estate with contingent remainder to the survivor and her heirs. Hart v. Kanaye Nagasawa,

218 Cal. 685, 689, 24 P.2d 815; In re Estate of Davis, 88 Cal.App.2d 704, 706, 199 P.2d 755; 13 Cal.Jur.2d 292. And the very form of the deed here in question created a presumption of intent to hold the property jointly. Sandrini v. Ambrosetti, 111 Cal. App.2d 439, 449, 244 P.2d 742. The applicable rule is thus stated in Edwards v. Deitrich, 118 Cal.App.2d 254, 260, 257 P.2d 750, 754:

[6] "That form of conveyance [joint tenancy] * * * itself raises the rebuttable presumption that the property is as described in the deed, and places the burden on the party claiming the property to be community to prove that fact. (Citing cases.)" And further, the record discloses, as pointed out by respondent, "Mrs. Scott was not a novice insofar as joint tenancies were concerned. Between the time in 1934, when according to appellant Bonnie M. Fifield, the two of them discussed purchasing the Gardner Street property together in joint tenancy, and December 7, 1950, when she showed her understanding of joint tenancies in her will, Mrs. Scott had on five different occasions been a party to deeds conveying, or purporting to convey property in joint tenancy."

The cases relied upon by appellant do not militate against what we have herein said. In Tyler v. Larson, 106 Cal.App.2d 317, 235 P.2d 39, the question of the sufficiency of the evidence to support the findings of fact made by the trial court was not involved. In the cited case the appeal was on the judgment roll, and the court was required to accept as true the facts found. In Nunes v. De Faria, 107 Cal.App.2d 794, 238 P.2d 106, also cited by appellants, the judgment of the trial court was predicated upon a finding of fraud on the part of the party appealing and the facts of that case have no resemblance to those present in the case at bar.

With further reference to the execution of her will by Mrs. Scott some six months after execution of the joint tenancy deed here under attack, it might well be said, as pointed out by respondent, "Suffice it to say, that if Mrs. Scott had desired or intended to destroy the joint tenancy estate in the property, she could have done so, at any time before her death, by executing and delivering an appropriate deed of her one-half of the property, creating a life estate in Grace, with remainder over to appellants. But her last will discloses a firm purpose to have title to the entire property remain in Grace after her own death."

An examination of Mrs. Scott's will discloses that she did not attempt to will away her half of the property *at her own death* but that, at most, she attempted to do so in such manner that her will would take effect *at Grace's death* after the latter had enjoyed the ownership of the entire property during the remainder of her life by virtue of *her right of survivorship under the joint tenancy deed.* And, insofar as the claimed effect of the provisions of Mrs. Scott's will is concerned, the following language in Edwards v. Deitrich, supra, 118 Cal.App. 2d at page 262, 257 P.2d at page 755, is pertinent.

[7] "The mere fact that one of the parties would like to will away more than her share, and the other party orally acquiesces, is not sufficient to convert the property from joint tenancy to community."

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 317

The PEOPLE of the State of California, on the relation of Ardy V. BARTON, Plaintiff and Appellant,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and Associated Indemnity Corporation, a domestic corporation, Defendants and Respondents.

Civ. 20659.

District Court of Appeal, Second District, Division 1, California.

April 18, 1955.

Hearing Denied June 16, 1955.

Quo warranto proceeding against insurance companies authorized to do business in California. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained demurrer, and plaintiff appealed. The District Court of Appeal, White, P. J., held that advertisements which were published by insurance companies and which related to subject of excessive jury verdicts did not constitute a clear and present danger to the orderly administration of justice, and maintenance of quo warranto proceedings against such corporation infringed constitutional rights.

Judgment affirmed.

1. Constitutional Law ⇐90, 274

The constitutional guarantee of free speech is not unlimited, and no person is permitted to impede or interfere with orderly administration of justice, but intemperate language, false charges or unfair criticism do not admit of judicial restraint or punishment unless there is an immediate, clear and present danger imperiling administration of justice. U.S.C.A.Const. Amends. 1, 14; West's Ann.Const. art. 1, § 9.

2. Courts ⇐97(5)

Decisions of the Supreme Court of the United States interpreting provisions of Federal Constitution are binding upon state courts.

3. Constitutional Law ⇐90

No man's mouth may be closed in advance for purpose of preventing utterance of sentiments, however mischievous the prospective results of the utterance, although each man is at all times responsible to law for abuse of right of free speech.

4. Quo Warranto ⇐18

The quo warranto statutes deal with forfeiture and suppression of corporate rights, and may not be used to effect restraint upon publications by corporations. West's Ann.Corp.Code, § 4690; West's Ann.Code Civ.Proc. § 803.

5. Constitutional Law ⇐90, 274

Advertisements which were published by insurance companies authorized to do business in California and which related to subject of excessive jury verdicts did not constitute a clear and present danger to the orderly administration of justice, and maintenance of quo warranto proceedings against such corporation infringed constitutional rights. West's Ann.Corp.Code, § 4690; West's Ann.Code. Civ.Proc. § 803; U.S.C.A.Const. Amends. 1, 14; West's Ann. Const. art. 1, § 9.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for appellant.

Henry G. Bodkin, Los Angeles, Jerry Giesler, Beverly Hills, Ardy V. Barton, Los Angeles, for relator.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, Los Angeles, Pillsbury, Madison & Sutro, A. B. Tanner, Charles F. Prael, San Francisco, for respondents.

WHITE, Presiding Justice.

This is an appeal by plaintiff from a judgment for defendants, entered upon plaintiff's failure to amend after a general demurrer was sustained to plaintiff's first amended Petition in *Quo Warranto*.

Defendants were insurance companies authorized to do and doing business in the State of California. Included in the business of defendants was the writing of policies of insurance covering negligence of automobile drivers.

In the first amended petition in *quo warranto*, plaintiff alleged that defendants

did cause to be published in various nationally distributed magazines, including "Life" and "The Saturday Evening Post", advertisements relating to the subject of excessive jury verdicts.

Attached to the amended petition were photostatic copies of the advertisements upon which plaintiff's petition was based.

On the first advertisement so set forth (marked Exhibit "A"), appears the picture of a woman holding a letter in her hand and beneath the picture appears the following:

"Me? *I'm* Paying for Excessive Jury Awards?

"Yes, Mrs. Jones, you pay for liability and damage suit verdicts whether you are insured or not.

"For example, higher insurance rates paid by the folks who helped fill your market basket—farmer, processors, truckers, wholesalers and retailers—are reflected in your grocery bill.

"You see, claims against insurance companies are paid out of policyholders' premiums. When jury awards are excessive, all business firms' premiums must be increased.

"And since insurance premiums are part of the overall cost of doing business, higher premiums must be passed on to you and every other member of the buying public through higher prices.

"Next time you serve on a jury, remember this: When you are overly generous with an insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy.

"Most claims for damages are legitimate and reasonable, and are amicably settled out of court. However, as jurors tend more and more to give excessive awards in cases that do go to court, such valuations are regarded as establishing the 'going' rate for the day-to-day out-of-court claims all of which means increased insurance premium cost to the public.

"American-Associated Insurance Companies.

"American Automobile Insurance Company—Associated Indemnity Corporation—Saint Louis 2, Missouri".

On the next advertisement (marked Exhibit "B") appears the picture of a jury being sworn to try a case, below which appears the following:

"* * * A True Verdict Render According To The Law and the Evidence.

"Jury service is often a difficult responsibility because, when making decisions, we always are tempted to listen to our hearts as well as our heads.

"But the Juror's Oath demands that jurors decide 'according to * * * the evidence.' Jurors sometimes forget this. Ruled by emotion rather than facts, they arrive at unfounded or excessive awards * * * verdicts occasionally even higher than requested!

"These men and women may be scrupulously honest. But as jurors, they feel in their hearts that the injured person—although he may have caused the accident—is entitled to an award.

"Because insurance rates depend on claim costs, these honest jurors cost millions of policyholders, including themselves, countless extra dollars in premiums every year.

"When you, as a juror, sit in judgment on a suit involving personal injuries, be fair with the public's—and your—money. Reach a decision according to the evidence." Then follows the same language as appears in the last two paragraphs of Exhibit "A".

The third advertisement (marked Exhibit "C") presents the picture of an officer sitting outside a closed jury room, and below which appears the following:

"Your Insurance Premium is Being Determined Now.

"This could be any courtroom in the country—Behind the locked door, twelve men and women are reaching a verdict involving a defendant protected by a casualty insurance company. What they decide affects your pocketbook.

"All claims against insurance companies have to be paid out of funds created by premiums from policyholders. When these

funds are insufficient, insurance rates must be increased.

"Casualty insurance companies have been losing an average of $11 on every $100 of earned automobile liability premiums. More accidents are partly responsible. So are excessive jury awards, rendered by jurors who feel they can afford to be generous with the 'rich' insurance company's money. Actually, jurors who are responsible for awards in excess of what is just and reasonable are soaking *you* by raising insurance rates." This is followed by a repetition of the statements contained in the last two paragraphs of the above Exhibit "A".

In the fourth advertisement (marked Exhibit "D") is found a photograph of a father and son engaged in conversation, and below which appears the following:

"Bill Set Me Straight on Jury Awards.

"Bill's my son—a senior in law school. Last night I told him about my recent experience as a juror.

"As a businessman, I knew the woman involved in the trial was legally at fault. She walked into a moving car. But she was a widow with a child to support. And I felt certain that the driver of the car was insured.

"The doctor said that the widow wouldn't be able to hold down a steady job for at least a year, so we awarded her a healthy sum. After all, her child must eat.

" 'But the law,' said Bill, 'clearly states that the verdict must be based on legal liability, fault for the accident, as determined by the evidence.'

" 'The insurance company can afford to pay,' I protested.

" 'But claims,' argued Bill, 'must be paid out of premiums belonging to thousands of policyholders—including widows, too. And don't forget, when premium collections do not cover claims, everybody's insurance rates—including yours—have to go up.'

"You know, sometimes it pays to listen * * * even to your son." Following this is the same wording as contained in the last two paragraphs of the aforesaid Exhibit "A".

Exhibit "E", also attached to plaintiff's petition, is a page taken from "Shop Talk", a publication apparently sponsored by "American-Associated Insurance Companies", of St. Louis, Missouri. The page contains an article upon the campaign being conducted "To combat the important problem of unjust jury awards", and in the lower lefthand corner reference is made to the above-mentioned advertisements in "Life" and "Saturday Evening Post", with the comment:

"More Than One Out of Every Three potential jurors will see at least one of these advertisements appearing in Life and The Saturday Evening Post. Based on total readership-per-issue figures for each magazine more than 70,000,000 persons will see these messages".

It was further charged in the petition that the foregoing publications amounted to a contempt of the judicial process and a conspiracy formed with the intent to corrupt jurors.

The petition prayed for a restraint against further publication of said or similar matter or forfeiture of defendants' corporate rights in the State of California, or that defendants be required to pay a suitable fine as punishment.

Defendants filed a general demurrer on the grounds that the petition sought to violate and suppress respondents' right of freedom of speech and of the press guaranteed by the Constitution of the United States and by the Constitution of the State of California, and that the facts alleged were insufficient to show a violation of Penal Code section 95, a contempt of the judicial process or a conspiracy or intent to corrupt jurors, or grounds for a proceeding in *quo warranto*. The demurrer was sustained with leave to amend. Plaintiff declined to amend and a judgment of dismissal was entered.

The theory of appellant in this proceeding is thus stated in its brief: "This appellant is the State of California, and if the conduct of a corporation, the creature of this State, is in violation of its penal statutes, this appellant, the State of California, may bring an action against the

offending corporation for dissolution, fine, restraining order, etc., or any combination of these remedies." Corporations Code, section 4690; Code Civ.Proc., section 803.

Because we regard it as the main if not determinative issue presented by this controversy, we shall first give consideration to respondents' claim that their demurrer was properly sustained because this proceeding constitutes a form of prior restraint upon publication barred by the free speech and free press provisions of the Federal and State Constitutions, Constitution of the United States, Amendments I and XIV, Section 1; Constitution of the State of California, Article I, Section 9.

[1, 2] From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Undoubtedly, the framers of our Constitution and Bill of Rights, as well as those who brought into being our own California Constitution, recognized that at the time of the adoption of these immortal documents, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable right of the individual to liberty of conscience and freedom of expression is the handmaiden of tyranny. In America, we have always felt and vigorously asserted that free speech is a natural and inherent right, and that it, and freedom of the press, are among the most sacred and vital rights of mankind. While the constitutional guarantee above referred to is a fundamental one and is couched in the broadest language, the right thus guaranteed is, of course, not without limit. One such limitation is that no person is permitted to impede or interfere with the orderly administration of justice. But, however intemperate the language, false the charges, or unfair the criticism, they do not admit of judicial restraint or punishment unless there is an immediate, clear and present danger imperiling the administration of justice. The foregoing principles have been firmly established in the recent decisions of the Supreme Court of the United States, and, interpreting as they do, a provision of the Federal Constitution, are binding upon us.

In Bridges v. State of California, consolidated with Times-Mirror Co. v. Superior Court, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, both petitioners had been found guilty of contempt and the Supreme Court of California had affirmed Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983; Times-Mirror Co. v. Superior Court, 15 Cal.2d 99, 98 P.2d 1029.

In the case of the newspaper, the facts were that two labor union members had been convicted of assault and the trial judge had pending before him applications for probation. Under these circumstances the newspaper discussed the merits of the case at length in its editorial columns, denounced practices relating to the behavior of the accused, and closed with the observation, 314 U.S. 252, 272, 62 S.Ct. 190, 198, "'Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Keenan Holmes. This community needs the example of their assignment to the jute mill.'"

In the Bridges case, a motion for a new trial was pending in a labor dispute case. During the pendency of that motion Bridges telegraphed to the Secretary of Labor condemning the decision as "outrageous", and threatened he would call a Pacific coast strike unless a new trial were granted.

In commenting upon the aforesaid cases, Mr. Presiding Justice Peters, speaking for the Court in Turkington v. Municipal Court, 85 Cal.App.2d 631, 642, 643, 644, 193 P.2d 795, 803, said: "In both cases the comment was about a pending case, and in both cases strong, intemperate and untrue remarks were made. The Supreme Court of the United States assumed that in both cases the accused were attempting to influence the course of pending litigation in the trial court. In both cases the trial court found, and the Supreme Court of California affirmed the finding, that the acts had a reasonable tendency to interfere with the orderly administration of justice. Nevertheless, the judgment was reversed, the Supreme Court holding that, as a matter of law, the comments did not present a clear and present danger to the orderly administration of justice. The majority of the court (the decision was 5 to

4) pointed out that prior decisions had established the rule that the constitutional right to free speech must be protected unless the comments about a court or judge are of such a nature 'as to create a clear and present danger that they will bring about the substantive evils.' In 314 U.S. at page 261, 62 S.Ct. at page 193. At page 262 of 314 U.S., page 193 of 62 S.Ct. it is stated:

"'Moreover, the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial", * * * it must be "serious", * * *.

"'What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. * * * For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.'

"The Court then refutes the argument that, regardless of the free speech provision, this country adopted the English common law on the subject of contempts where a '"reasonable tendency" to obstruct justice' is all that is required, and then stated, 314 U.S. at page 270, 62 S.Ct. at page 197:

"'* * * The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

"'The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.'

"At page 273 of 314 U.S., page 198 of 62 S.Ct., appears the following comment: 'In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.' The Court then held that the editorials and telegram did not create, as a matter of law, a clear and present danger.

"There thus emerges from the Bridges' case a rule that had been strongly hinted at in earlier cases, but now couched in the strongest and most positive language, to the effect that a false publication that merely tends to obstruct justice is not sufficient to justify the interference with the constitutional right to free speech by punishment for contempt, and that there must accompany such tendency a clear and present danger of such obstruction. Such danger must be both 'imminent' and 'serious.'" (Emphasis added.)

Six years after rendition of the Bridges decision the Supreme Court reaffirmed the reasoning and conclusion therein contained in the case of Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295.

In the case just cited, Mr. Justice Frankfurter, discussing the responsibility of the press 328 U.S. at pages 365, 366, 66 S.Ct. at page 1046, had this to say:

"It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. *Such a restriction, which merely bars the operation of extraneous influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalized discussion of a particular topic should be forbidden, or run the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process.*" (Emphasis added.)

It would serve no useful purpose to here present a detailed analysis of other cases supporting the foregoing doctrine. Suffice it to say that the above principles are enunciated and approved in the cases of Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 91 L.Ed. 1546; Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497, certiorari denied, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562; Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357.

[3, 4] It must also be remembered that appellant in this proceeding seeks to restrain respondents from further utterance of their sentiments on claimed excessive jury verdicts or to oust them from carrying on their corporate business in the State of California. Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the State and Federal Constitutions in their protection of freedom of speech and press. The courts have held that a statute authorizing such proceedings in restraint on publication is not consistent with the conception of the liberty of the press as historically conceived and guaranteed. While, as heretofore pointed out, the right of free speech is not unlimited, no one's mouth may be closed in advance, as sought herein, for the purpose of preventing an utterance of his sentiments, however mischievous the prospective results of such utterance. The right of free speech was his, but at all times he was responsible to the law for an abuse of that right. Near v. Minnesota ex rel. Olson, supra; Dailey v. Superior Court, 112 Cal. 94, 97, 99, 44 P. 458, 32 L.R.A. 273; Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A.1917E, 383; Northwestern Pac. R. R. Co. v. Lumber & S. W. Union, 31 Cal.2d 441, 448, 449, 450, 189 P.2d 277. The principle underlying the rules enunciated in the cited cases is the inability to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so. We are persuaded that the *quo warranto* statutes in this state deal with forfeiture and suppression of corporate rights, and not with publications *per se*, and their use is not permitted to effect restraint upon publication—which is the essence of censorship.

The advertisements here in question amount to a generalized discussion of a particular topic—the claimed excessive awards in negligence cases. There is no effort made to influence a particular decision. As pointed out by respondents, "The gist of the four advertisements attached to the amended petition is that verdicts should be rendered '"according to the Law and the Evidence."'. They protest excessive verdicts rendered on the assumption that '"The insurance company can afford to pay."' They point out that when jurors do not base their verdicts on the law and the evidence, but, in violation of their oath, upon an impulse to be 'overly generous with an insurance company's money'—the jurors, in violating their oath, hurt not just the insurance company but themselves and the public generally. To allege by way of a conclusion that a protest on behalf of the whole insurance industry and, according to the beliefs of many, on behalf of the public at large, is 'presently dangerous of prejudicing and corrupting' jurors, is to reject every reasonable hypothesis from the facts pleaded."

Appellant relies heavily upon the case of People v. Connors, 70 Cal.App. 315, 233

P. 362, in which a conviction under Penal Code, Section 95 was reversed because of an erroneous instruction. Upon a retrial defendant was again convicted resulting in an affirmance of the judgment, 77 Cal. App. 438, 246 P. 1072, 1073. In the cited case, Connors caused copies of a multigraphed letter to be circulated promiscuously in Sacramento County during the pendency of a series of criminal syndicalism cases and during the actual trial of one. The letter strongly criticised the law under which the cases were prosecuted, attacked the prosecution witnesses as "'a trio of degenerates'" and defended the accused. The court said that the defendant would be subject to punishment if the letters were sent in the hope and expectation of thereby reaching many jurors and with the intent of corruptly influencing them. However, the Connors case is unlike the one now engaging our attention in that it did not involve the form of prior restraint sought here. There was no attempt to restrain future utterances. The publication in the Connors case related to particular and specific pending cases. And in neither appeal was the constitutional question presented. However, in the Connors case [233 P. 364] the court carefully distinguishes publications "for the sole purpose of creating public opinion" from publications corruptly attempting to influence jurors in specific pending cases, thereby anticipating the holding in Pennekamp v. Florida, supra, that only the extraneous influence "specifically directed to a concrete case" can be barred.

[5] The reasoning in the cases cited by us is conclusive in the case at bar. The language used in the questioned advertisements herein was not nearly so intemperate or unfair as those charged in the Pennekamp and Craig cases, supra. When appellant's petition is read in the light of the cases cited, it seems to us the conclusion is inescapable that there is no sufficient showing therein of a "clear and present danger" to the orderly administration of justice, nor that any such danger was "serious" and imminent". On the basis of the facts alleged in the amended petition, the maintenance of *quo warranto* proceedings against respondents, must be held, under the authorities herein cited, to amount to an infringement upon rights guaranteed respondents by the Federal and State Constitutions. Respondents' demurrer was therefore, properly sustained.

The foregoing conclusion at which we have arrived renders it unnecessary to discuss or decide other points raised on this appeal.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

132 Cal.App.2d 471

Rowena J. GRAYSON, Plaintiff and Respondent,

v.

Michael GRAYSON, Defendant and Appellant.

Civ. 20461.

District Court of Appeal, Second District, Division 2, California.

April 21, 1955.

Action for breach of contract. From adverse judgment of Superior Court of Los Angeles County, Otto J. Emme, J., defendant appealed. The District Court of Appeal, McComb, J., held that where defendant's brief contained no attack on any finding of fact and made no references to reporter's transcript, court would not search record to see if there was any evidence to support appellant's contentions.

Affirmed.

1. Appeal and Error ⇐766

Where appellant's brief contains no attack on any finding of fact and makes no references to reporter's transcript, reviewing court will not search record to see if there is any evidence to support appellant's contentions. Rules on Appeal, rule 15(a).

2. Appeal and Error ⇐762

Every point relied upon for reversal should be stated and argued in opening brief, and points presented for first time in reply brief will ordinarily not be considered by reviewing court

Thomas D. Mercola, Beverly Hills, for appellant.

Alexander K. Ginsburg, Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment, after trial before the court without a jury, in an action to recover damages for breach of a contract.

Defendant contends that "the trial court erred in awarding judgment and damages to the respondent."

[1] Nowhere in defendant's brief is any attack made on any finding of fact nor are there any references in his brief to the Reporter's Transcript. Hence this court is not advised by reading defendant's brief where the evidence may be found to support his contentions. It would require this court to search the record itself to see if there is any evidence to support his contentions. This an appellate court will not do. (Wallace v. Thompson, 129 Cal.App.2d 21, 276 P.2d 108.)

Defendant has failed to comply with Rule 15(a), Rules on Appeal, 36 Cal.2d 1, 15. The rule was accurately stated in Richard v. Richard, 123 Cal.App.2d 900, 902[5], 267 P.2d 867, 868, thus:

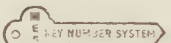
"The provisions of this rule are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court. Not only must an appellant raise the point in his brief properly but he must point out the error specifically showing accurately wherein the lower court's action is deemed erroneous. (See cases cited in 4 Cal.Jur.2d(1952), Appeal & Error, § 480, note 4, p. 311.)"

[2] It is likewise settled that every point relied on for reversal should be stated and argued in the opening brief, and should not be presented for the first time in the reply brief. Points so presented will ordinarily not be considered by an appellate court. (Richard v. Richard, supra, 903 [7]; Utz v. Aureguy, 109 Cal.App.2d 803, 808[8], 241 P.2d 639.)

Since defendant has failed to meet the foregoing requirements, he has not sustained the burden cast upon him and the decision of the trial court and the judgment must be affirmed.

Affirmed.

MOORE, P. J., and FOX, J., concur.



132 Cal.App.2d 459

Jewel L. GOULD, Plaintiff and Appellant,

v.

Louis T. SAMUELS and Helen Frederick, Defendants and Respondents

Civ. 16195.

District Court of Appeal, First District, Division 1, California.

April 21, 1955.

Rehearing Denied May 20, 1955.

Hearing Denied June 16, 1955.

Action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that plaintiff's requested instruction that jury should return verdict in favor of plaintiff in amount representing difference between true market value of equity of plaintiff and price obtained by defendants on sale involved, was properly refused, since it was direction of verdict for plaintiff in conflicting evidence situation.

Judgment affirmed.

1. Brokers ⇐38(6)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, general instructions with regard to agent's authority to bind his principal in negotiations with third persons were properly given, where evidence established that one defendant claimed by plaintiff to have been his subagent was in reality agent for other party in sale, and was therefore third party to plaintiff.

2. Appeal and Error ⇐1066
Trial ⇐251(2)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, instruction that principal is responsible to third persons for negligence of his agent in transaction of business of agency was not prejudicial to plaintiff, and was inapplicable where controversy did not involve suit for negligence of agent.

3. Appeal and Error ⇐1033(5)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, instruction that agent has power to disobey instructions in dealing with subject of agency in cases where it is clearly for interest of his principal that he should do so and there is no time to communicate with principal could only have harmed brokers and could not have been prejudicial to former owner where evidence of such disobedience was doubtful. West's Ann.Civ. Code, § 2320.

4. Appeal and Error ⇐215(1)
Brokers ⇐38(6)

In action by former owner of hotel against real estate brokers to recover for alleged handling of sale of plaintiff's hotel, instruction that, if jury found that one defendant was not agent of plaintiff, a verdict for such defendant should be rendered, was not error requiring reversal, where theories attacking such instruction were first raised on appeal, were not embraced within pleadings, were not raised in trial court, and were not supported by record.

5. Appeal and Error ⇐171(1)

An appellant is not permitted to change the theory of his case at the appellate level.

6. Appeal and Error ⇐882(12)

Appellant cannot complain of an instruction given at his own request or of an error in an instruction given at the instance of his adversary when he requests a substantially similar one.

7. Brokers ⇐38(6)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, refusal to give plaintiff's requested instruction that brokers representing opposing sides of negotiation who secretly agree to pool respective commissions and divide them according to prearranged plan are not entitled to be compensated by their employers, and that agreement between themselves is void and unenforceable as being contrary to public policy, was properly refused, where question whether one broker was in reality agent for plaintiff and whether brokers did actually agree, without knowledge or consent of their principals, to pool commissions, were matters in controversy.

8. Brokers ⇐38(6)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, plaintiff's requested instruction that in the event jury found that one defendant assumed to act as broker and without knowledge or permission of plaintiff actually disposed of property consisting of hotel, then such defendant would have no right to commission on such transaction, and that defendant should be given no credit for commission on any accounting by him, was incomplete and misleading and was properly refused, where it failed to tell jury that plaintiff's subsequent ratification with knowledge of all facts would rectify lack of prior consent.

9. Brokers ⇐38(5)

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's

hotel, plaintiff's requested instruction that jury should bring a verdict in favor of plaintiff in amount representing difference between true market value of equity of plaintiff and price obtained by defendants on sale involved was properly refused, since it was direction of verdict for plaintiff in conflicting evidence situation.

10. Appeal and Error ⇐216(1)

A party may not complain of a trial court's failure to instruct upon a subject upon which no proper instruction was requested

11. Trial ⇐255(1)

There is no duty, in civil cases, for a trial court to give on its own motion instructions on issues not covered by proffered instructions.

12. Evidence ⇐256

In action by former owner of hotel against real estate brokers to recover for alleged mishandling of sale of plaintiff's hotel, trial court properly excluded from evidence undated, unsigned one-page paper relating to sale of hotel, claimed to be admission of one defendant, where there was no evidence of its authenticity, of its execution, or that such defendant authorized it or knew about it. West's Ann.Code Civ.Proc. §§ 1940, 1942, 1953f.

Frank J. Perry, George Olshausen, San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher, Albert E. Polonsky, San Francisco, for respondents.

PETERS, Presiding Justice.

This action for the alleged mishandling of the sale and proceeds of the sale of the Worth Hotel, was brought by H. W. and Jewel L. Gould, husband and wife, against Louis T. Samuels and Helen Frederick, real estate brokers, and against Max Stern, the Title Insurance and Guaranty Company, and the City Title Insurance Company. It is alleged in the amended and supplemental complaint that the brokers negligently and wrongfully sold the hotel, formerly owned by the Goulds, for $200,000, when its real value was $221,500. Defendant Frederick cross-complained for $5,000 claimed to be due her for commissions. H. W. Gould then died, and a second supplemental complaint was filed by Jewel L. Gould, individually and as trustee for Janet L. Gould. During trial, by stipulation, non-suits were granted in the trustee action, and as to the defendant City Title Insurance Company. Before trial the action was dismissed as to defendants Max Stern and the Title Insurance and Guaranty Company. Thus, the cause proceeded to trial with Jewel L. Gould as plaintiff, and Louis T. Samuels and Helen Frederick, as defendants. The jury decided that plaintiff was entitled to nothing against these defendants, and that defendant Mrs. Frederick was not entitled to recover on her cross-complaint. From the judgment entered in favor of Samuels and Frederick the plaintiff appeals. Her main contentions are that the trial court committed prejudicial error in the giving and in the refusal to give certain instructions, and in its ruling excluding a certain piece of evidence.

H. W. Gould was a mining engineer, who also bought and sold real estate. He purchased the Worth Hotel in September of 1946. In March of 1947 he gave written authority for a period of 30 days to defendant Frederick, who had been his real estate broker for ten years, to sell the hotel for $221,500 net to him, and also to sell a certain building owned by him in Oakland. Mrs. Frederick approached Samuels, also a broker, for advice in reference to the deal. Samuels told Mrs. Frederick that the hotel could not sell for over $200,000.

Gould was anxious to sell the hotel. Mrs. Frederick first offered it for sale for cash at the price fixed by Gould, but was unable to find a buyer. Gould then contemplated an exchange. He was shown several buildings, but no exchange was consummated. In April of 1947 Mrs. Frederick suggested to Gould the Battery-Jackson Building for exchange purposes. This building was owned by one Heskins. Gould was very much interested and directed Mrs. Frederick to try to arrange an exchange. Samuels continuously told Mrs. Frederick that neither for cash nor in an exchange could $220,000 be secured for the hotel, and was

assured by her that Gould knew that and to try to effectuate a good exchange.

On May 1, 1947, Gould addressed a letter to Mrs. Frederick and Samuels in which he stated:

"We agree to consummate the following exchange agreement:

"We will take title to the NW corner of Battery and Jackson, subject to a new Ten (10 year Life Insurance loan in the sum of One Hundred Twenty-Five Thousand and no/100 Dollars ~~($125,000.00)~~, $150,000 * * *.

"And

"In lieu thereof—We will give a deed to the Worth Hotel * * * subject to the amount of existing encumbrance at the date of transfer. * * *

"In addition to the above equity, we will pay the sum of Seventy Thousand and no/100 Dollars ~~($70,000.00)~~ $45,000 * * *.

"If we desire to handle the above transaction in the manner of an exchange, you are to cooperate with us so that the deal can be closed on said lines. * * *

"We will pay to your joint offices the sum of Five Thousand and no/100 Dollars ($5,000.00) as commission for services rendered."

Mrs. Frederick testified that when this letter was prepared the price of $221,500 for the Worth Hotel was no longer in effect; that by that date Gould and the brokers had agreed to try to effectuate an exchange; that in the proposed trade no price was being placed on either building; and that Gould knew all of these facts.

Heskins, owner of the Battery-Jackson property, was not willing to make the exchange on the terms offered, because he wanted cash for his interest. Thus, it was obvious to all, including Gould, that to effectuate the exchange it would be necessary to "cash out" the Worth Hotel, that is, sell it at a quick sale for cash in order to pay Heskins and so as to get money for the brokers' commissions. Mrs. Frederick told Gould that this was so, and he directed her to make every effort to sell the Worth Hotel as part of the exchange transaction. In order to acquire the Battery-Jackson property Gould intended to assume the $150,000 encumbrance on it, use the $45,000 received from the sale of his Oakland property, and use $40,000 in cash which was the amount that he hoped to secure from the sale of his equity in the Worth Hotel. Mrs. Frederick testified that Gould was unwilling to put up any more money. In other words, Gould intended to get enough out of the sale of the Worth Hotel to complete the Battery-Jackson exchange.

In May of 1947 Heskins issued instructions to the City Title Insurance Company setting forth the terms on which he was willing to sell the Battery-Jackson property to Gould. Shortly thereafter, Gould executed a deed to the Worth Hotel naming the City Title Insurance Company as trustee, instructing the trustee to convey the hotel at defendants' instructions. Gould did this because he was going on a vacation and desired to give defendants the power and ability to complete the transaction.

Late in May of 1947, defendants, in pursuance of their plan, known to all, to "cash out" the hotel, entered into an agreement to sell it to one Williams for $190,000, the purchaser agreeing to exchange certain property and to pay $40,000 by check. Mrs. Frederick told Gould about the proposed sale, and he was agreeable. Gould then, as part of the Battery-Jackson deal, executed notes in the sum of $150,000, and deposited them, some cash, and the $40,000 Williams check, in the escrow of the Battery-Jackson transaction. This escrow was to be closed upon the arrival of $45,000 from the sale of the Oakland property. Before this occurred, however, it was discovered that there were not sufficient funds in the bank to cover the Williams check, so that the sale to Williams failed. Defendant Samuels, thereupon, put up $40,000 of his money and security in order to close the deal. Mrs. Frederick told Gould that Samuels was putting up the money to close the deal. Gould wanted the transaction closed, and instructed Mrs. Frederick to close it on these terms. On June 26, 1947, the transaction involving the Battery-Jackson property was completed.

Both defendants testified that this terminated Gould's interest in the Worth

Hotel, because Gould had received all he bargained for when he secured the Battery-Jackson property. Gould, in his deposition, stated that he sold the hotel in June of 1947, and that from that date on he felt that he had no further interest in it. It is worthy of note that in July, 1947, certain repairs to the hotel were authorized and paid for by respondent Samuels.

On June 27, 1947, another person—Max Stern, a former owner of the hotel—came into the picture, by agreeing with Samuels to put up the $40,000 in place of Samuels. By the agreement between Stern and Samuels, and by the instructions to the City Title Insurance Company, it was provided that the hotel was to be deeded to Stern unless within 120 days a buyer was found for a price in excess of $177,000. In the meantime, Stern was to take over the management of the hotel and empowered to collect the rents. If a buyer was found Stern was to be paid $2,500, to come out of the commissions, and if a buyer was not found, and Stern, therefore, got the property, defendants' commissions totalling $12,500, were to be forfeited. Gould was told by Mrs. Frederick of this agreement and Samuels was told that Gould knew about it. Defendants, who as yet had received no commissions, in an attempt to realize those commissions from a sale of the hotel, then made an effort to sell it. They listed it with various brokers, including one Milton Meyer, for $200,000, but no offers were secured. Meyer's office and another broker, Hammond by name, offered the hotel to Dr. Callison. When the doctor was informed that Samuels was involved he talked with him. Thereafter, Samuels handled the negotiations, but assured the doctor that Meyer and Hammond would be "recognized." Mrs. Frederick told Gould that Samuels, through Meyer, had a deal on the Worth Hotel, and that the purchaser was Dr. Callison. She also told him that they were trying to consummate the deal, and that Samuels-Meyers thought that the brokers should take smaller commissions. Gould replied that it was up to Mrs. Frederick to decide that question.

On July 11, 1947, Stern was paid off pursuant to the agreement, and the City Title Insurance Company was informed that any further instructions would come from Samuels. On July 25, 1947, the hotel was sold to Dr. Callison. Mrs. Frederick was given a $5,000 check by Samuels and she signed a release in settlement of a larger commission claimed by her. Gould was informed of the sale.

In the sale Dr. Callison assumed an encumbrance on the hotel, paid a substantial sum in cash, and turned over a lot valued at $33,500 for the purposes of the sale, but the actual value of which was $23,500. The stated selling price of the hotel was $200,000, but because of the intentional over-valuation of the lot the price was considered to be $190,000. Samuels took the lot and paid all commissions due in the transaction, except his own.

The experts opined that the fair market value of the hotel was $200,000, $180,000 to $185,000, $185,000 to $200,000, $190,000, $185,000 to $190,000 and $190,000. The "cash out" price was fixed at $185,000.

On this evidence the jury brought in a verdict adverse to plaintiff and denied any relief to Mrs. Frederick on her cross-complaint. From the judgment entered on that verdict plaintiff appeals.

The first contention made by appellant is that three instructions given by the trial court at the request of Samuels should not have been given. These instructions were as follows:

"An agent has such authority as the principal actually or ostensibly confers upon him."

"A principal is bound by the acts of his agent under a mere ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof."

"Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, in cluding wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

[1] It is appellant's theory that both respondents were agents of Gould; that no third person was involved in the lawsuit; that such instructions relating to third persons must have misled the jury, and such error was prejudicial because the instructions were calculated to cause the jury to believe that a sub-agent was a third person. The instructions were proper under the evidence. Respondent Samuels in his answer and at the trial denied that he was the agent of Gould. Samuels contended, and his evidence showed, that he was Heskin's agent to sell the Battery-Jackson property, and that after that property was sold, Samuels represented himself and the other brokers in selling the Worth Hotel in order to realize the commissions from the proceeds of the sale of the hotel. Gould was by no means clear that Samuels was his agent. If Samuels was not Gould's agent, then he was a "third person" and entitled to rely on the ostensible authority of Mrs. Frederick, Gould's admitted agent. The instructions are, therefore, not subject to the challenge made by appellant.

[2] It is probably true that the instruction last quoted above should not have been given because it seems to refer to situations in which a third person is suing a principal for the negligence of his agent, and obviously the present action does not involve such a controversy. That is so obvious that the instruction could not possibly have been prejudicial. Jacobs v. Bozzani Motors, 109 Cal.App.2d 681, 241 P.2d 642; Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 105 P.2d 649.

[3] Appellant next objects to the giving of an instruction requested by Samuels stating the rule set forth in section 2320 of the Civil Code. The instruction was in the following language: "An agent has power to disobey instructions in dealing with the subject of the agency in cases where it is clearly for the interest of his principal that he should do so and there is no time to communicate with the principal."

Appellant argues that this instruction is not supported by the evidence in that there was no evidence that the agent's disobedience of instructions was for Gould's benefit, or that there was not time to communicate with Gould. The claimed disobedience is in selling the hotel for less than $221,500. It is quite doubtful that the evidence shows that either Mrs. Frederick or Samuels ever disobeyed any instructions of Gould, and therefore we agree that the instruction should not have been given. As we read the record it shows that Gould authorized Mrs. Frederick to sell the hotel for $221,500, but when no offers were received, entered into a new arrangement with her, that is, to exchange the hotel for the Battery-Jackson property, and when that failed, he authorized her to "cash out" the hotel at a price that would permit him to acquire the Battery-Jackson property. Moreover, Gould knew about, acquiesced in, and accepted the benefits of the activities of respondents with full knowledge of all the facts. This would seem to amount to a a ratification of any unauthorized acts of respondents. See 2 Cal.Jur.2d 765, § 101. The most that can be said about the instruction is that it is very doubtful that there is any evidence of disobedience of instructions, and therefore it should not have been given. But an instruction implying that respondents may have disobeyed instructions, when there was no evidence of such disobedience, could only have harmed respondents. It could not have been prejudicial to appellant.

[4] The trial court also gave an instruction, at the request of Samuels, to the effect that, as far as Samuels was concerned, the jury should first determine whether Samuels was the agent of Gould, and, if it was found that he was not, a verdict for this respondent should be rendered. This instruction is attacked on several grounds. It is first contended that the instruction prejudicially limited the question of Samuels' liability to agency when there are several other theories disclosed by the proof upon which Samuels could have been held liable.

Thus it is argued that if Samuels was not Gould's agent then he was not entitled to a commission, and such commission at least would be recoverable. It is also argued that if Samuels was not Gould's agent then he

dealt with Gould's property as his own and is liable as for a conversion.

The difficulty with these two theories is that they are raised for the first time on appeal, are not embraced within the pleadings, were not raised in the trial court, and are not supported by the record.

[5, 6] The pleadings are based on the theory of agency, and the case was tried on the theory of agency. An appellant is not permitted to change the theory of his case at the appellate level. Ernst v. Searle, 218 Cal. 233, 22 P.2d 715; Schneider v. Henley, 61 Cal.App. 758, 215 P. 1036; Marra v. Aetna Construction Co., 15 Cal. 2d 375, 101 P.2d 490. Moreover, appellant offered an instruction telling the jury that appellant's pleadings were based on the theory that both respondents while acting as brokers in the sale of the hotel and "in purported representation of the owners of the hotel," sold it for an improper sum. This instruction, as does the challenged one, limits Samuels' liability to a breach of agency. It is, of course, the law that an appellant cannot complain "of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one." Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772, 774; see also Jentick v. Pacific Gas & Elec. Co., 18 Cal.2d 117, 114 P.2d 343; George v. City of Los Angeles, 51 Cal.App.2d 311, 124 P.2d 872; Lenning v. Chiolo, 63 Cal.App.2d 511, 147 P.2d 410; Cedzo v. Bergen, 53 Cal.App.2d 667, 128 P.2d 683; People v. Harlan, 133 Cal. 16, 65 P. 9.

Moreover, the theory in reference to the commission is contrary to the evidence. The record shows that the commission paid to Samuels was not paid by Gould. The total commission in the exchange of the properties was to be $12,500. Gould was to pay $5,000 of this for the sale of the hotel, and Heskins was to pay to Samuels $7,500 for the sale of the Battery-Jackson property to be retained out of $217,000 sale price for that property. But Gould paid to Heskins only the net price, less both commissions, for the Battery-Jackson property. Therefore, Mrs. Frederick and Samuels quite properly looked to the proceeds of the "cash out" sale of the Worth Hotel for the source of their commissions. Gould had already got all he had bargained for and his connection with the hotel had terminated.

The theory that if Samuels was not Gould's agent he should be held as for a conversion, a theory argued as some length, is just not supported by the evidence. There is no evidence that any dealings by Samuels was not with the prior consent of Gould or his admitted agent Mrs. Frederick, or with his subsequent ratification, made with full knowledge of all the facts.

The contention that the instruction was erroneous because the evidence demonstrates, as a matter of law, that Samuels was Gould's agent requires but scant consideration. By his answer, and by his testimony Samuels denied that he was such an agent. His testimony supports the implied findings that he acted solely for Heskins in the sale of the Battery-Jackson property, and that after that sale was completed his activities in connection with the hotel were directed to the end of realizing his earned commission at a time that Gould's interest in the hotel had terminated.

[7] The next major contention of appellant is that prejudicial error was committed in refusing to give several instructions offered by appellant. The first of these refers to the liability of brokers when they agree to pool commissions. It reads as follows: "It is generally held that brokers representing the opposing sides to a negotiation who secretly agree, without the knowledge or sanction of their principals, to pool their respective commissions and divide them according to a prearranged plan, are not entitled to be compensated by their employers, and that the agreement between themselves is void and unenforceable as being contrary to public policy."

The difficulty with this proffered instruction is that it assumes the existence of facts in respect to which the evidence was conflicting. It assumes that Samuels was the agent of Gould in the sale of

the hotel, and it assumes that Samuels and the brokers for Dr. Callison secretly agreed, without the knowledge or consent of Gould or Dr. Callison, to pool the commissions. On both issues there was a conflict. Under such circumstances it was not error to refuse the instruction. See many cases collected 24 Cal.Jur. p. 841, § 101.

[8] The court also refused to give the following instruction: "In the event that you find that defendant Samuels assumed to act as broker and without knowledge or permission of Henry W. Gould and Jewel L. Gould actually dispose of their property consisting of the Worth Hotel, then defendant Samuels has no right to a commission on said transaction and that defendant should be given no credit for a commission on any accounting by him. His duty under such circumstances is to account for the fair market value of plaintiffs' property. The same rule is applicable toward defendant Frederick if you find that she participated in such form of transaction."

The trial court noted that this instruction was refused because "Type of action (Negligence) constitutes an affirmance *pro tanto* of transaction. Omits element of condition or understanding under which conveyances to City Title Ins. Co. were made."

The instruction would seem to be incomplete and misleading. Even if it be assumed that it correctly states the law as far as it goes (a point disputed by respondents), it fails to tell the jury that permission of Gould's agent would be equivalent to the permission of Gould, or that Gould's subsequent ratification with knowledge of all the facts would rectify the lack of prior consent. For this reason the instruction was properly refused.

[9–11] Appellant complains of the failure to give the following instruction: "You are instructed to bring in a verdict in favor of plaintiff in an amount to be determined by you representing the difference between the true market value of the equity of plaintiff and her husband in the Worth Hotel and the price obtained by the defendants on the sale herein involved."

The trial court noted that this instruction was "inapplicable under evidence."

Since the proffered instruction was a direction of a verdict for appellant in a conflicting evidence situation, it was clearly incorrect. But appellant claims that this was the only instruction on the measure of damages that was offered, and no other on that subject was given. She, therefore, contends that this was error. No other instruction except the one quoted and properly refused was requested by appellant. A party may not complain of a trial court's failure to instruct upon a subject upon which no proper instruction was requested. Bellon v. Silver Gate Theatres, Inc., 4 Cal. 2d 1, 47 P.2d 462; Mills v. Los Angeles Junk Co., 3 Cal.App.2d 546, 40 P.2d 285; Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 P. 342; Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 39 P.2d 209; Kuehn v. Lowthian, 124 Cal.App.2d 867, 269 P.2d 666; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Western States, etc., Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735. There is no duty, in civil cases, for a trial court to give on its own motion instructions on issues not covered by proffered instructions. Moreover, it should be pointed out that the jury found against appellant on the issue of liability, so that the failure to give the instruction on the measure of damages if liability were found would seem to be nonprejudicial.

[12] The last major contention of appellant is that error was committed in excluding from evidence an undated, unsigned typed one-page paper relating to the sale of the hotel. This paper was offered as a claimed admission of Samuels. The parties stipulated that the document had been been typed on a typewriter in Samuels' office. There was no other evidence of its authenticity, of its execution, or that Samuels authorized it or knew about it. Quite clearly the foundational proof was insufficient to warrant the introduction of the document as a letter under sections 1940 and 1942 of the Code of Civil Procedure. See cases collected 18 Cal.Jur.2d p. 685, § 210. The statutory requirements for the admission of the document as a business

record were not met. § 1953f, Code Civ. Proc. There was no abuse of the power of the trial court in refusing to admit the paper on the proof made.

The judgment appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.

132 Cal.App.2d 496

Elizabeth H. OGIER, Plaintiff and Appellant,

v.

PACIFIC OIL AND GAS DEVELOPMENT CORPORATION, a corporation, A. F. Hilding, Dorothy Hilding, James P. George, Robert W. Casey, Elizabeth Casey, et al., Defendants and Respondents.

No. 16592.

District Court of Appeal, First District, Division 1, California.

April 22, 1955.

Rehearing Denied May 20, 1955.

Hearing Denied June 16, 1955.

Action arising out of allegedly fraudulent sale to plaintiff of deeds which allegedly constituted certificates of interest within statute prohibiting issuance of such certificates without permit. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., sustained demurrers to an amendment to original complaint, without leave to amend, and entered judgment of dismissal. The plaintiff appealed. The District Court of Appeal, Bray, J., held that where the original complaint had been amended by filing of an amendment which incorporated only by reference the original complaint, after demurrer had been sustained to the latter, the complaint as thus amended constituted a proper pleading.

Judgment reversed.

1. Pleading ⇐32

Complaint may adopt by reference various writings.

2. Pleading ⇐15

Though demurrer to original complaint had been sustained, amended complaint which consisted solely of amendment and incorporation of original complaint by reference constituted proper pleading.

3. Pleading ⇐34(1)

Pleadings should be liberally construed in furtherance of justice in order that every case may be determined as far as possible on its real facts.

4. Pleading ⇐223

When demurrer to complaint is sustained, complaint, except for purposes of review, is, in effect, destroyed as existing pleading.

5. Pleading ⇐15

That complaint to which demurrer has been sustained is, in effect, destroyed as existing pleading does not prevent its being incorporated by reference in an amendment.

6. Licenses ⇐39.15

Buyer of "certificate of interest" which has been issued without permit in violation of statute may seek recovery of purchase price paid, either by way of rescission or in action for damages. West's Ann.Corp. Code, §§ 25000 et seq., 25008, 26100.

7. Licenses ⇐18½(16)

Deed to mineral rights may or may not be security within statute requiring permit for certificate of interest, and determination of true character requires inquiry which goes beyond mere name of instrument or nature of interest conveyed. West's Ann. Corp.Code, §§ 25008, 25008(a).

8. Licenses ⇐39.24

In action arising out of allegedly fraudulent sale of deeds which allegedly constituted certificates of interest within statute requiring permit for issuance of same, it was question for triers of fact whether transactions were clean-cut transfers of interest in real estate or whether it was intended by seller and buyer that they were to transfer rights to participate in earnings or profits in nature of landowner's oil royalties that might inure to benefit of others under leases. West's Ann.Corp.Code, §§ 25008, 25008(a).

9. Fraud ⇐41

Pleadings in action for fraud must show fraudulent representations, that same were known by defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive plaintiff or with intent to induce him to enter into transaction; that plaintiff relied upon representations, believing them to be true; and that he was injured. West's Ann.Civ.Code, §§ 1572, 1710.

10. Fraud ⇐20

One misrepresentation justifiably relied on by a plaintiff is sufficient to establish fraud. West's Ann.Civ.Code, §§ 1572, 1710.

11. Fraud ⇐44

In action for fraud, allegations of plaintiff's advanced age, failing eyesight, impaired faculties, close advisor-advisee relationship between herself and defendant and her purchase of every security recommended to her by defendant would, if proved, constitute "confidential relationship." West's Ann.Corp.Code, §§ 25000 et seq.; West's Ann.Civ.Code, §§ 1572, 1710.

See publication Words and Phrases, for other judicial constructions and definitions of "Confidential Relationship".

12. Fraud ⇐11(1), 12

Representations that lands were potential oil lands, were good buy and worth price asked were representations of present facts and were not inactionable as mere expressions of opinion or as representations of act to be performed in future. West's Ann. Civ.Code, §§ 1572, 1710.

13. Fraud ⇐11(1)

There are two exceptions to rule that expressions of opinion are not actionable: (1) if party expressing it does not honestly entertain that opinion and (2) when party making false representation of opinion has superior knowledge or special information. West's Ann.Civ.Code, §§ 1572, 1710.

14. Fraud ⇐45

Where plaintiff in fraud action alleged that defendant did not believe truth of his own representations that lands were potential oil lands, were good buy and worth price asked, general rule that expressions of opinion are not actionable was not applicable. West's Ann.Civ.Code, §§ 1572, 1710.

15. Fraud ⇐46

Where plaintiff in fraud action alleged that defendants were in business of selling oil securities while plaintiff was lay person of advanced age relying on representations, general rule that mere expressions of opinion are not actionable was not applicable. West's Ann.Corp.Code, § 25000 et seq.; West's Ann.Civ.Code, §§ 1572, 1710.

16. Fraud ⇐11(1)

Though mere statement as to value is ordinarily deemed opinion of party making representation, if such statement is positive affirmation of fact, intended as such by party making it and reasonably regarded as such by party to whom it is made, it may be actionable like any other representation of fact. West's Ann.Civ.Code, §§ 1572, 1710.

17. Limitation of Actions ⇐100(1)

Cause of action for fraud does not accrue until discovery of true facts. West's Ann.Code Civ.Proc. § 338, subd. 4.

18. Limitation of Actions ⇐179(2)

Where plaintiff in action for fraud alleged that because of some transaction she had with defendant in October or November, 1952, she began to suspect that she had been imposed upon and thereupon employed attorney to investigate and thereafter first learned true facts, complaint met requirement of alleging facts which would disclose that action was not barred by statute of limitations. West's Ann.Code Civ.Proc. § 338, subd. 4.

19. Fraud ⇐38
Limitation of Actions ⇐100(1)

Where, from time plaintiff in action for fraud had first become suspicious until discovery of true facts, not more than two months had elapsed, and thereafter for period of approximately four months she had withheld action at request of defendants' attorney, her action was barred neither by statute nor by laches. West's Ann. Code Civ.Proc. § 338, subd. 4.

20. Equity ⇐81

Where party protests promptly on discovering he has been defrauded in making contract, and he enters into negotiations for peaceful settlement which fail, complaint filed within reasonable time after such failure is not barred by laches.

21. Action ⇐63

Defense of laches can be asserted only in an action in equity.

22. Fraud ⇐38

In action in tort for fraud, defense of laches, even if otherwise sufficient, was inapplicable.

Melbert B. Adams, Arthur Matin, San Francisco, for appellant.

Joseph A. Brown, San Francisco, for respondents, James P. George and Pacific Oil & Gas, etc.

Frank J. Baumgarten, San Francisco, for A. F. Hilding and Dorothy Hilding.

George H. Sullivan, San Francisco, for Robt. W. Casey and Elizabeth Casey.

BRAY, Justice.

Plaintiff appeals from a judgment of dismissal upon sustaining without leave to amend defendants' demurrers to an amendment to an amended complaint and upon granting a motion to strike said amendment.

Questions Presented.

1. After the sustaining with leave to amend of demurrers to a complaint, is an amendment to that complaint a proper pleading?

2. Does the complaint as thus amended state causes of action?

3. Are the causes of action barred by the statute of limitations?

4. Laches.

Record.

Defendants demurred generally and specifically to the original complaint. Upon the sustaining of demurrers thereto plaintiff filed an amended complaint. Again demurrers thereto were sustained with leave to amend. Plaintiff then filed an "Amendment to Complaint." The court ordered the amendment stricken, the demurrers thereto sustained, and entered judgment of dismissal.

1. Effect of Amendment.

The original complaint and the amended complaint contained 25 causes of action. The amendment to the complaint recites that the amended complaint is amended: (1) by changing paragraph VIII in the first 12 causes of action to read as in the amendment set forth, so as to set forth facts purporting to avoid the application of the statute of limitations; and (2) by changing paragraph X of the next 12 causes of action for the same purpose.

[1-3] The effect of this procedure was to adopt by reference the amended complaint changed as set forth in the amendment. It is elementary that a complaint may adopt by reference various writings. The amended complaint referred to is 24 transcript pages long. No particular point would be gained by rewriting that complaint. It was perfectly obvious to court and counsel what was before the court. We can see no reason why the complaint as thus amended did not constitute a proper pleading.

In California it is fundamental that pleadings should be liberally construed in furtherance of justice in order that every case may be determined so far as possible on its real facts. To decline to permit the procedure followed here would be bowing to highly technical requirements to the exclusion of a consideration of the pleading as thus amended without any good reason for so doing. See Big Boy Drilling Corp. v. Rankin, 213 Cal. 646, 648, 3 P.2d 13, 14; "The complaint, as originally filed, was not superseded by the amendment thereto, but was merely augmented or supplemented by the addition of allegations pertinent alone to the appellant's liability, and necessary to cause the complaint to conform to the proofs in this regard. It is not important that an amendment to the complaint was filed instead of an amended complaint." See also Maddux v. Mora, 99 Cal.App. 695, 699, 279 P. 467. And Redington v. Cornwell, 90 Cal. 49, 61, 27 P. 40, 43: "Unless otherwise required by the court, an amendment to a

complaint, whether it consists of a mere additional averment, or effects a change in the original, may be filed by itself, without being incorporated in the original by engrossment of the complaint as amended, (Code Civ.Proc. [sec.] 432) * * *." While in these cases no demurrer had been sustained, the liberal attitude of the courts towards pleadings is indicated. In Tidwell v. Henricks, 124 Cal.App.2d 64, 268 P.2d 84, the default of the defendant was taken for failure to answer the complaint. Thereafter the plaintiff filed and served an amendment to the complaint and again took the default of the defendant for failing to answer. It was held that the filing of the amendment vacated the default to the original complaint and that the complaint as thus amended superseded the original complaint. The court then set aside the second default for failure of the plaintiff to serve the original complaint with the amendment. As we are not dealing here with default and no objection was made here to the failure to serve another copy of the original complaint, the latter portion of the court's decision in the Tidwell case is not applicable.

[4, 5] It is true that when a demurrer to a complaint is sustained, the complaint, except for purposes of review, is, in effect, destroyed as an existing pleading. However, that fact would not prevent its being incorporated by reference in the amendment. Cases cited by defendants like Hendricks v. Osman, 72 Cal.App.2d 465, 164 P.2d 545, and Ross v. Goins, 51 Cal.App. 412, 197 P. 132, dealing with the refusal of the plaintiff to amend after demurrer sustained, have no application here.

2. Does The Complaint as Thus Amended State A Cause of Action?

(a) Lack of Permit.

The first 12 counts allege the sale to plaintiff of oil properties in violation of the Corporate Securities Act, Corporations Code, § 25000 et seq., because no permit for the issuance of securities was obtained. Count 1 is typical of these counts.[1] It alleges that plaintiff is single, practically blind, aged 85, and because of age and infirmity likely to be deceived by designing persons; that at all times defendant A. F. Hilding was acting as the agent of all defendants, that defendants were engaged in the business of selling and issuing "certificates of interest in an oil title," within the meaning of the Corporate Securities Act and as specified; that on specified occasions defendant A. F. Hilding induced her to buy one of the said certificates of interest; that each defendant knew the land was in unproved territory and that plaintiff had neither money nor ability to prospect for oil; that it was the plan and scheme of defendants to induce plaintiff to part with her money upon her expectation that she would be able at some future time to lease her interest to defendant Pacific Oil and Gas Corporation or some oil company and thereby receive large and prospective oil royalties when oil was actually discovered on said land as the result of drilling thereon by either the defendant corporation or some other oil company. Plaintiff relied upon the representations. It is further alleged that defendants' scheme was to execute grant deeds to plaintiff purporting to convey title to prospective oil lands, or to an interest therein; that under the Corporate Securities Act a permit was required for the issuance of said securities and that defendants did not obtain such permit; that by making said sales defendants fraudulently represented that said sales were legal but in fact they were illegal and void; that a total failure of consideration resulted and plaintiff has been damaged in the amount paid. Plaintiff imposed full confidence in defendant Hilding and had no knowledge of the absence of said permit until on or about December 23, 1952. Plaintiff is uncertain whether she is entitled to recover against certain or all of the defendants, because all defendants were the grantors in the deeds at various times, and plaintiff is uncertain who was the real issuer of the securities and who ultimately received the consideration therefor. Plaintiff has no

1. The counts are practically identical with the exception of the names of the defendant or defendants to whom plaintiff paid her money, the time and amount of payment, and the particular property acquired.

recollection of the exact amount she paid in each transaction but believes the amounts indicated by the revenue stamps on each deed are the true amounts. The property deeded her is described, the purchase price indicated by the stamps is $2,000, and the purchase date was January 2, 1941. A notice of rescission was served on all defendants June 23, 1953. The complaint further alleges that at the time of the transaction plaintiff was 75 years of age, had poor eyesight and a progressively declining physical condition, her faculties were impaired and she was easily influenced by defendant Hilding in whom she reposed great trust and confidence; that he deliberately sought her trust so that he could induce her to enter into the described transactions; that he always saw her alone; that she accepted his word for everything and that a confidential relationship existed between them until about November 15, 1952; that upon investigation by her attorney she became fully aware of the falsity of the representations about February 24, 1953, and that she refrained from filing suit until June 21, 1953, at the request of defendants' attorney.

[6] The theory of the first 12 counts is that by failing to satisfy the requirements of the Corporate Securities Act defendants fraudulently transferred the "securities" (deeds) to plaintiff. Our first inquiry, then, is whether deeds to lands represented as oil bearing constitute a "certificate of interest" under Corporations Code section 25008. Any such certificate issued without a permit is void under section 26100. A buyer of such a certificate may seek recovery of the purchase price paid either by way of rescission or an action for damages. See Auslen v. Thompson, 38 Cal.App.2d 204, 213, 101 P.2d 136, and Woods v. Deck, 9 Cir., 112 F. 2d 739, 741.

Section 25008 defines a "security" as "(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; *any certificate of interest in an oil, gas, or mining title or lease;* any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings." (Emphasis added.) Taormina v. Antelope Mining Corp., 110 Cal. App.2d 314, 320, 242 P.2d 665, 668, states: "* * * it is also the law that a person who sells a security impliedly represents that a permit therefor has been secured when one is required by law for such a sale, and if this implied representation is false, then *it is a negligent misrepresentation which is an actionable fraud* [citation]; and where, as here, the action is for damages for fraud, recovery may be had against all persons participating in the fraud, whether they received a portion of the money paid or not. [Citation.]" (Emphasis added.)

Ballantine, California Corporation Laws, 1949 ed. p. 608, states: "The term 'security' has been defined in the Act to cover practically every type of contract or transfer which the ingenuity of a promoter can conceive * * *"

In Moore v. Stella, 52 Cal.App.2d 766, 127 P.2d 300, the defendant transferred interest in mineral rights *by deed.* The interest ran to many acres of described land. The court said, 52 Cal.App.2d at page 776, 127 P.2d at page 305: "Deeds to interests in real property may be 'certificates of interest' and hence 'securities' although the word 'deed' is not used in the definition." This answers defendants' contention that real property transferred in fee simple is not included in the section. The court added that the *size* of the area conveyed was not determinative, and stated this rule, 52 Cal.App.2d at page 773, 127 P.2d at page 303: "Whether the transactions were clean-cut transfers of interests in real estate to be held, used, or sold by the grantees without participation with others in a profit-sharing venture on the one hand, or whether upon the other hand, while they were conveyances of definite interests in real property, they were intended by both seller and buyer to transfer rights to participate in earnings or profits in the nature of landowner's oil royalties that might inure to the benefit of numerous landowner lessors under community leases, *was necessarily a question of fact for the trial court.*" (Emphasis added.) The court then concluded that the evidence supported a "securities" finding.

In People v. Chait, 69 Cal.App.2d 503, 159 P.2d 445, the defendants sold to various individuals fractional lots upon the representation that they were "either proven oil lands, were located in a proven oil district, or that negotiations were then pending with major oil companies operating in the district, and that leases would be made with these companies by virtue of which the purchasers would receive large bonuses or royalties and a comfortable income." 69 Cal. App.2d at pages 507–508, 159 P.2d at page 448. Mr. Presiding Justice Nourse noted, 69 Cal.App.2d at pages 520–521, 159 P.2d at page 455, that the lands were purchased as investments in "proven oil lands," ("potential oil lands" is the language used in our case) and the court held that evidence supported the finding that the transactions were within the purview of the Corporate Securities Act.

[7] In Domestic and Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 51 P.2d 73, lessees under an oil and gas lease executed assignments of percentages of oil and other substances to be produced during the term of the lease, and money derived therefrom. It was not contemplated that the lessees and assignees were to be tenants in common. The court held that such assignments were securities within the meaning of the act. In People v. Daniels, 25 Cal.App.2d 64, 76 P.2d 556, the defendant offered to sell units of land, the receipts for payment for which were called "grant deeds" purporting to convey an undivided 1/100 of ¼ of an acre per unit. The court held that a jury was warranted in finding the deeds came under the act. Although the court pointed out that the unit interest was so small as to exclude any possibility that the seller and the investor intended anything other than an interest in possible oil production, the court used this language applicable here, 25 Cal.App.2d at page 69, 76 P.2d at page 558: "* * * what in fact is a grant deed * * * is also in substance and effect a 'certificate of interest [in] an oil, gas or mining title' within the evident purpose, intent, and meaning of the Corporate Securities Act."

"A deed to mineral rights may or may not be a security. The determination of its true character requires an inquiry which goes beyond the mere name of the instrument or the nature of the interest conveyed.

"In deciding whether a given instrument is a security the courts have invariably looked through mere form to substance. [Citations.]" Moore v. Stella, supra, 52 Cal.App.2d 766, 772, 127 P.2d 300, 303.

[8] One of the allegations of the complaint is that, in pursuance of the scheme to defraud plaintiff, defendants adopted the "device of executing grant deeds to plaintiff purporting to convey title to said prospective oil lands, or to a fractional undivided interest therein, but each such instrument was in fact a certificate of interest and a certificate of interest in an oil title." Under the allegations of the complaint, the triers of the fact could determine that the transactions were not clean-cut transfers of interests in real estate to be held, used or sold by plaintiff without participation with others in profit-sharing ventures but it was intended by both seller and buyer that, while they were conveyances of definite interests in real property, they actually were to transfer rights to participate in earnings or profits in the nature of landowners oil royalties that might inure to the benefit of others under leases. This seems to be the test laid down in Moore v. Stella, supra, 52 Cal.App.2d 766, 773, 127 P.2d 300. The first 12 counts state causes of action, at least as against the general demurrer filed.

(b) Fraud.

Counts 13 to 24, inclusive, allege fraud.[2] Most of the facts alleged in the first 12 counts are alleged in the fraud counts.

2. The 25th count alleges a common count for the sum of $71,500 (the total of moneys paid out by plaintiff on all the transactions mentioned in the previous 24 counts) money had and received. As we hold that the 24 other counts state causes of action, it is unnecessary to discuss the 25th count, as the common count cause of action would only fall in the event that the facts upon which the demand is based and which are specially pleaded in the other counts, failed to constitute causes of action. See Rose v. Ames, 53 Cal.App. 2d 583, 589, 128 P.2d 65.

Additionally it is alleged that defendant Hilding represented to plaintiff that the lands were potential oil lands, that defendant corporation was going to drill on the land, or that they would engage someone to drill for them; that other companies were going to drill on lands which were in the same oil trend and that this would make plaintiff's property valuable if oil were found. Defendants induced plaintiff to believe that such purchase was a good buy and worth the purchase price. Defending Hilding said: "There is a strong possibility of securing oil from this land. How much more money you will have if you put money in oil." Plaintiff, because of her faith and confidence in defendant Hilding, relied on these statements, all of which statements were known to be untrue, or were not warranted by information possessed by Hilding. The lands were not potential oil lands and were of little or no value. Plaintiff had no knowledge of the fraud until about December 23, 1952, and learned the true situation about February 24, 1953, from which date until June 21, 1953, she withheld action at the request of defendants' attorney.

[9] The complaint as amended meets the test of the essential elements for a fraud action. Those elements are clearly stated in Kauffman v. Bobo & Wood, 99 Cal.App.2d 322, 326, 221 P.2d 750, 752: "'The pleadings must, of course, show the fraudulent representations; that they were known by the defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive the plaintiff, or with intent to induce him to enter into the transaction; that the plaintiff relied upon the representations, believing them to be true; and that he was injured.'" Quoting 12 Cal.Jur. 806. See Civ.Code, §§ 1710 and 1572.

[10] It is alleged that Hilding represented to plaintiff and induced her to believe that the lands were potential oil lands and that defendants or others would drill for oil, all of which allegations she alleged to be false, all of which allegations defendant Hilding, the agent of all defendants, knew to be false or made without information warranting his making them, and made with intent to induce plaintiff to enter into the transactions; that plaintiff believed the representations and relied on them and was injured to the extent of parting with the various sums for land of little or no value. One misrepresentation justifiably relied on by the plaintiff is sufficient to establish fraud. Hefferan v. Freebairn, 34 Cal.2d 715, 721, 214 P.2d 386.

[11] Plaintiff alleged her advanced age, failing eyesight, impaired faculties, the close advisor-advisee relationship between herself and Hilding and her purchase of every security recommended to her by Hilding. The facts alleged, if proved, would constitute a confidential relationship. In Kent v. First Trust & Savings Bank, 101 Cal.App.2d 361, 370, 225 P.2d 625, 631, it is said: "There is no merit in plaintiff's contention that a confidential relationship was not pleaded * * *. It is alleged in the answer that by reason of Mrs. McKee's age and physical condition her mental faculties were impaired and she was easily influenced by those in whom she had confidence; that she reposed trust and confidence in plaintiff and for a long period prior to and after the execution of the note she did whatever he suggested or instructed her to do."

[12–16] Defendants cite the rule stated in 12 Cal.Jur. 452, and cases supporting it, to the effect that the representations to be actionable must be of a present or past fact and not a mere expression of opinion or a representation of an act to be performed in the future, and contend that the representations here are in the latter categories. However, the representations here were of present facts, namely, that the lands were potential oil lands, were a good buy and worth the price asked. Moreover, there are two exceptions to the rule that expressions of opinion are not actionable and the allegations of the complaint bring the case within both exceptions. The first is that an expression of opinion is actionable if the party expressing it does not honestly entertain that opinion. Dyke v. Zaiser, 80 Cal.App.2d 639, 649, 182 P.2d 344; Restatement, Torts, 525(b); Hobart v. Hobart Estate Co., 26

Cal.2d 412, 430, 159 P.2d 958. Here it is alleged that defendant Hilding did not believe his representations to be true, thus making his opinion a dishonest one. The second exception arises when the party making the false representation of opinion has superior knowledge or special information. Union Flower Market v. Southern Cal. F. M., 10 Cal.2d 671, 676, 76 P.2d 503. Plaintiff alleged that defendants were in the business of selling oil securities, while plaintiff was a lay person of advanced age relying on the representations. As said in Reton v. J. D. Millar Realty Co., 132 Cal.App. 708, 711, 23 P.2d 419, 420: "It is true that a bare and naked statement as to value is ordinarily deemed the opinion of the party making the representation. [Citation.] On the other hand, such statement may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. *When it is such, it is like any other representation of fact* * * *." (Emphasis added; see also Willson v. Municipal Bond Co., 7 Cal.2d 144, 150–151, 59 P.2d 974.

3. Statute of Limitations.

[17, 18] Plaintiff's allegations of the existence of the fiduciary relationship between her and Hilding, her age and condition and the other circumstances of the case, were sufficient to account for her failure to discover the true facts, until the dates alleged. Her causes of action did not accrue until the discovery of such facts. Code Civ. Proc. § 338(4). She alleged that because of some transaction she had with Hilding in October or November, 1952 (a transaction not here involved) she began to suspect that she had been imposed upon. She thereupon employed an attorney to investigate for her and upon his reporting to her the results of his investigation she first learned the true facts. This meets the requirements set forth in Douglas v. Douglas, 103 Cal.App.2d 29, 32, 228 P.2d 603, 605. "Where the fraudulent acts complained of occurred more than three years prior to the filing of the action to constitute a valid complaint not only must the facts constituting the fraud be declared but also the circumstances surrounding the discovery must be so alleged as to disclose that the action is not barred by the statute of limitations. [Citations.]" See also Strangman v. Arc-Saws, Inc., 123 Cal.App.2d 620, 267 P.2d 395, an action based on the Corporate Securities Act, where it was held that the plaintiff's failure to make inquiry sooner was justified because of the confidence imposed by him in his attorney who was also an officer of the issuing corporation. See Myers v. Stevenson, 125 Cal.App.2d 399, 402, 270 P.2d 885, giving right to amend if allegations concerning the ignorance of the cause of action and its discovery are not sufficiently explicit.

4. Laches.

[19–22] What has been said about plaintiff's failure to discover the facts earlier applies to the claim of laches. From the time plaintiff first became suspicious until the discovery of the facts, not more than two months elapsed. Thereafter for a period of approximately four months she withheld action at the request of defendants' attorney. "'Where a party protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceable settlement which fail, a complaint filed within a reasonable time after such failure is not barred by laches.' Reiniger v. Hassell, 216 Cal. 209, 210–211, 13 P.2d 737, 738." Williams v. Marshall, 37 Cal.2d 445, 456, 235 P.2d 372, 379. No element of laches appears. It should be pointed out, also, that "* * * the defense of laches can be asserted only in an action in equity." (18 Cal.Jur.2d 205.) Plaintiff's action sounds in tort for fraud. See Taormina v. Antelope Mining Corp., supra, 110 Cal.App.2d 314, 319, 242 P.2d 665.

The orders granting the motion to strike and sustaining the demurrers were erroneous. The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

132 Cal.App.2d 536

Russell Bullet STEWART, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Cr. 20955.

District Court of Appeal, Second District, Division 3, California.

April 26, 1955.

Hearing Denied June 23, 1955.

Proceeding for writ of mandamus to compel dismissal of criminal action on ground petitioner had not been brought to trial within statutory 60-day period after filing of information. The District Court of Appeal, Vallée, J., held that where the petitioner had expressly consented to the setting of the cause for trial on the 61st day after the filing of the information, he waived his right to be brought to trial within the 60-day period.

Alternative writ discharged; peremptory writ denied.

1. Criminal Law ⇐576(5)

Right of defendant to trial within statutory 60-day period following filing of information may be waived. Pen.Code, § 1382.

2. Criminal Law ⇐576(5)

Consent of a defendant that his trial be set for date beyond 60-day limit after filing of information is equivalent to postponement upon his application within meaning of statute. Pen.Code, § 1382.

3. Criminal Law ⇐576(5)

Where defendant in criminal prosecution expressly consented to setting of cause for trial on date 61 days after filing of information, he waived right to be brought to trial within statutory 60-day period. Pen. Code, § 1382.

4. Criminal Law ⇐573, 635

Though defendant in criminal prosecution had waived right to be brought to trial within statutory 60-day period following filing of information, he had right, guaranteed by constitution, to speedy and public trial. Pen.Code, § 1382; Const. art. 1, § 13.

5. Criminal Law ⇐575

Procedure whereby criminal prosecution was continued because only eight of 59 judges of Superior Court presiding at county seat were assigned to departments for trial of criminal cases and 29 civil cases were assigned for trial to civil departments of the court, was contrary to requirements of provision that criminal cases shall have precedence over all civil matters and proceedings. Pen.Code, § 1050.

6. Criminal Law ⇐576(2)

Even if postponement of criminal trial from March 4 to April 12 was not for good cause, in view of fact some departments of court were being devoted to civil cases, continuance from March 3 to April 12 was not unreasonable and did not entitle defendant to discharge. Pen.Code, § 1050; Const. art. 1, § 13.

Harold Rhoden, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Petitioner seeks a peremptory writ of mandamus commanding the superior court to dismiss a criminal action pending against him on the ground he has not been brought to trial within sixty days after the filing of the information as required by section 1382 of the Penal Code.

[1–3] On December 30, 1954 an information was filed charging petitioner with the crime of burglary. On December 31 he was arraigned, pleaded not guilty, and his trial was set for March 1, 1955. March 1, 1955 was the 61st day after the filing of the information. At the time the cause was set for trial defendant and his counsel waived "time for trial." On March 1 petitioner answered he was ready for trial, but the court continued the trial to March 2; and on that date it continued the trial to March 3. On March 3 petitioner refused to consent to a continuance and moved the court to dismiss the action pursuant to section 1382 of the Penal Code. The mo-

tion was denied and the trial was continued to March 4. On March 4 petitioner again refused to consent to a continuance and moved the dismissal of the action. The motion was denied, the trial was continued to April 12, and defendant was released on his own recognizance. The ground for each continuance was that there was no department of the superior court available for trial of petitioner's cause.

Section 1382 of the Penal Code provides:

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the * * * filing of the information * * *."

The right of a defendant to a trial within the 60-day period may be waived. People v. Greene, 108 Cal.App.2d 136, 140, 238 P.2d 616. The consent of a defendant that his trial be set for a date beyond the 60-day limit is equivalent to a postponement upon his application within the meaning of section 1382. People v. George, 91 Cal. App.2d 537, 540, 205 P.2d 464. In People v. O'Leary, 130 Cal.App.2d 430, at page 436, 278 P.2d 933, at page 937, this court said:

"The purpose of an objection to a trial date beyond the 60-day period is to give the court an opportunity to fix an earlier date. If an objection is not made within the 60-day period, it cannot validly be made at all."

Since petitioner expressly consented to the cause being set for trial on March 1, 1955, he waived his right to be brought to trial within the 60-day period.

[4] Petitioner argues that his consent was only to a trial on March 1, 1955 and, at most, to a trial on March 3; and that if it is held that by consenting to a trial after the 60-day period he consented to a trial after March 3, he could be tried years after the filing of the information. The argument is unsound. The Constitution gives a defendant "the right to a speedy and public trial". Const. art. I, § 13. On facts identical with those in the case at bar the court in In re Lopez, 39 Cal.2d 118, at page 120, 245 P.2d 1, 2, said:

"But his consent to delay beyond the 60 day period does not amount to a waiver of his constitutional right to a speedy trial nor of the requirement that further delay must be justified on grounds of reasonableness and good cause. [Citations.]

"The defendant was not entitled to go to trial as of right on the day to which he last consented if good cause appeared for further delay. But the further delay must not be unreasonable and good cause is shown where the condition of the court's business would not permit the trial to proceed. [Citations.]

"The foregoing cases define what is a speedy trial in the constitutional sense and as required by section 1382 of the Penal Code. They also indicate that the question depends on the circumstances of each case bearing on the factors of good cause and the reasonable exercise of discretion in allowing postponements."

[5, 6] In the present case the minutes of the court of March 1, 2, and 3 state that on each of those dates the cause was continued because of a congested calendar. The minutes of March 4 recite "Because of congested calendar, trial continued to April 12, 1955, 9:00 A.M." We must assume that had this proceeding not been instituted, petitioner would have been tried on April 12. In an affidavit of petitioner's counsel filed with the petition it is stated on information and belief that on March 3 and 4 only 8 of the 59 judges of the superior court presiding at the county seat were assigned to departments for the trial of criminal cases and that on those dates 29 civil cases were assigned for trial to the civil departments of the court. These statements are not denied by respondent. This procedure, of course, was contrary to the requirements of section 1050 of the Penal Code: "Criminal cases shall be given precedence over all civil matters and proceedings." However if, in view of the availability of open departments of the

court, good cause did not exist for the continuance from March 4 to April 12, the question remains whether the continuance for 40 days deprived the petitioner of the right to a speedy trial. We are of the opinion that the time intervening between March 3, the last agreed trial date, and April 12, when the trial was to have commenced, was not unreasonable.

The alternative writ is discharged. A peremptory writ is denied.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

132 Cal.App.2d 509

Leopold FELLNER and Clara M. Fellner, Plaintiffs and Respondents,

v.

Morris STEINBAUM, Irvin D. Berzon, Jerry Steinbaum, Albert Steinbaum, et al., Defendants,

Morris Steinbaum, Appellant.

Civ. 20379.

District Court of Appeal, Second District, Division 1, California.

April 25, 1955.

Rehearing Denied May 23, 1955.

Hearing Denied June 23, 1955.

Action for damages for breach of contract for sale of hotel. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to support trial court's finding that there was no fraud or misrepresentation inducing defendant to enter into contract.

Affirmed.

1. Vendor and Purchaser ⇐320

In action for damages for breach of contract for sale of hotel, evidence on issue of fair market value was sufficient to support trial court's finding of amount of damages for plaintiffs.

2. Appeal and Error ⇐996

Where different conclusions may reasonably be drawn from evidence by different minds, trial court's findings are not to be disturbed on appeal.

3. Vendor and Purchaser ⇐330

In action for damages for breach of contract for sale of hotel, it was not error not to credit defendant with amount received by plaintiffs as forfeit upon breach of agreement for sale of same property, made after one involved in present action, where losses sustained by plaintiffs in their endeavors to sell property after breach of agreement exceeded amount of judgment and forfeiture added together.

4. Appeal and Error ⇐1050(1), 1056(1) Witnesses ⇐275(1)

In action for damages for breach of contract for sale of hotel, record failed to establish that there had been undue restriction of defendant's examination of plaintiff or that there was reversible error in admission or rejection of testimony on trial of case. West's Ann.Code Civ.Proc. § 2055.

5. Appeal and Error ⇐964 Trial ⇐2

Question of consolidating two cases for trial is matter committed to sound discretion of trial judge, and his decision will not be reviewed except upon clear showing of abuse of discretion. West's Ann.Code Civ.Proc. § 1048.

6. Trial ⇐2

In action for damages for breach of contract for sale of hotel, it was not error to consolidate for trial such breach of contract action with action for recovery of alleged commission due on sale.

7. Appeal and Error ⇐1010(1)

If finding is supported by substantial evidence, notwithstanding evidence to contrary, or asserted weaknesses in opposing evidence, that finding is conclusive and binding upon courts of review.

8. Vendor and Purchaser ⇐44

In action for damages for breach of contract for sale of hotel, evidence was

sufficient to support trial court's finding that there was no fraud or misrepresentation inducing defendant to enter into contract.

Pacht, Tannenbaum & Ross; Pacht, Ross, Warne & Bernhard; Isaac Pacht and Stuart L. Kadison, Los Angeles, for appellant.

Sidney Dorfman, Beverly Hills, for respondents.

DRAPEAU, Justice.

Plaintiffs and defendant entered into a written agreement for the sale and purchase of the Langham Apartment Hotel and furnishings in the City of Los Angeles. Defendant purchaser gave the real estate broker who arranged the transaction his check for $10,000, to apply on the purchase price.

A few days after making it, the defendant repudiated the agreement, and stopped payment on his check.

Two legal actions followed: (1) The instant one for damages for breach of the contract; and (2) an action against plaintiffs for the broker's commission.

These two actions were consolidated and tried together, over the objection of defendant.

Findings and judgment were for plaintiffs in the breach of contract case, and for the broker for his commission.

Defendant purchaser appeals from the judgment against him, and contends:

1. That the evidence does not support the finding of the amount of plaintiffs' damages.

In support of this contention defendant argues in his brief:

"Since the measure of damages for the vendee's breach of a contract to purchase real property is deemed to be the excess, if any, of the amount due under the contract over the fair market value of the property, and since it appears from the record that there was no such excess, there was prejudicial and reversible error resulting in a miscarriage of justice in the award of damages in any amount."

2. That it was error not to credit defendant with $50,800 received by plaintiffs as a forfeit upon the breach of an agreement for the sale of the property, made after the one here under consideration.

3. That it was error to restrict the examination of plaintiff when he was testifying under Section 2055 of the Code of Civil Procedure, and under cross-examination when he was testifying in his own behalf. And that it was error to permit hearsay testimony over the objection of defendant.

4. That it was error to consolidate and try together the breach of contract and the commission cases.

5. That there is no evidence to support findings that there was no fraud or misrepresentation inducing defendant to enter into the contract.

These contentions have been considered and will be commented upon in the order in which they have been stated.

[1, 2] 1. It appears from the record that the purchase price for the hotel agreed upon by plaintiffs and defendant was $1,100,000; that the plaintiffs finally sold the hotel for $930,000; that a real estate expert testified that in his opinion the fair market value of the property at the time of the breach of the contract was $950,000; that the trial court found the value to be $995,500, and adjudged damages of $104,500.

It will serve no useful purpose to recapitulate in this opinion all the figures entering into the computation of the amount of damages by the trial judge. The amount of the judgment comes well within the measure of damages specified by law in such cases as this, and the finding and judgment are supported by substantial evidence. It was the duty of the trial judge to consider all of the testimony as to fair market value, and "'Where different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal.'" Pfingsten v. Westenhaver, 39 Cal.2d 12, 19, 244 P.2d 395, 399.

[3] 2. Plaintiffs did receive as a forfeit $50,800 under a contract of sale with other parties, made after defendant breached his agreement. It is not necessary to determine whether or not there was a legal obligation to give defendant credit for this sum, for the reason that the losses sustained by plaintiffs in their endeavors to sell the property after the breach of the agreement exceed the amount of the judgment and $50,800 added together. As pointed out in plaintiff's brief on appeal, giving them credit for the judgment and for the $50,800, and other items of expense shown in the record, shows a loss of more than the damages awarded by the judgment.

[4] 3. After a careful review of the record it appears that there was no undue restriction of defendant's examination of the plaintiff, and that there was no reversible error in the admission or rejection of testimony on the trial of the case. Ample time was taken, defendant was permitted to cross-examine all the witnesses at great length, and there was no abuse of the discretion committed by our law to a trial judge in the conduct of this law suit. People v. McReynolds, 31 Cal.App.2d 219, 87 P.2d 734, and see cases digested in West's Cal.Dig., Witnesses, ⚷267.

[5, 6] 4. And it need hardly be said that no error appears in the order consolidating the two cases for trial. This too is a matter committed to the sound discretion of the trial judge, and his decision will not be reviewed except upon a clear showing of abuse of discretion. Code of Civil Procedure, Section 1048; Fisher v. Nash Bldg. Co., 113 Cal.App.2d 397, 248 P.2d 466. No substantial rights of defendant were trenched upon by trying these two cases together.

5. Finally, defendant's contention that the evidence does not support findings that there was no fraud or misrepresentation inducing the contract is also without merit. In this connection, it is sufficient to quote from defendant's brief. After repeating and arguing evidence at great length he says: "As against this imposing array of testimony that various misrepresentations were made as to 1950 income, Mr. Fellner testified that he made no representations."

[7, 8] It is elementary law that if a finding is supported by substantial evidence, notwithstanding evidence to the contrary, or asserted weaknesses in opposing evidence, that finding is conclusive and binding upon courts of review. In this case it was the province of the trial court to decide this issue, and it is not the province of this Court to pass upon the weight, value, or effect of conflicting evidence.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 491

Catherine WEEKS, as Executrix of the Last Will of Alessandrina Taddeucci, Deceased, Plaintiff and Respondent,

v.

Alvin TADDEUCCI and Johanna E. Taddeucci, Defendants and Appellants.

Civ. 8499.

District Court of Appeal, Third District, California.

April 21, 1955.

Action in ejectment by mother against her son and his wife for possession of certain farm property. The son filed a cross-complaint in which he alleged an oral agreement whereby his father agreed to transfer ownership of property on his death to his son subject to life estate in the mother with a right in son to operate farm during the mother's life, and in which son prayed that property be decreed to be held in trust by the mother for him. The Superior Court, Sonoma County, Charles J. McGoldrick, J., entered judgment in favor of the mother and the son and his wife appealed. The District Court of Appeal, Schottky, J., held that evidence supported

findings that no oral agreement was entered into as alleged by son that would obligate mother to convey real property to son or compel mother to hold as trustee of constructive trust for benefit of son.

Judgment affirmed.

1. Trusts ⇐110

In action in ejectment by mother against her son and his wife for possession of certain farm property, evidence supported findings that there was no oral agreement entered into as alleged by son that would obligate the mother to convey real property to her son or compel mother to hold as trustee of constructive trust for the benefit of son.

2. Appeal and Error ⇐987(1)

Issues of fact are determined in the trial court and not in an appellate tribunal.

3. Appeal and Error ⇐1010(1)

The trial court having decided upon sufficient evidence in favor of one party on fact issues, the District Court of Appeal must uphold the judgment.

Clarendon W. Anderson, Santa Rosa, for appellants.

Francis M. Passalacqua, Healdsburg, for respondent.

SCHOTTKY, Justice.

Alessandrina Taddeucci commenced an action in ejectment against her son, Alvin Taddeucci, and his wife, Johanna Taddeucci, for possession of certain farm property in Sonoma County known as the "Home Ranch."

Defendants filed a cross-complaint in which it was alleged that on or about January, 1934, defendant Alvin Taddeucci and his father, Jacopo Taddeucci, entered into an oral agreement that said defendant would assume the management of said Home Ranch and that they would share the profits equally; that said defendant Alvin Taddeucci performed all the terms of said oral agreement from January, 1934, to November, 1942, when said defendant entered the military service; that upon said defendant's discharge from the military service he resumed his duties under said oral agreement of 1934; that on or about May, 1946, said father, Jacopo Taddeucci, agreed orally to execute a written agreement confirming all the provisions of said oral agreement and also providing "that said Jacopo Taddeucci would devise and bequeath and transfer ownership and title of aforesaid real property and all appurtenances thereto belonging, and thereafter added, to said Alvin Taddeucci subject only to a life estate in Alessandrina Taddeucci if she survived said Jacopo Taddeucci and provided further that said Alvin Taddeucci would have the right to operate said properties during the life tenancy of said Alessandrina Taddeucci, and said written agreement to contain the further provision that said Alvin Taddeucci upon the death of Alessandrina Taddeucci, would pay to Walter Taddeucci, his brother, the sum of Two Thousand ($2000.00) Dollars; to Vivian Taddeucci, his sister, the sum of Fifteen Hundred ($1500.00) Dollars, and to Kathryn Weeks, his sister, the sum of Fifteen Hundred ($1500.00) Dollars." The cross-complaint alleged further that defendant Alvin Taddeucci continued to operate said properties under the terms of said oral agreement and also alleged that plaintiff, Alessandrina Taddeucci, agreed with defendant Alvin Taddeucci and the father, Jacopo Taddeucci, to be bound under said agreement which was to be executed in writing by Jacopo Taddeucci; that Jacopo Taddeucci died on March 25, 1947; and that in the performance of said agreement defendant expended various sums of money for labor and materials in making improvements. The prayer of the cross-complaint was that (1) "the court make its decree declaring that Alessandrina Taddeucci holds said real property and the appurtenances thereto belonging in trust for said Alvin Taddeucci," and (2) "that in the event the court finds that Alvin Taddeucci has no interest in the said real property that the court make its order that Alessandrina Taddeucci pay to said Alvin Taddeucci" certain sums for money expended by him.

The material allegations of the cross-complaint were denied and the action was tried before the court sitting without a jury. The trial court found contrary to the allegations of the cross-complaint, the substance of said findings being that there was no oral agreement entered into as alleged by the defendants that would obligate plaintiff to convey the real property to appellants or compel respondent to hold as trustee of a constructive trust for the benefit of the defendant Alvin Taddeucci; also, that Alvin Taddeucci's actions were not in reliance upon the oral agreement as alleged by him, but that his actions were done in the operation of the property on a share crop basis and, therefore, recovery was denied as to his claim for monetary damages. In accordance with said findings judgment was entered that defendants had no right or interest in the property, that they take nothing on their cross-complaint and that plaintiff recover the possession of her property.

Defendants' motion for a new trial was denied and they have appealed from the judgment. During the pendency of this appeal Alessandrina Taddeucci died and the executrix of her estate was substituted as plaintiff and respondent.

In their opening brief appellants fail to state any specific contentions of error but the general purport of their argument is that the evidence does not support the judgment in favor of respondent and that "to deny the existence of a trust upon the property would not only be detrimental to Appellant but would undeniably result in the unjust enrichment of Respondent by permitting her to receive the benefits of Appellant's performance under the agreement." We shall hereinafter refer to appellant Alvin Taddeucci as appellant and to Alessandrina Taddeucci as respondent.

It appears from the record that in 1921 Jacopo Taddeucci and respondent acquired the realty which is the subject matter of this action, about 56 acres, known as the Home Ranch. It was paid for with community funds and consisted of uncultivated land, a stand of forest, ten acres of cherries and a few apple trees. Subsequent to the purchase respondent and her husband improved the ranch and planted additional acreage. There are four children of Jacopo and Alessandrina Taddeucci, namely, Walter Taddeucci, Catherine Weeks, Vivian Taddeucci and Alvin Taddeucci, who is the youngest and the appellant herein. The family was supported and raised from the profits and earnings of the ranch, the children assisting their parents with the farm chores and housework. In 1933 or 1934 appellant, after working away from home, returned to live on the ranch, together with his parents and sister. Appellant assisted his father in the operation of the ranch from approximately 1934 until 1942, for which he received fifty per cent of the profits. During this time appellant worked approximately two months each year in assisting his father in the operation of the ranch, which was done on a share basis. After appellant returned from service in the United States Army he received all the returns for the years 1946 and 1947. In 1948, 1949 and 1950 appellant again operated the Home Ranch on a share basis, but only gave his mother a total of $830 rental for the entire three years.

Respondent, 82 years of age at the time of trial, testified that the reason appellant got all the profits of the ranch for 1946 and 1947 was that after he returned from the military service he constantly complained that while he was in service he had not earned any money and that the others had received all the benefits of the ranch, so his father told him that he could have the profits of the ranch for two years. Respondent knew of and was satisfied with this arrangement. Respondent's husband died in March of 1947. Respondent testified that during 1948, 1949 and 1950 appellant operated the ranch and was supposed to give her seven or eight hundred dollars a year. During this time (1948 through 1950) she supported herself from her own money and contributions by the other children, as appellant only gave her a total of $830. However, in 1951 respondent's grandson operated the ranch and she received $1,300, plus a portion of crops not yet sold. On December 21, 1950, at respondent's request, her attorney sent a letter to appellant asking him to vacate the premises. However, he refused to do so

and told respondent that he would leave after he had collected everything from the 1950 crops, but he was still there at the time of the trial in March, 1952. Respondent testified that some years before appellant went into the military service her husband told her that the working agreement with appellant was that for working on the ranch he would receive one-half of the proceeds. During the war Walter, the oldest son, worked on the ranch and was paid for his services.

In 1924 respondent's husband executed a gift deed of this land to respondent and delivered it to her. It was recorded after her husband's death. She gave it to appellant, who took it to the recorder's office. A few years before his death respondent's husband told her that upon their death the property should go to all the children equally.

Vivian Taddeucci, a daughter, testified that she returned home in 1929 to live, because of her mother's health, as respondent had been ill during the past several years. Up to 1934 she thought that her father did all the work on the place. From 1934 to 1937, Walter helped in working the place. In 1937 she was present when her father loaned appellant money, which she thought to be about $600, to help him buy some farm equipment, as a tractor, disc, etc. Appellant testified that the amount borrowed from his father was $1,000 and that he thought he had repaid it by the time he went into the army. After this time Vivian saw appellant doing some tractor and spraying work on the Home Ranch. She knew that he was leasing and working other lands in 1937, and 1938, also that he performed work for others from 1939 to 1942, when he entered the military service. After appellant returned home from the army, Vivian was present at a conversation at the dinner table when appellant appeared disgusted because others had been home making money while he was away, and her father told him that he could have the crops off the ranch for the next two years. In 1948 appellant married and converted the brooder house into a dwelling for himself and his wife; when asked by respondent what he was doing, he replied: "It's my business," and further stated that he would do as he pleased. Appellant told his sister Catherine that it was to be used as a dwelling until they could get their own place later on. Sometime after his father's death appellant endeavored to purchase the ranch from his mother, but respondent refused to sell; appellant then wanted to exert pressure upon her so that she would have to sell to him.

[1] The only evidence in the record to support appellants' position was testimony given by appellant Alvin Taddeucci himself. He gave testimony tending to support the allegations of his cross-complaint and in appellants' brief the argument is apparently based entirely upon said appellant's testimony, the fact that Alvin's testimony was contradicted by his mother and sisters being completely ignored. It is abundantly clear from the record that there is ample evidentiary support for the court's finding that the arrangement between Alvin and his father was as testified to by respondent and the other witnesses for plaintiff, and that appellants failed to meet the burden of proof required of them to establish a constructive trust. Appellants concede that the quantum of proof necessary to establish the existence of trust must be clear and convincing.

Appellants cite section 50 of Restatement of Trusts which reads:

> "Although a trust of an interest in land is orally declared and no memorandum is signed, the trust is enforceable if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust."

[2, 3] There can be no question that if the trial court had believed the testimony of appellant Alvin Taddeucci and had found in accordance therewith such finding would be sustained by the record. But there was a clear conflict in the evidence and the court resolved that conflict in favor of respondent. There was no dispute as to the legal principles involved and the case resolved itself into a determination of the factual issues. Issues of fact are determined in

the trial court and not in an appellate tribunal. The trial court having decided upon sufficient evidence in favor of respondent we must uphold the judgment.

The appeal in the instant case is so lacking in merit that we are constrained to state that, if it were not for the apparent earnestness of counsel for appellant, we would regard it as frivolous.

The judgment is affirmed.

VAN DYKE, P. J., and FINLEY, J. pro tem., concur.

132 Cal.App.2d 569

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Al BENNETT, Harry W. Steetle and Charles E. Berry, Defendants and Appellants.

Cr. 1018.

District Court of Appeals, Fourth District, California.

April 27, 1955.

Hearing Denied May 25, 1955.

Prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer, and for the substantive offense. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment and denied motions for new trial, and defendants appealed. The District Court of Appeals, Barnard, P. J., held, inter alia, that evidence sustained conviction on all counts except one substantive count.

Judgment and motions affirmed in part and reversed in part.

1. Conspiracy ⇐47

A conspiracy may be proved by indirect evidence and inferences justified by circumstances.

2. Conspiracy ⇐47

In prosecution for conspiring to commit crime of asking or receiving bribes by a public officer, evidence of association between the nonofficial defendants and of a common design and concert of action between them and official sustained conviction. Pen.Code, § 68.

3. Bribery ⇐11

In prosecution for asking or receiving bribes by a public officer, evidence sustained conviction on all counts but one. Pen.Code, § 68.

4. Indictment and Information ⇐125(5½)

Indictment charging conspiracy to commit crime of asking or receiving bribes by a public officer was not subject to claimed objection of pleading more than one conspiracy in a single count. Pen.Code, § 68.

5. Criminal Law ⇐126(2)

Record in prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer and for the substantive offense disclosed that there had been no such unusual publicity in connection with particular case as would render trial court's refusal to change venue abuse of discretion. Pen.Code, § 68.

6. Indictment and Information ⇐159(3)

Allowing state, in prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer, to amend indictment, shortly before resting case, so as to change date of an alleged overt act, was not error.

7. Criminal Law ⇐1166(3)

Where defendants made no request for additional time in which to prepare defense, or for other relief, and did not indicate to trial court how prejudice might result, failure to require defendants in prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer to plead again to indictment which was amended, shortly before prosecution rested case, so as to change date of alleged overt act, was not prejudicial. Pen.Code, § 68.

8. Bribery ⇐1(1)
Criminal Law ⇐507(1)

The giving or offering of a bribe to an executive officer is not an offense under

statute relating to asking or receiving of bribe by a public officer, and, in prosecution under latter statute, victims were not liable for prosecution for identical offense charged against defendants, and were not "accomplices". Pen.Code, §§ 67, 68, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplices".

9. Criminal Law ⇐780(3)

Instruction which was given in prosecution for conspiracy to commit crime of asking or receiving bribes by a public officer and for substantive offense and which stated that certain witnesses were accomplices as a matter of law was not subject to claimed objection of telling jury that a conspiracy had been proved as charged. Pen.Code, § 68.

Thomas Whelan, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., Barton C. Sheela, Deputy Dist. Atty., San Diego, Jack R. Levitt, Deputy Dist. Atty., Los Angeles, for respondent.

BARNARD, Presiding Justice.

In an amended indictment the defendants were accused of a conspiracy to commit the crime of asking or receiving bribes by a public officer. They were also accused in six counts of asking or receiving bribes by a public officer; in three counts of grand theft; and in two counts of attempted grand theft.

Count One charged that the three defendants and certain unknown persons conspired to commit the crime of asking or receiving bribes by a public officer, and alleged that Bennett and Steetle did agree to accept and solicit bribes on behalf of Berry, an executive officer of this state, to wit: District Liquor Control Officer of the State Board of Equalization. Five overt acts in furtherance of said conspiracy were alleged.

Counts Two, Four, Six, Eight and Ten charged the defendants with grand theft or attempted grand theft and need not be considered since all defendants were found not guilty on those counts.

Count Three charged that Berry and Bennett committed the crime of asking or receiving bribes by public officers or employees, in violation of section 68 of the Penal Code, it being alleged that on December 3, 1952, they asked, received, and agreed to receive a bribe from one Lyman Lucore in the sum of $7,000 "upon an understanding and agreement that the vote, opinion or action upon matters which would be brought before" Berry in his official capacity as an executive officer of this state would be influenced thereby. The remaining counts, in similar language, charged the commission of the crime of asking or receiving bribes by public officers or employees, in violation of section 68 of the Penal Code. In that manner Count Five charged Berry and Bennett with asking or agreeing to receive a bribe from one Jack Millspaugh on December 15, 1953, in the sum of $4,000. Count Seven charged Berry and Bennett with asking or agreeing to receive a bribe from one Mathew Howard on October 15, 1953, in the sum of $4,000. Count Nine charged Berry, Bennett and Steetle with asking or receiving such a bribe from one Shoberg on January 5, 1953, in the sum of $7,000. Count Eleven charged Berry, Bennett and Steetle with asking or receiving such a bribe from one Dodds on December 1, 1953, in the sum of $4,500. Count Twelve charged Berry and Bennett with asking or agreeing to receive such a bribe from one Gillette on June 1, 1952, in the sum of $5,000.

A jury found all three defendants guilty on Count One, the conspiracy count. Berry and Bennett were found guilty on Counts Three, Five, Seven, Nine, Eleven and Twelve. Steetle was also found guilty on Counts Nine and Eleven. Motions for a new trial were made and denied and all three defendants were sentenced to state prison. With respect to each defendant some of the sentences were to run consecutively, and to run concurrently with relation to other counts. Fines were also imposed on each defendant with respect to certain counts. All three defendants appealed from

the judgments and from the orders denying their motions for a new trial. Subsequently, Berry's appeal was dismissed at his request, and this appeal is presented on behalf of Bennett and Steetle.

Berry was District Liquor Control Officer in charge of the San Diego office of the Board of Equalization. Bennett was a business opportunity broker, his office being adjacent to the Board of Equalization office in San Diego. Steetle was associated with Bennett in that business, and in the same office. The state fee for on-sale general liquor licenses was $525, and there was a restriction on the number of such licenses which would be issued. These licenses were transferable and at the times here in question they had a value, as soon as issued, of about $10,000 on the resale market. While anyone was allowed to make a preliminary application for a license, a formal application with payment of the statutory fee could only be filed with the permission of Berry, and he never delegated that authority to any of his subordinates. In no instance was a person who was allowed by Berry to file a formal application ever turned down by the Board of Equalization on the issuance of that license.

With respect to Count One, the conspiracy count, Harold Dodds testified as follows: During the fall of 1953 he learned that new on-sale general licenses were to be issued. He wrote a letter to the Board of Equalization asking permission to apply for one of these on-sale licenses. In response to this he received a preliminary application which he executed and returned to the Board. Shortly thereafter, he received a visit from appellant Steetle who informed him that he thought that he, Dodds, would be able to obtain one of these licenses but in order to do so he would have to pay the sum of $4,500 in cash. Shortly thereafter he went to the office of Steetle and Bennett, and there met Bennett. He asked Bennett if he could pay for the license by paying $3,500 in cash and giving a note for $1,000. Bennett agreed, and he paid the money and signed the note. After Bennett agreed to this he picked up the telephone and called someone and said: "I am sending Harold Dodds over shortly." Bennett then told Dodds to go to the office of the Board and see Berry and make his application for a license. Dodds walked next door to the Board of Equalization and was taken immediately into Berry's office, where he saw his preliminary application form on Berry's desk. After a brief discussion Berry took him out to the counter and had the girl type up his formal application for a liquor license. Shortly thereafter Dodd received a general on-sale liquor license.

Dodd's testimony is corroborated by the testimony of Jack Millspaugh, who testified that when he was seeking a general on-sale license he asked Bennett what assurance he would have that he would receive his license if he paid $4,000; and that Bennett replied that when the money was paid he would phone Berry and "give him the green light and then I would go over and fill out the final application and pay $525.00." Two other witnesses, not involved in any of the counts, testified that during the fall and winter of 1953 they put in preliminary applications for licenses and that shortly thereafter they were contacted by Steetle who solicited them for the payment of money to cause the issuance of the licenses. It further appears from the evidence that all of the witnesses, five in number, who refused to make the payment asked did not receive liquor licenses; and those witnesses who did make such payments, eight in number, did receive licenses.

Another witness, Gillenberg, testified that in 1951 he attempted to get a seasonal liquor license for his premises at Jacumba, that he was not allowed to file an application until he was finally approached by Mr. Provart, who was then employed as a liquor control officer under Berry; that Provart asked him for $5,000; that he later paid $5,000 to another man; and that he was then allowed by Berry to file his application. Incidentally, Provart testified that he received $400 from Berry "as his part in the Gillenberg transaction." Gillenberg further testified that in the fall of 1952, he tried to apply for an on-sale general license which had a resale value and was refused; that on October 25, 1952, Bennett came to his premises and told him that the only way he could get such a license was by paying $2,500 in cash. Ben-

nett and his wife accompanied Gillenberg to a bank where the latter secured the money. Gillenberg then paid the money to Bennett, but not in the presence of the woman. Shortly thereafter, he was notified that he could apply for his on-sale general license, was allowed to do so by Berry, and received that license. The testimony with respect to some of the other counts is also applicable to Count One.

The evidence with respect to Count Three shows that Mr. Lucore had made inquiries about the possibility of applying for a license. Shortly thereafter, in the latter part of November, 1952, Bennett came to Lucore's premises and told him that the only way he could get a license was by paying $7,000 in cash. Lucore agreed to this and went to Bennett's office where he handed him $7,000 in cash. He was then instructed to go next door to the office of the Board and see Berry, and make application for a general on-sale license. He did this and received his license. With respect to Count Five, the evidence shows that Millspaugh attempted to apply for a license and was given a preliminary application form to fill out. Because of gossip and rumor which he had heard he asked Mr. Cameron, a liquor control officer in the office of the Board, whether or not this was going to be a legitimate transaction and if not how much he would have to pay for his license. Mr. Cameron told him "I can't talk to you about that, you will have to see Mr. Bennett or Mr. Berry." The next day he received a phone call from Bennett saying that Bennett wanted to talk to him. He went to Bennett's office and Bennett suggested that they go outside and talk. They went outside where Bennett informed him that in order to get a license he would have to pay $4,000 in cash. Millspaugh protested and asked how the money was to be distributed. Bennett refused to discuss this matter at any length. Millspaugh then asked Bennett what would happen when he paid the money. Bennett informed him that he would pick up the phone and call Berry and he would get his license. Bennett also informed him that this money should be in cash and should be withdrawn from bank accounts in such a manner that the money could not be traced. Millspaugh had later conversations with Bennett and on his last phone call Bennett informed him that due to the investigating committee's activities there was too much "heat", and the transaction would have to be called off at that time.

With respect to the Seventh Count Howard testified that he wanted to obtain a license and was told by Berry that none was available. He was then referred by Berry to Bennett, and went to Bennett where they discussed the acquisition of such a license. Bennett finally suggested that he would be able to get a new license by the latter part of 1953 by paying $4,000 in cash. Howard was unable to raise that amount. He further testified that in one conversation Berry told him that he, Berry, alone would decide whether or not any person got a liquor license. With respect to Count Nine, Shoberg testified that he desired to obtain a license and inquired among many people in the trade as to how to go about it. He was given a phone number to call, this being the number of Bennett's office. He called during the fall of 1952 and Steetle identified himself as the party on the other end. A few hours later Steetle came to his premises and told him it would cost $7,000 in cash to get such a liquor license. Shoberg agreed, and when he had raised the $7,000 in cash he called Steetle and was told to come to his office. He did so, whereupon Steetle asked him to take a ride in Steetle's car. They drove to a point in San Diego and parked, and Shoberg handed Steetle a sack containing $7,000 in cash. Steetle counted the money and they then returned to Steetle's and Bennett's office. A few minutes later Steetle instructed Shoberg to go to the office of the Board and make his application. He went there, and Berry allowed him to make the application and a liquor license was issued.

The testimony of Mr. Dodds with respect to Count Eleven has been sufficiently referred to, and need not be repeated.

With respect to Count Twelve, Gillette testified that during the summer of 1952 someone visited his premises and left Berry's card with instructions to call Berry. He called Berry and shortly thereafter Ber-

ry came to see him. Berry asked him if he wanted a seasonal license and told him it would cost $5,000 in cash in order to obtain it, and that the money should not all be drawn from one bank account so it could not be traced. Gillette refused to do this and was never issued a liquor license.

There was considerable other evidence applicable to all counts which showed a common scheme or design among Berry and the two appellants. Several other witnesses testified to similar experiences in getting licenses for themselves or their friends, and similar activities on the part of Bennett or Steetle. The evidence discloses that in many instances large sums of cash were paid to Berry, Bennett or Steetle for which receipts were never given; that much secrecy was engaged in by Berry and the appellants in their dealings with potential licensees; that in all cases where such payments were received licenses were issued; and that in every instance where such payments were refused, whatever the reason therefor, no license was ever issued.

[1, 2] The appellants admit that there was evidence as above briefly summarized but contend that, for various reasons, the evidence was insufficient to support the verdicts. With respect to the First (conspiracy) Count, it is argued that there is no evidence that either Bennett or Steetle were acquainted with Berry, and no evidence that either of them were ever in the office of the Board of Equalization; that there is no evidence that Bennett or Steetle made any statements to any of the victims as to how the amounts paid were to be used; that any evidence tending to support the conspiracy charge is entirely circumstantial; that the only circumstances from which a conspiracy could be inferred are those appearing in the testimony of Dodds; and that his testimony is deficient in failing to show that when he saw Bennett he told Bennett about his previous conversation with Steetle. It is further argued that if the evidence was sufficient to show any conspiracy, it showed several conspiracies between other persons and Berry, with which the appellants were not connected; and that it follows that the testimony of some of the witnesses was hearsay and inadmissible as against the appellants. There is no merit in this latter contention. Only one conspiracy was shown, and the court and jury were justified in believing that each of the transactions disclosed by the testimony was a part of a single general conspiracy to ask or receive bribes in connection with the issuance or proposed issuance of such liquor licenses. Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250. As to the other contentions, a conspiracy may be proved by indirect evidence, and inferences justified by the circumstances. There was ample evidence of an association between Bennett and Steetle and of a common design and concert of action between them and Berry. The evidence, with the reasonable inferences therefrom, supports the verdicts as to the First Count. People v. Benenato, 77 Cal.App.2d 350, 175 P.2d 296; People v. Steccone, 36 Cal.2d 234, 223 P.2d 17; People v. Chait, 69 Cal.App.2d 503, 159 P.2d 445; People v. Collier, 111 Cal.App. 215, 295 P. 898; People v. Malone, 20 Cal.App.2d 1, 66 P.2d 216.

With respect to the Third Count, it is argued that Lucore did not remember the date on which he paid the money to Bennett; that there is no evidence that he told Berry that he had paid the money to Bennett; that it might be inferred that Lucore freely and voluntarily turned $7,000 over to Bennett without asking what it was to be used for; and that "It may well be that Mr. Bennett saw an opportunity to pick up what is known in F.H.A. financing circles, as a 'windfall'". With respect to Count Five, it is argued that Millspaugh was interested and biased; that sometime during his negotiations with Bennett he decided to cooperate with the district attorney, and that it appears from his testimony that he thereafter made plans to entrap Bennett by giving him marked money. It is also pointed out that there is a conflict between his testimony that Bennett made no comment when he told Bennett that he had heard that Bennett got everything over $2,000 and that Berry and Bonelli got the rest, and his testimony before the grand jury that he had told Bennett that he understood that $2,000 of it went to Bonelli and

that he, Bennett, kept the rest, to which Bennett replied "I don't get that much". With respect to the Seventh Count, it is argued that Howard also testified that he originally borrowed $4,000 from his landlord which he later returned to his landlord; that he later was unable to secure the $4,000 required; that Bennett had not told him what was supposed to happen to the $4,000 which he was supposed to pay; that there was nothing in Howard's testimony indicating that Bennett was working in concert with Berry; and that the weight of the evidence indicates that Howard was trying to get someone to take money from him in order that he might obtain a license.

With respect to Count Nine, it is argued that Shoberg's testimony made no reference to Bennett or Berry; that Steetle testified that he had nothing to do with Shoberg's obtaining a license and received no money from Shoberg; and that there was other evidence that Bennett was absent from San Diego from December 6, 1952 to January 6, 1953. With respect to Count Eleven, it is argued that Dodds did not testify that Bennett told him that the money was to be used to offer a bribe to either Berry or anyone connected with the Board of Equalization; that he testified that he never knew where the money was to go; and that it cannot be reasonably inferred that the money thus collected by Bennett was to be turned over to Berry for the purpose of influencing Berry's official action or conduct. With respect to Count Twelve, it is argued that the evidence shows no connection by the appellants with the transaction with Berry, to which Gillette testified.

[3] We find no evidence in the record which would connect Bennett with the transaction referred to in Count Twelve, or which would support the verdict finding Bennett guilty as to that count. With respect to the other substantive counts, Three, Five, Seven, Nine and Eleven, appellants' arguments relate to questions of fact presented by all of the evidence and make no allowance for the inferences which could reasonably be drawn from the evidence received. The evidence, as a whole, was sufficient to support the verdicts with respect to those counts. When considered in its entirety the evidence strongly supports the verdicts as to all counts, with the exception of Count Twelve.

[4] It is contended that the court erred in denying a motion to quash this indictment and in sustaining a demurrer thereto. It is argued that at the time these actions were taken the court had before it the transcript of the testimony before the grand jury; that where more than one conspiracy is involved each conspiracy must be pleaded in a separate count; that, where there are several conspiracies, testimony relating to one would be hearsay and inadmissible as against a defendant involved only in other conspiracies; and that, where a central figure is involved in several conspiracies who deals with different individuals in the various conspiracies, and all the evidence is received as against all of the parties, although only one conspiracy is charged, a conviction thus obtained is void except as to the central figure who participated in all of the conspiracies. It is argued that this principle is established in the cases of Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 and Canella v. United States, 9 Cir., 157 F.2d 470. The Kotteakos case was distinguished in Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154, where it was held that in a prosecution for selling whiskey at over-ceiling prices the fact that certain salesmen did not know of the action of other salesmen, and that each defendant salesman aided in selling only his part of such whiskey, did not show the existence of more than one conspiracy but established a single conspiracy of which several actions were merely integral steps. Only one conspiracy was here alleged, of which the various transactions disclosed by the evidence were a part. No error appears in denying the motion to quash, in overruling the demurrer, or in the admission of the evidence referred to in this connection. People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65; Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250.

It is next contended that the court erred in denying a motion for a change of venue to another county. Several affidavits were filed to the effect that the affiants did not

believe that the defendants could receive a fair trial in that county, and that affiants had talked to numerous other people who entertained the same opinion, based upon the publicity in the newspapers which had occurred. The appellant Bennett filed such an affidavit, in which he included a statement of opposition to a trial before any judge of the superior court of San Diego County, on the ground of bias and prejudice. In his affidavit he alleged that the Council of Churches of San Diego had voiced opposition to the issuance of new licenses in 1946 and in 1952; that the Council of Churches had such influence that the city council, board of supervisors and other officers of the city and county also opposed the issuance of such licenses; that these repeated attacks upon the issuance of licenses caused affiant to believe that the citizens of San Diego County generally thought there was graft involved in the issuance of such licenses; that the Council of Churches has influenced the two daily San Diego newspapers to oppose the issuance of such licenses; that affiant has talked with many individuals in the city and county of San Diego who believed that he could not have a fair and impartial trial there; that all of the foregoing has built up in that city and county a widely held conviction that this affiant is guilty as charged in the indictment; that this action has received such extensive publicity, adverse to affiant, that it appears probable that he cannot have a fair and impartial trial in that county; that it also appears probable that he could not have a fair trial before any judge living in that county; that the affiant has heard that the district attorney plans to bring additional indictments against the affiant during the trial for the purpose of prejudicing the cause of affiant in the pending case; and that because of this publicity and local prejudice it would be for the best interest of this affiant and the administration of justice that he be tried before a judge from outside San Diego County, free from the reaction created by the Council of Churches and the daily newspapers of San Diego.

[5] Eight newspaper clippings were attached to the affidavits. These articles referred to hearings before the grand jury and the Board of Equalization, and referred to a number of different people. Some of them related to these appellants and what they had said or refused to say. Practically all of the allegations of the affidavits were conclusions, and we find no factual matters therein which would justify a conclusion that a fair trial could not be had in that county. That county has a large population, these newspaper articles were similar to those usually found in connection with any case involving matters which create a rather wide public interest, and they largely mentioned other people and proceedings other than this action, although the appellant Bennett was mentioned in most of them. There was no statement that he was guilty and no threat against him appears. The court has a wide discretion in passing on such a motion and the record does not indicate that this discretion was not properly exercised. Unusual freedom was allowed in examining prospective jurors, including their reaction to any such publicity, and while considerable time was devoted to selecting a jury no unusual difficulty in selecting one appears. The defendants did not exhaust their peremptory challenges and at the conclusion of that proceeding appellants' counsel expressed himself as satisfied with the jury. In his opening brief counsel states that he is convinced that the trial judge did his best to give the defendants a fair and impartial trial. While there was naturally a large amount of publicity about that time, in connection with several matters of this general nature, there was no unusual publicity in connection with this particular case, and the record fails to reveal any abuse of discretion in this respect. People v. Mendes, 35 Cal.2d 537, 219 P.2d 1; People v. Agnew, 77 Cal.App.2d 748, 176 P.2d 724; People v. McCracken, 39 Cal.2d 336, 246 P.2d 913; People v. Walker, 112 Cal.App.2d 462, 246 P.2d 1009.

In their closing brief appellants argue that the court should have granted a continuance until the prejudicial effect of the publicity had worn off, citing Delaney v. United States, 1 Cir., 199 F.2d 107. Our attention is called to no request for such a continuance, and the facts of this case

are easily distinguishable from those in the Delaney case. United States v. Flynn, 2 Cir., 216 F.2d 354.

[6, 7] Some contention is made that the court improperly admitted evidence, as against these appellants, and erred in denying their motion to strike such testimony at the conclusion of the People's case. This is based upon their contention that the evidence showed a number of separate conspiracies and failed to show a general overall conspiracy. For the reasons above given this contention is without merit. It is also argued that the court erred in permitting an amendment to the indictment shortly before the prosecution rested its case. Complaint is made of the fact that the date alleged in overt act No. 2 was allowed to be changed from December 8, 1952 to December 3, 1952. It is argued that this was prejudicial to appellant Bennett, because there was some evidence that he was in Texas on December 8, 1952. Aside from other considerations, which need not be gone into at length, no error appears. People v. Biggs, 9 Cal.2d 508, 71 P.2d 214, 116 A.L.R. 205; People v. Wright, 26 Cal. App.2d 197, 79 P.2d 102. It is further argued in this connection that the defendants were not thereafter required to again plead to the indictment as thus amended. No prejudice appears. People v. Bryant, 101 Cal.App. 84, 281 P. 404; People v. Finkelstin, 98 Cal.App.2d 545, 220 P.2d 934. While an objection to the amendment was made on the ground that the defendants had already gone to trial, no request was made for additional time in which to prepare a defense, or for other relief, and no attempt was made to indicate to the trial court how any prejudice might result.

[8] Finally, it is contended that the court erred in instructing the jury. It is argued that the court instructed the jury that the victims in these transactions were not accomplices, and that their testimony need not be corroborated; and that the jury should have been permitted to determine, as a factual matter, whether or not the people whose financial transactions were the subjects of Counts Three, Five, Seven, Nine, Eleven and Twelve were accomplices whose testimony required corroboration. Reliance is placed on People v. Wayne, 41 Cal.2d 814, 264 P.2d 547 and People v. Harper, 25 Cal.2d 862, 156 P.2d 249. A distinction between the facts in those cases and such facts as appear in the instant case is pointed out in People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, and in People v. Brigham, 72 Cal.App.2d 1, 163 P.2d 891. In the latter case, in discussing section 68 of the Penal Code, it was stated that there was nothing in the language of the section to suggest any intention to include the victim as an offender. A separate statute, section 67 of the Penal Code, is provided to cover the action of one who gives or offers a bribe to an executive officer. Such a person is not liable to prosecution for the identical offense charged against these appellants. Penal Code, § 1111. Under these circumstances, these victims were not accomplices.

[9] It is further argued that by instructing the jury that eleven named witnesses, including Provart, "are accomplices as a matter of law, and this applies to the conspiracy count" the court in effect told the jury that a conspiracy had been proved as charged in Count One. No such effect can be given to that instruction, and in the instructions given, in relation to the conspiracy charge, the jury was told that each defendant was entitled individually to its determination as to whether or not that defendant was a member "of the alleged conspiracy, if any existed."

Several minor contentions are made which we have not overlooked, but which require no specific attention. The record discloses no reversible error, and indicates that the appellants had a fair trial. We find nothing therein which would justify a conclusion that a miscarriage of justice has occurred.

The judgments and the motions appealed from are affirmed with respect to all counts except Count Twelve, and with respect to Count Twelve they are reversed.

GRIFFIN and MUSSELL, JJ., concur.

Dixie GILMORE, an Incompetent person, by and through Walter Russell, guardian of her person and estate, Plaintiff, Cross-Defendant and Appellant,

v.

Don GILMORE, Defendant, Cross-Complainant and Respondent.

No. 16139.

District Court of Appeal, First District, Division 1, California.

April 26, 1955.

Rehearing Denied May 26, 1955.
Hearing Granted June 23, 1955.*

Divorce action by wife through guardian of her person and estate, on grounds of extreme cruelty and desertion and, by virtue of amended and supplemental complaint, adultery allegedly committed subsequent to filing of action. Husband cross-complained for divorce on ground of extreme cruelty. The Superior Court, Marin County, Jordan L. Martinelli, J., granted husband divorce on ground of extreme cruelty and decreed that there was not any community property, and plaintiff appealed. The District Court of Appeal, Bray, J., held that where trial court should have found on issue of husband's alleged adultery and on issue whether both parties were entitled to divorce inasmuch as both had grounds for divorce, and failure to do so would necessitate grant of new trial.

Judgment reversed.

1. Appeal and Error ⇐994(3), 1011(1)
Trial ⇐382

Question of credibility of witnesses and of resolution of conflicts in testimony is matter for trial court, and reviewing court may not interfere with such determination.

2. Pleading ⇐279(4)

Generally, cause of action which is different from that set up in complaint cannot be set up by supplemental complaint, but must be pleaded in a new action. West's Ann.Code Civ.Proc. § 464.

3. Divorce ⇐1

Marital status can be terminated only with consent of state.

4. Divorce ⇐11

In divorce action, court must consider not merely rights and wrongs of parties but public interest in institution of marriage.

5. Divorce ⇐104

To hold that court cannot consider a divorce cause of action based upon misconduct of one party prior to actual dissolution of marriage status merely because cause of action was set up in supplemental cross-complaint rather than in complaint in another action to be consolidated for trial with first is making form of pleading more important than its substance. West's Ann. Code Civ.Proc. § 464.

6. Divorce ⇐104

To hold that adultery cause of action should not be considered as being before the court because it had been set up in supplemental cross-complaint, rather than complaint in another action consolidated for trial with first action, would prevent court from exercising fully state's consent to proper dissolution of the marital status. West's Ann.Code Civ.Proc. § 464.

7. Divorce ⇐6½

A divorce action is one in equity.

8. Action ⇐65

Equity court, which has jurisdiction of parties and subject matter, will make final disposition of litigation governed by circumstances as shown to exist at time the decree is made rather than at time of inception of litigation.

9. Divorce ⇐104

In divorce action by wife through her guardian on grounds of cruelty and desertion, filing of an amended and supplemental complaint, which charged husband with adultery committed subsequent to filing of divorce action, was a proper proceeding, and issue of husband's adultery was properly before the court. West's Ann.Code Civ.Proc. § 464; West's Ann.Civ.Code, § 93.

10. Divorce ⇐26

Adultery, which has been committed after divorce action has been brought, can be ground of divorce for purposes of such action. West's Ann.Civ.Code, § 93.

* Opinion vacated 287 P.2d 769.

11. Divorce ⇐150(2), 151

Where, in divorce action by wife through her guardian on grounds of extreme cruelty and desertion, wife filed amended and supplemental complaint which charged husband with adultery committed subsequent to filing of divorce action, trial court should have found on issue of husband's alleged adultery and on issue whether both parties were entitled to divorce inasmuch as both had grounds for divorce, and failure to do so would necessitate grant of new trial. West's Ann.Code Civ.Proc. § 464; West's Ann.Civ.Code, §§ 93, 111, 122.

12. Divorce ⇐141

In determining whether parties, each of whom has grounds for divorce, are entitled to divorce, court must consider prospects of reconciliation, effect of marital conflict upon parties and upon third parties, and comparative guilt of the parties. West's Ann.Civ.Code, §§ 111, 122.

James Martin MacInnis, Nicholas Alaga, San Francisco, for appellant.

Michael L. Haun, San Francisco, Myers & Meehan, San Anselmo, for respondent.

BRAY, Justice.

Plaintiff appeals from an interlocutory decree of divorce granted defendant upon the ground of plaintiff's extreme cruelty and decreeing no community property.

Questions presented.

1. In a divorce case is a supplemental complaint alleging a cause of action accruing after the commencement of suit, proper?

2. The trial court, having found plaintiff guilty of extreme cruelty and in effect defendant guilty of adultery, should it have granted a divorce to both parties?

Record.

Plaintiff's complaint as supplemented charged (1) extreme cruelty, (2) desertion, (3) adultery. Defendant cross-complained charging extreme cruelty. The court found against plaintiff on her counts of extreme cruelty and desertion. It found that plaintiff's charge of adultery was untrue, "save and except that" subsequent to the filing of this action defendant indulged in at least six acts of sexual intercourse with other women, but that such conduct did not cause plaintiff any mental pain or suffering or constitute extreme cruelty towards her. It found plaintiff guilty of extreme cruelty towards defendant as follows: (1) She called him vile and opprobrious names causing him shame and humiliation. (2) For more than four years last past and without cause she failed to exhibit any affection towards him. (3) During that period she drank intoxicating liquor to excess. (4) On numerous occasions while under the influence of intoxicating liquors and without cause she quarreled and nagged at, and called him vile names in the presence of other persons. (5) More than four years, without cause, she refused defendant reasonable, or any, matrimonial sexual intercourse. It found that there is no community property; that the real property at Fairfax Manor and the Belvedere home were held by the parties as joint tenants; that the corporate stock in the three Don Gilmore corporations was the separate property of defendant; that the salaries paid defendant by these corporations during the married life of the parties fully compensated for all services rendered them by defendant during that period and that all of such salaries were used for community purposes. A Cadillac car and the yacht "Larke" which plaintiff claimed were gifts to her from defendant, but whose titles were in the Don Gilmore San Francisco corporation, were found to belong to that corporation. Furniture, furnishings, etc., acquired during marriage were found to be held in joint tenancy.

1. Sufficiency of evidence.

[1] The trial consumed approximately five weeks. The reporter's transcript is 3061 pages. The case is one of the most sordid and revolting with which courts are required to deal. Plaintiff during most of the marriage was admittedly a dipsomaniac. She claimed, however, that her constant inebriacy was the result of defendant's treatment of her, particularly his revolting suggestions that she perform sex perversions with him and other women. She denied ever doing so, but claimed that because

of these repeated suggestions she was so disturbed as to be unable for the last four years to engage in sexual intercourse with him. Defendant denied that he participated in the perversions but claimed to be a "glorified observer" thereof, and claimed that not only did plaintiff participate in them but that she was the instigator thereof. He produced a woman witness who corroborated his testimony. The trial court made no findings on this subject but in its oral opinion rendered at the end of the case, stated that as to this situation the parties were "in pari delicto." The evidence showed that the married life of the parties consisted primarily in an endless search for amusement and entertainment, in which large sums of money were spent, and no attempt made to establish a sane, sound home life. Possibly the inability to produce offspring, earnestly desired by the plaintiff in the early years of the marriage, may have been a contributing factor. There was proof that on occasions each party had struck the other and had called the other vile names. However, plaintiff indulged in this pastime far more than defendant, and on many occasions in the presence of his friends and business associates. The couple were married almost seven years before their separation, during the last four years of which plaintiff, except when taking the cure in various institutions, was almost continually intoxicated. Defendant was exceedingly patient with plaintiff's conduct in this respect. Plaintiff objected to being alone. Defendant would return to the home every afternoon and spend the evening and night with plaintiff. Defendant was only away from plaintiff overnight on two occasions during their entire married life, except, of course, the occasions when plaintiff was in the above mentioned institutions. As to these two absences defendant was on legitimate missions, one of them being a Coast Guard meeting. Defendant gave his wife many expensive gifts, furs, jewelry, etc. In an endeavor to save the marriage defendant built a home costing $158,000. Defendant gave as the cause of the failure of the marriage, plaintiff's addiction to liquor. Plaintiff claimed that defendant's revolting suggestions to her for at least the previous four years were the reason. Yet, as pointed out by the judge, she continued to live with defendant and even encouraged him to build the new home. The court pointed out, too, the unreliability of plaintiff's testimony throughout. For example, plaintiff testified that because of defendant's revolting suggestions she left their home and went to the Huntington, making her own reservations. Defendant claimed that he had made the reservation and signed the register. On being confronted with the register card she denied that what purported to be defendant's signature was his signature. Defendant then wrote exemplars of his signature in court, to be compared with the register card, plaintiff watching him. Plaintiff then denied that the exemplars were his signature, saying that he would make a good forger. Her own attorney in his opening brief states of her testimony, "Her untrained mind made a mockery of the polite judicial admonitions which would ordinarily control and limit the outpourings of the indignant and unschooled mind. A kind and patient judge found himself vexed by her intrusions into frivolity; * * * she did not speak the truth." The trial court rejected the reasons given by plaintiff for her four years refusal (defendant testified it was only two and a half years) to permit matrimonial sexual intercourse. We do not deem it necessary to detail the evidence for the reason that there is very little contradiction of the evidence concerning plaintiff's attitude and acts towards defendant. The main conflict is in the reason for them, and the determination thereof depends principally upon which of the parties is to be believed. The court chose to believe defendant. As we have so often said, the question of the credibility of the witnesses and the resolving of conflicts is a matter for the trial court, with which determination an appellate court may not interfere. Rarely do we find a case in which the record shows such a lack of reliability and credibility as shown by plaintiff here.

1. Supplemental complaint.

The original complaint charged only cruelty and desertion. Over defendant's objection the court permitted plaintiff to file an amended and supplemental complaint

charging defendant with adultery committed subsequent to the filing of suit.

[2] It is true that in California, as in many jurisdictions, the general rule is that a cause of action different from that set up in the complaint cannot be set up by supplemental complaint, but must be pleaded in a new action. See 2 Witkin, California Procedure, § 616, p. 1633; Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 668, 161 P. 116. Witkin, supra, refers to this rule as reasonable enough, but "its violation does not seem to be a particularly serious matter." He then states: "But the supplemental complaint, bringing up matters occurring after the action is commenced, is almost always timely. The only objection is that the plaintiff is joining a cause of action which could not have been joined because it had not yet accrued, at the time the original complaint was filed. Pursuing this analysis still further, the rule merely demands that the plaintiff entitle the new pleading 'complaint' instead of 'supplemental complaint,' serve a summons on the party instead of a pleading on the attorney, and move to consolidate both actions for trial if this is appropriate. It might well be held, therefore, that *error in allowing* the filing of a supplemental complaint changing the cause of action is not prejudicial and should not be reversible."

There are cases in which supplemental pleadings have been approved notwithstanding the fact that they appeared to state a new and different cause of action. Thus in Perkins v. Benguet Consol. Min. Co., 1942, 55 Cal.App.2d 720, at page 773, 132 P. 2d 70, at page 101, this court stated: "While it is the rule generally that a new cause of action may not be set up by supplemental complaint, that rule is not of inevitable application," referring to section 464, Code of Civil Procedure, the section allowing the filing of supplemental pleadings "alleging facts material to the case occurring after the former complaint or answer." The language of that section is broad enough to include new causes of action, although generally the section has been construed otherwise. In the Perkins case the action was brought by the plaintiff stockholder against the defendant corporation to recover dividends on stock up to the filing of the complaint. The supplemental complaint asked for dividends declared in several subsequent years. Strictly speaking, the supplemental complaint set up a new cause of action. However, the court held that the "case" mentioned in section 464 was the plaintiff's ownership of the stock and her right to dividends on it, and therefore the plaintiff's right to subsequent dividends was material to the "case." 55 Cal.App.2d at page 774, 132 P.2d 70.

[3–6] In the instant action the "case" is actually the marital status of the parties, a status in which not only the parties but the state is interested. That status "can be terminated only with the consent of the state. * * * the court must consider not merely the rights and wrongs of the parties * * * but the public interest in the institution of marriage. * * * the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty." DeBurgh v. DeBurgh, 39 Cal.2d 858, 863, 864, 250 P.2d 598, 601. To hold that the court cannot consider a divorce cause of action based upon the misconduct of one of the spouses prior to actual dissolution of the marriage status merely because that cause of action is set up in a supplemental cross-complaint rather than in a complaint in another action to be consolidated for trial with the first is making the *form* of the pleading more important than its *substance*. Moreover, to hold here that the adultery cause of action should not be considered as being before the court deprives the court of exercising fully the state's consent to a proper dissolution of the marital status. It must be remembered that here the proof showed and the court actually found (although not using the word itself) that defendant was guilty of adultery.

With the three parties above mentioned all before the court, with the main issue being the marriage status, whether it should be dissolved, and if it were to be dissolved, how; with the evidence of the life of the married parties from the beginning of the

marriage to practically the day of the trial before the court, the supplemental complaint should have been considered. This permits the court to have before it, in the language of section 464, *all* the evidence *material* to the *case*. In Brix v. People's Mut. Life Ins. Co., 2 Cal.2d 446, 41 P.2d 537, the plaintiff brought action to recover monthly disability payments under an insurance policy. The Supreme Court held that the trial court should have permitted the plaintiff to file a supplemental pleading to recover installments accruing after the filing of the complaint. "To deny him this right would be simply to send him out of court one day and compel him to return the next day to litigate the same matter that was before the court on the first day. Such a construction of the law is not in harmony with the spirit of our modern procedure which endeavors to simplify court proceedings and particularly to provide for the settlement in a single action of all controversies of the parties growing out of the same subject-matter." 2 Cal.2d at page 457, 41 P.2d at page 542. So, to hold that a supplemental pleading setting up a new cause of action may not be filed in a divorce proceeding would be completely out of harmony with our modern procedure designed to get before the court all the facts material to the case and would interfere with the proper determination of the state's interest in such a case.

While the facts are not completely analogous the holding in Strickler Co. v. Eisner, 5 Cal.App.2d 441, 42 P.2d 1065, is significant as showing that the general rule has exceptions. There, in an action to recover installments of rent, taxes and attorney's fees alleged to be due under a written lease, supplemental pleadings for installments of rent, taxes and attorney's fees accruing after the filing of the suit were held to be properly filed, even though each installment of rent as it fell due constituted a new cause of action. A number of authorities from other states were cited to support the holding. The court additionally seemed to treat the new causes of action as separate suits and pointed out that under the court's power of consolidating actions the appellant's rights were in nowise prejudiced by considering the actions consolidated.

In Groom v. Bangs, 153 Cal. 456, 96 P. 503, the plaintiffs, husband and wife, joined in an action for the wife's personal injuries. She died, and the plaintiff husband, with leave of court, filed an amended and supplemental complaint for wrongful death of the wife. The court referred to the procedure as "irregular," but upheld it as no objection had been made in the trial court. The case is of value here because the court, in effect, held that the "irregular" filing of a supplemental complaint was not jurisdictional.

Again, that it is not a jurisdictional matter is well shown by the decision in Cohn v. Cohn, 1941, 47 Cal.App.2d 683, 118 P.2d 903. The action was brought for separate maintenance on the ground of cruelty. On stipulation of the parties, the plaintiff was permitted to file a supplemental complaint for divorce on the ground of desertion, the cause of action for which accrued after the filing of the original complaint. See also Randall v. Randall, 203 Cal. 462, 264 P. 751, where a supplemental complaint setting up a new cause of action for divorce on the ground of desertion was considered to supersede the original complaint and a judgment rendered on it was upheld.

In Renner v. Renner, 1940, 177 Md. 689, 12 A.2d 195, at page 198, 127 A.L.R. 674, it was held that a supplemental pleading setting up a cause of action for divorce on the ground of adultery was not allowable; that the proper procedure would be "the existing suit for divorce should be dismissed by consent of the Court, and a new action should be instituted." The absurdity of this requirement as applied to California rules of pleading is demonstrated when we consider that in this state, the action could not be dismissed even with the consent of the court, if the defendant in the case had asked for affirmative relief. In such case is the wronged party to be denied the right to inform the court of the adulterous action of the other party?

In Smith v. Smith, 21 N.J.Misc. 273, 33 A.2d 684, the general rule was upheld. However, it was pointed out that the filing of such a supplemental pleading was merely an irregularity which the parties could waive, and also that a supplemental pleading

would be permitted where the new matter would remove the effect of a condonation.

In a later case in the same court, Schmitt v. Schmitt, 1950, 9 N.J.Super. 470, 75 A.2d 480, it was held that the rule expressed in the Smith case no longer existed due to a change in the rules of pleading and that the plaintiff might amend his complaint for divorce to set up an act of adultery allegedly occurring after the filing of the answer to the original complaint. The court stated that "such an interpretation seems in keeping with the progressive liberality of the Rules * * *." 75 A.2d at page 480.

Stating "It is a well-recognized practice in equity to permit new matter arising subsequent to the complaint to be alleged in a supplemental pleading," the court in Kelsall v. Kelsall, 1952, 139 Conn. 163, 90 A.2d 878, 880, denied the contention that a court adopted rule permitting the filing of an amendment to a complaint in a divorce action to set up a ground of divorce arising subsequent to the filing of the action, was a rule affecting substantive rights and not merely a rule governing practice and procedure. There the original complaint charged cruelty. The court held proper an amendment charging desertion, the cause of action for which did not accrue until some three months after the original complaint was filed.

In Ames v. Ames, 1919, 109 Misc. 161, 178 N.Y.S. 177, it was held that while a plaintiff could not file a supplemental complaint setting up adultery committed by the defendant after suit filed, a defendant could by supplemental answer as a defense or counterclaim set up acts of adultery committed by the plaintiff since suit filed, giving as the reason for this curious distinction between the case of a plaintiff and a defendant, "'A plaintiff may discontinue and sue over again, while a defendant cannot.'" 178 N.Y.S. at page 178. This reasoning would not be applicable in California if the defendant had asked for affirmative relief. Moreover, that this is no longer the law in New York is shown by Taffler v. Taffler, 1947, Sup., 75 N.Y.S.2d 895, where the plaintiff sued for judicial separation on the ground of cruelty. Over the defendant's objection, evidence was received of adultery committed by the defendant almost four years after suit filed. The plaintiff moved to amend her complaint to conform to the proofs. The court held that this was improper, stating, 75 N.Y.S.2d at page 896. "In order that plaintiff might properly plead this adultery, an order for the issuance of a supplemental complaint should have been obtained by plaintiff so that it might embody facts occurring after the institution of the action."

[7, 8] Another reason for permitting consideration in a divorce case of acts of the parties subsequent to suit filed is the following rule applying to equity suits (and, of course, a suit for divorce is in equity): "It is a settled rule that a court of equity having jurisdiction of the parties and of the subject matter will make a final disposition of the litigation governed by the circumstances as they are shown to exist at the time the decree is made rather than at the inception of the litigation." Mercer Casualty Co. v. Lewis, 41 Cal.App.2d 918, 922–923, 108 P.2d 65, 67. Appropriate here is the language of Rosicrucian Fellowship v. Rosicrucian etc. Church, 39 Cal.2d 121, 135, 245 P.2d 481, 490: "Inasmuch as this action is in the nature of an equitable proceeding, the court may consider the facts as they existed at the time of trial so that the interests of justice may be subserved."

[9] In our case, the supplemental complaint was a proper proceeding and the issue of defendant's adultery was properly before the court.

2. What is effect of court's findings on the adultery cause of action?

While the court found that the charge of adultery was untrue, it nevertheless found that defendant shortly after the action was brought indulged in repeated acts of sexual intercourse with women other than plaintiff. As "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife", Civ.Code, § 93, the court, in fact, found that defendant had committed adultery. It is obvious that the court's findings are contradictory unless, as apparently the trial court believed, adulterous acts committed after suit filed cannot constitute the

ground of adultery in a divorce action.[1] This was the ruling in Renner v. Renner, supra, 12 A.2d 195, 198. There the court stated: "In the Ecclesiastical Courts of England, either party to a divorce suit was allowed to enter supplemental proceedings to show that acts of adultery had been committed by the other party after the commencement of litigation, and a decree could be obtained thereon. But in most of the American Courts the rules of Equity practice have been applied to actions for divorce with the result that adultery committed by a defendant subsequent to institution of suit can not be used as the basis for a decree. Maryland has followed the prevailing view that testimony as to acts of adultery by a defendant after institution of suit is inadmissible."

However, in Connecticut it was held that in a divorce on the grounds of habitual intemperance the trial court properly admitted evidence concerning both parties' intemperance subsequent to the commencement of the action. Each party had sought divorce on the ground of the other's intemperance, Allen v. Allen (Barber v. Barber) 1900, 73 Conn. 54, 46 A. 242.

In Arix v. Arix, 1920, 212 Mich. 438, 180 N.W. 463, it was held that evidence of the plaintiff's adultery after she filed her complaint but before the defendant filed his cross-complaint was admissible. "The mere filing of her bill of complaint did not cancel the marriage relation between her and defendant, and any evidence of misconduct on her part subsequent to that date and before the filing of the cross-bill and the hearing thereon was competent as bearing upon the rights of the parties." 180 N.W. at pages 463–464.

In Allen v. Allen (Barber v. Barber) supra, 46 A. 242, the court pointed out that while the assent of both parties is necessary to a marriage, the relationship of the parties thereafter is not merely contractual but is a status in which the parties "stand to each other, towards all other persons, and to the state." 46 A. at page 242. It is a relation from which the parties cannot separate themselves by their own agreement or by their own misconduct. "When an attempt is made, through the courts, to undo a marriage, the state becomes, in a sense, a party to the proceedings,—not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause, shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair." 46 A. at page 242. It has even been held that the parties to a divorce action do not have the right to control procedure as in other actions. Grannis v. Superior Court, 146 Cal. 245, 252, 79 P. 891; see also In re Lazar, 37 Cal.App.2d 327, 330, 99 P.2d 342.

In Rackham v. Rackham, Utah, 1951, 230 P.2d 566, the defendant husband filed a counterclaim one month after the commencement of a divorce action by the wife. In it he alleged that she was consorting with another man. At the trial the wife objected to evidence of what she did after she had filed the suit on the ground it was immaterial. The trial court admitted evidence of the "meretricious relationship between plaintiff and a paramour", 230 P.2d at page 569, and granted the defendant a divorce on the ground set forth in the counterclaim. The reviewing court held that the action of the trial court was proper. While there was evidence indicating that the meretricious relationship had existed prior to suit filed, and the court does not discuss its holding, the case is authority for the proposition that acts of adultery committed subsequent to suit constitutes grounds for divorce.

In California there are two cases considering the question. The second case, Johanson v. Johanson, 1910, 12 Cal.App. 635, 108 P. 55, is not in point. There the trial court rejected evidence of the hus-

1. As we have heretofore pointed out in considering the supplemental pleading, the issue of plaintiff's adultery was properly before the court. We will now consider the cases which seem to hold that adultery occurring after suit filed cannot be ground for divorce.

band's visits to a house of prostitution about two months after the filing of the action in which the wife was seeking divorce on the grounds of adultery, she having charged the adultery occurred in a brothel prior to suit. The evidence was offered in support of the specific charge to show the habits and inclinations of the husband. The court said, 12 Cal.App. at page 636, 108 P. at page 56: "* * * the evidence sought to be elicited by this question related to conduct long after the commencement of the action, and in no degree can the same be said to establish the commission of the offenses alleged to have been committed before the filing of the complaint." It then stated that assuming the evidence admissible to show the intent with which the defendant visited the brothel on the date charged in the complaint (and which visit the trial court found to be innocuous) the error, if any, in its rejection was not prejudicial as the intent with which he made that visit was immaterial as no act of adultery occurred. The court did not discuss the question involved here, as to whether adultery after suit filed may be a cause of divorce. The first case, Conant v. Conant, 1858, 10 Cal. 249, is interesting. There the wife sued for divorce on a number of grounds including adultery. The husband answered alleging desertion (but not for the statutory period). The wife offered no evidence in support of any ground of divorce other than adultery. Her evidence on this subject related to acts committed more than a year after the court found that without cause she had "deserted the residence" of her husband (at that time desertion to constitute a ground of divorce must have existed for two years). The court discusses at length the subject of recrimination as related to various grounds of divorce and then held that as the grounds of adultery were established the wife's acts in leaving the husband without cause for a time less than the statutory period for desertion, could not constitute a defense against divorce from bed and board, but did constitute a defense against divorce *a vinculo matrimonii*. This case, of course, did not deal with adultery after suit filed, but merely with adultery after separation of the parties.[2]

[10] It would appear that the decision in Renner v. Renner, supra, 12 A.2d 195, to the effect that adultery committed after suit filed cannot constitute grounds for divorce, was, to some extent at least, a matter of pleading, for the court stated, in effect, that to make it such the plaintiff merely needed to start her divorce action all over again. We have heretofore discussed the liberalized attitude of California courts towards pleading. As pointed out in Allen v. Allen (Barber v. Barber) supra, 46 A. 242, it is the condition existing *at the very time the divorce is granted* that is important in determining the disposition of a divorce action. Therefore adultery committed after suit brought can be a ground of divorce. But the court, although finding in fact that adultery had been committed by defendant, refused to find it to be adultery in law. Thus the court failed to find on a material issue. If it be deemed a finding of adultery in law then we have a finding that plaintiff had grounds for divorce,—defendant's adultery, and defendant had grounds for divorce,—plaintiff's extreme cruelty. This brings us to a determination of what the court should do where it finds both parties to have divorce grounds. This in turn requires a consideration of DeBurgh v. DeBurgh, supra, 39 Cal.2d 858, 250 P.2d 598, and other authorities.

Divorce to both parties?

In the DeBurgh case both parties asked divorce on the ground of extreme cruelty. The trial court found that each party was guilty of extreme cruelty and denied a divorce to either because it held that the cruelty of each constituted recrimination as to the cruelty of the other. On appeal the reviewing court reviewed the doctrine of the application of recrimination in California. It pointed out that the doctrine of recrimination as an absolute bar to a cause of action for divorce came about through the erroneous discussion of the subject in Conant v. Conant, supra, 10 Cal. 249, and stated that the rule of that case

2. In DeBurgh v. DeBurgh, supra, 39 Cal. 2d 858, at page 863, 250 P.2d 598, the discussion in the Conant case, supra, is characterized as "erroneous."

was repudiated by the Legislature in the adoption in 1872 of the present Civil Code sections 111 and 122. It then stated the rule to be—that recrimination will not be a bar in every case, but only in the discretion of the trial court; that there is no precise formula for determining when a cause of divorce,[3] shown by one party should be a bar to a cause of divorce shown by the other, but that the court is clothed with a broad discretion to advance the requirements of justice in each particular case. Generally, it said, there are certain major considerations which should govern the court's decision: (1) the prospect of reconciliation; (2) the effect of the marital conflict upon the parties; (3) the effect of the marital conflict upon third parties, children and community; and (4) comparative guilt. The court then stated, 39 Cal.2d at page 873, 250 P.2d at page 606: "It is essential that findings be made on every material issue raised by the pleadings. [Citations.] As we have seen, whether or not the cause of action proved against each spouse is to be regarded as in bar of the cause of action proved against the other spouse is a material issue and must be expressly decided by the trial court before it may be said that recrimination has been decided." It further stated that upon remand of the case, the trial court might decide that one of the parties should be granted a divorce, or that a divorce should be granted both parties.

[11, 12] Applying the principle of the DeBurgh case to our case, we find that (1) the court should have found on the issue of adultery raised by the pleadings; (2) the court should have found whether or not both parties were entitled to a divorce inasmuch as both had grounds for divorce. In determining this question it would be advisable to bear in mind the major considerations suggested in the DeBurgh case: (1) The prospects of reconciliation. Apparently from the evidence here there are none. (2) The effect of the marital conflict upon the parties. (3) The effect of the marital conflict upon third parties. There are no children, so the inquiry here will be restricted to the effect on the community. If public policy permits a complete disregard of the fact that defendant committed adultery, such a policy might result in the general belief that once a spouse feels that the marriage relation should be severed because of the actions of the other spouse, or because the other spouse has filed suit for divorce, the former is completely free to commit adultery at will. In Jeppi v. Jeppi, 179 Md. 698, 18 A.2d 207, 210, it was held that the husband's previous desertion of the wife was not a defense to the wife's subsequent adultery. In Arix v. Arix, supra, 212 Mich. 438, 180 N.W. 463, 464, it was held that the mere filing of a complaint for divorce did not cancel the marriage relations between the parties and that evidence of misconduct on the part of the plaintiff subsequent to the filing of the complaint and before the filing of a cross-complaint was "competent as bearing upon the rights of the parties." (4) The comparative guilt of the parties. As said in the DeBurgh case, 39 Cal.2d at page 866, 250 P.2d at page 602: "Although the plaintiff's fault has always been regarded as an important element in the decision of any case, our courts have traditionally refused to exalt that element above the public interest." (See discussion throughout the DeBurgh case of the necessity of applying in divorce cases the doctrine of clean hands.)

The fairness of the rule of the DeBurgh case is shown by the situation in this case. The trial court stated at the end of the case that although it was granting the divorce to defendant it intended to grant alimony to plaintiff. Because of its belief that the adultery committed subsequent to the filing of suit could not be considered as grounds of divorce, and of the rule that the court may not grant alimony to a party not having grounds for divorce, the court was prevented from carrying out its intention. After seven years of married life, plaintiff was left practically penniless. True, the court found that the two homes were joint tenancy properties. But they were heavily mortgaged and plaintiff had no funds from which to meet the mortgages.

3. See 41 Cal.L.Rev. 320, for an extensive discussion of the doctrine of recrimination and the effect of the DeBurgh case.

From subsequent proceedings filed in this court we learned that the properties were lost to plaintiff by foreclosure proceedings at which defendant became the purchaser. With the evidence showing that plaintiff as well as defendant had grounds for divorce, the case cries aloud for the application of the rule of the DeBurgh case, namely, a determination by the trial court of the rights of the parties in the face of that fact.

In Phillips v. Phillips, 41 Cal.2d 869, 264 P.2d 926, the trial court found that each party had a cause of action against the other on the ground of extreme cruelty and denied each a divorce on the ground of recrimination. The reviewing court applied the rule of the DeBurgh case and held that the trial court erred in denying a divorce, and reversed the judgment, stating that on retrial the court must determine whether one or both parties should receive a divorce.

In view of our decision herein and as this case will have to be retried, we deem it unnecessary to discuss the other questions raised on the appeal.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

132 Cal.App.2d Supp. 898

J. K. LAW, Plaintiff-Appellant,

v.

Jean HEINIGER, etc., et al., Defendants-Respondents.

C. A. 8628.

Appellate Department, Superior Court, Los Angeles County, California.

April 12, 1955.

Action in claim and delivery by assignee of seller of ring under conditional sales contract on which seller noted that person other than purchaser was to be holder of ring. From judgment of the Municipal Court of the Los Angeles Judicial District, in favor of assignee as to purchaser of ring and against assignee as to holder of ring, the assignee appealed. The Appellate Department of the Superior Court, held that finding that holder of ring was not "now" in possession of ring was immaterial if word "now" meant any time later than commencement of action and was not sustained by the evidence if it meant at commencement of action.

Judgment reversed as to holder of ring and affirmed as to purchaser of ring.

1. Replevin ⇐8(4), 10

An action in claim and delivery will not lie unless plaintiff has right to immediate and exclusive possession of property at time of commencement of action and defendant has possession of property or power to deliver it in satisfaction of a judgment for its possession.

2. Replevin ⇐8(1)

An exception to the rule, that a cause of action in claim and delivery does not exist against one who does not have possession at commencement of action, is made in those cases where possession had been in defendant but was wrongfully given to another.

3. Sales ⇐480(2)

Where seller of ring under conditional sales contract noted on contract of sale that person other than purchaser was to be holder of ring, assignee of seller was required to make demand for possession upon person holding it before action in claim and delivery could be brought against such person for purchaser's failure to make payments on ring.

4. Stipulations ⇐18(1)

A finding should not be made contrary to a stipulation, and if made it must be disregarded.

5. Sales ⇐480(4½)

In action in claim and delivery by assignee of seller of ring under conditional sales contract on which seller had noted that person other than purchaser was to be holder of ring, which holder claimed he had mislaid several months prior to trial, find-

ing that holder did not "now" have possession of ring was immaterial if "now" meant any time later than commencement of action, and was not sustained by evidence if it meant at time of commencement of action.

6. Sales ⇐479(9)

In action in claim and delivery by assignee of seller of ring under conditional sales contract on which seller noted that person other than purchaser was to be holder of ring, which purchaser had given to holder long before action was commenced, judgment that assignee recover possession of ring from purchaser, who made no appearance and who suffered default to be entered against her, was improper.

7. Appeal and Error ⇐877(2)

Where judgment in claim and delivery action that assignee of seller of $500 ring under conditional sales contract recover possession of ring from purchaser was improper because purchaser did not have possession of ring at commencement of action, and judgment allowed as an alternative recovery sum of $93.89 if possession could not be had, assignee could not contend that he had not been awarded a proper sum in alternative since alternative judgment is only proper where possession is awarded.

8. Sales ⇐479(9)

Where purchaser of $500 ring under conditional sales contract defaulted in payments when only a balance of $93.89 remained on purchase price, assignee of seller was only entitled to recover balance due in action in claim and delivery against purchaser. West's Ann.Civ.Code, §§ 1670, 1671, 3294.

9. Replevin ⇐109

Alternative provision in judgment is for benefit of party prevailing in an action in claim and delivery, and does not give other party option of delivering property for amount of alternative award.

Murray Riskin, Los Angeles, for appellant.

Sidney Fisher, in pro. per.

Jean Heiniger, in pro. per.

PER CURIAM.

This is an action in "claim and delivery," in which it is alleged that both defendants detain from the possession of the plaintiff a $500 sapphire ring belonging to him. Plaintiff appeals from a judgment that denied him any relief as to defendant Sidney Fisher and which limited his relief as to defendant Jean Heiniger to the recovery of possession of the ring or, in case possession could not be had, to its value "which is fixed at $93.89." We have determined that the judgment should be reversed as to defendant Sidney Fisher, but that it should be affirmed as to defendant Jean Heiniger.

[1, 2] Certain principles should be in mind as we undertake to review the record in this case. These words from Riciotto v. Clement, 1892, 94 Cal. 105, 107, 29 P. 414, are quoted in Richards v. Morey, 1901, 133 Cal. 437, 439–440, 65 P. 886, 887: "'* * the relief sought in claim and delivery cannot be had from the defendant unless he is *then* possessed of the property, which fact must, therefore, constitute an essential element in plaintiff's cause of action.'" Again, we read: "It is well settled that to sustain an action for the recovery of specific personal property the plaintiff must have the right to immediate and exclusive possession of such property at the time of the commencement of the action (5 Cal. Jur. p. 161; Fredericks v. Tracy, 98 Cal. 658, 33 P. 750); furthermore that an action to recover possession of personal property will not lie unless at the time the action is commenced defendant has the possession of the property or the power to deliver it in satisfaction of a judgment for its possession * * *." Ramacciotti v. Galiano, 1943, 59 Cal.App.2d 8, 11–12, 137 P.2d 722, 723. One or both of these principles are recognized in the following cases: Home Payment Jewelry Co. v. Smith, 1914, 24 Cal.App. 486, 488, 141 P. 933; California Packing Corp. v. Stone, 1923, 64 Cal.App. 488, 492–493, 222 P. 193; Paganucci v. Kalpouzos, 1947, 78 Cal.App.2d 714, 719, 178 P.2d 62, 64; Stockton Morris Plan Co. v. Mariposa County, 1950, 99 Cal.App.2d 210, 213, 221 P.2d 232, 235. An exception to the rule, that a cause of action in "claim and

delivery" (replevin) does not exist against one who does not have possession at the commencement of the action, is made in those cases (detinue) where possession had been in the defendant but was wrongfully given to another. Faulkner v. First Nat. Bank, 1900, 130 Cal. 258, 264–266, 62 P. 463; Teter v. Thompson, 1922, 57 Cal.App. 329, 331–332, 207 P. 260.

Case Against Defendant Sidney Fisher.

The evidence and findings are agreed that the ring plaintiff seeks was sold by his assignor to defendant Jean Heiniger under a conditional sales contract sometime in 1951. At the time of the sale, Jean notified the seller that the ring was for Sidney Fisher, and the seller noted on the contract of sale of the "gents star sapphire, that Sidney Fischer (sic) was to be the 'Hdr' of the ring." He continued to hold it, according to his testimony, until "five or six months" before the trial (which was held June 22, 1954), at which time he quarreled with Jean, who had become his wife, because she had bought the ring on time, took it off, misplaced it, and, at the time of the trial, did not know where it was.

[3–5] Jean made payments on the ring until only a balance of $97.38 was due; at the time of trial it was "long since due." Plaintiff was entitled to its possession, under the conditional sales contract. Of necessity, before an action in claim and delivery (replevin) could be brought against Sidney Fisher, demand for the possession of the ring had to be made upon him. Home Payment Jewelry Co. v. Smith, supra, 24 Cal.App. 486, 488, 141 P. 933. In spite of the evidence that demand was made by letter early in November, 1953 and by a telegram later in the month, supplemented by a stipulation that the demands had been made, the trial court found "that no demand for the return of said personal property was made upon the said Sidney Fisher." A finding should not be made contrary to a stipulation, and if made must be disregarded. Wilson v. Mattei, 1927, 84 Cal. App. 567, 572–575, 258 P. 453. With respect to defendant Fisher's possession of the ring, the only finding is "that said Sidney Fisher does not now have possession of said personal property." If by the use of "now" the trial court meant any time later than the commencement of the action (February 8, 1954), the finding is immaterial and without support in the evidence. If the finding is to be construed as referring to the commencement of the action, then it lacks evidentiary support. Clearly possession was in defendant Fisher from late 1951 to a time near the filing of the complaint, and the evidence as to the events following the quarrel furnishes no basis for the conclusion that the ring ever left his possession. We see no reason why judgment should not have been rendered in plaintiff's favor as to defendant Fisher.

Action as to Defendant Jean Heiniger.

[6] Defendant Jean Heiniger made no appearance, and her default was entered. She was called as a witness on behalf of the plaintiff and her testimony (ruled, properly, to be binding only on her) was to the effect that she had given the ring to defendant Sidney Fisher, her husband at the time of the trial. There was no evidence contradicting her testimony that she had parted with the possession of the ring long before the action was commenced. Whether significant or not, in view of her default, the fact is that no finding was made that she possessed the ring at the commencement of the action. The judgment that plaintiff recover the possession of the ring from the defendant Jean Heiniger was therefore improper, as measured by the evidence given by the defendant "to prove up on her default."

[7] However, the defendant Jean has not appealed, and on plaintiff's appeal this part of the judgment favorable to him may not be changed unless we reverse the whole judgment (as to Jean) because the amount allowed as an alternative recovery (if possession may not be had) is too small; $03.89 for a $500 ring. Two paths that lead to the same destination, an affirmance, lay before us. We have not chosen between them, although both may not be taken.

The first solution that has been offered to our problem is to say that the plaintiff may not contend that he has not been awarded

a proper sum in the alternative, because an alternative judgment is only proper where possession is awarded, and plaintiff proved that he was not entitled to a judgment awarding him possession, as against defendant Jean. If this answer may not be given because the judgment awarding possession has not been, and on this appeal may not be, challenged, see MacDonald v. Pacific Nat. Bank, 1944, 66 Cal.App.2d 357, 363, 152 P.2d 360, 363, then the propriety of the award of $93.89 as the alternative judgment remains.

[8] The general rule undoubtedly is that where a vendee defaults under a conditional sales contract, the vendor is entitled to recover the property or, in the alternative, its value without any deduction for the amount theretofore paid upon the contract price by the vendee. Markall v. Peterson, 1943, 59 Cal.App.2d 248, 252, 139 P.2d 70; 78 C.J.S., Sales, § 611, p. 395. This rule has been changed in some states by statute, Harper v. Futrell, 1942, 204 Ark. 822, 164 S.W.2d 995, 143 A.L.R. 235, 237, whereby the amount of the alternative judgment is limited to the unpaid balance due upon the contract, together with interest thereon. No such statute, however, has been enacted in California, and under the authority of Markall v. Peterson, supra, we would be constrained to agree with plaintiff's contention, unless a different result is required by the decision in Freedman v. Rector, 1951, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1, wherein it was held that a defaulting vendee under a contract for the purchase of realty was entitled to recover from the vendor so much of the money paid by him on account of the purchase price as exceeded the damage, if any, sustained by the vendor—measured by the value of the property when repossessed by the vendor. This conclusion proceeds upon the reasoning that to permit the vendor to retain both the land and the amount paid upon account of the purchase price by the vendee under the circumstances would result in unjust enrichment—permitting, in effect, "punitive damages merely because a party has partially performed his contract before his breach" in violation of the spirit, if not the letter, of Civil Code sections 1670, 1671 and 3294. See the discussion 37 Cal.2d at pages 21–23, 230 P.2d 629.

We cannot escape the conclusion that the reasoning of that case is applicable here as to the defendant Jean. In the light of the allegation and proof adduced by the plaintiff that the ring is of the value of $500, to permit the plaintiff to recover the full value of the ring while retaining the amount previously paid on account of the purchase price thereof would result, in effect, in awarding plaintiff punitive or liquidated damages in the sum of the aggregate payments made on account thereof by defendant Jean, or $420.69.

[9] It should perhaps be noted that the affirmance of the judgment as to Jean does not operate to prejudice plaintiff's pursuit of his remedy against Sidney, for plaintiff is not obligated under the judgment against Jean, to accept the amount of the alternative award in lieu of the delivery of the ring. The alternative provision is for the benefit of the party prevailing in an action of claim and delivery, and does not give the other party the option of delivering the property or the amount of the alternative award. Griffith v. Reddick, 1919, 41 Cal.App. 458, 461–462, 182 P. 984; Peterson v. First Nat. Bank, 1929, 101 Cal.App. 532, 540, 281 P. 1104.

Unless plaintiff elects to accept payment of the alternative amount awarded against Jean in lieu of the property, see Johnson v. Durnell, 1939, 98 Utah 487, 93 P.2d 914, 917, he may proceed to retry the case as against defendant Sidney, and if he is successful in securing a judgment against him for the redelivery of the ring upon a finding that it was in his possession upon the date of the filing of the action, he will not be precluded from then urging his contention that the alternative award as against him should be in the amount of the value of the ring, as may be established by the evidence, rather than the balance due upon the contract of purchase—a question which we do not now undertake to decide.

The judgment as to defendant Sidney Fisher is reversed; as to the defendant Jean Heiniger, it is affirmed; plaintiff to recover his costs as to Sidney Fisher.

44 Cal.2d 401

Pietro FERRO, Plaintiff-Respondent,

v.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, etc., Defendant-Appellant.

MONARCH WINE COMPANY, Inc., a corp., Plaintiff-Respondent,

v.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, etc., Defendant-Appellant.

L. A. 23524, 23525.

Supreme Court of California, In Bank.

April 26, 1955.

Actions by owners of wine destroyed by fire to recover proceeds of fire policy paid to defendant as loss payee under blanket policy issued to winery on whose premises wine was stored, were consolidated for trial. The Superior Court, Los Angeles County, Arthur Coats, J., assigned by chairman of Judicial Council, rendered judgments in favor of plaintiffs and defendant appealed and actions were consolidated for hearing on appeal. The Supreme Court, Traynor, J., held that where bank allowed proceeds of wine insurance to be used to pay unsecured creditors of winery company in which wine was stored, where bank commingled wine insurance proceeds with those of building and equipment insurance on winery itself and paid itself unsecured debt of such winery to bank, and where bank delivered remainder of proceeds to winery without paying owners of wine stored therein and without notice to them that it was thus disposing of proceeds, such action constituted breach of trust, and fact that winery was also obligated to pay owners of wine stored therein did not excuse bank's breach of such trust.

Judgments affirmed.

Opinion, 275 P.2d 106, vacated.

1. Pledges ⇐1

A pledgee of collateral security for the payment of a debt is a trustee of the pledgor. West's Ann.Civ.Code, §§ 2986, 2987.

2. Insurance ⇐582

Where owner of wine in warehouse pledged warehouse receipts for such wine as collateral security for payment of debt to defendant, after wine was destroyed by fire, insurance proceeds took place of wine, and when proceeds came into defendant's possession, they likewise became subject to trust established by pledge and defendant could properly apply such proceeds to discharge of obligations secured by the pledge, but upon satisfaction thereof it was obliged to return any surplus that remained to pledgor, and its failure to do so, constituted breach of trust. West's Ann.Civ.Code, § 3008.

3. Money Received ⇐10

Rule that common count for money had and received will not lie to enforce express contract does not apply if plaintiff owes no further performance under contract and nothing remains to be done thereunder except payment of money by defendant, and payment can then be recovered under complaint stating common count for money had and received.

4. Insurance ⇐582

Provision in insurance policy designating named insured was intended to protect insurer by permitting it to pay the named insured and to be thereafter free of claims by other persons who might have interest in lost property, and such provision did not give bank who held proceeds of such policy right to transfer proceeds to such named insured.

5. Insurance ⇐582

Insurance proceeds take place of insured chattel, and named insured holds proceeds in trust for owner of chattel.

6. Insurance ⇐582

If proceeds of insurance policy come into possession of third party who has notice of trust in favor of owner of chattel and of interest of beneficial owner, he holds them in trust for such owner.

7. Insurance ⇐582

Where bank allowed proceeds of wine insurance to be used to pay unsecured creditors of winery company in which wine was

stored, where bank commingled wine insurance proceeds with those of building and equipment insurance on winery itself and paid itself unsecured debt of such winery to bank, and where bank delivered remainder of proceeds to winery without paying owners of wine stored therein and without notice to them that it was thus disposing of proceeds, such action constituted breach of trust, and fact that winery was also obligated to pay owners of wine stored therein did not excuse bank's breach of such trust. West's Ann.Civ.Code, § 2235.

8. Trial ⇐295(5)

In action by owner of wine destroyed by fire against loss payee for lawful disbursement of proceeds of fire policy issued to winery on whose premises wine was stored, instructions when considered as a whole failed to show that jury could have been under any misapprehension as to trial judge's meaning in use of word wrongful in instructing as to what could be found to be wrongful payment by defendant to winery of share of insurance proceeds covering owner's wine.

9. Trial ⇐243

In action by owner of wine destroyed by fire against loss payee for wrongful disbursement of proceeds of fire policy issued to winery on whose premises wine was stored, instruction which informed jury that if defendant wrongfully acquired or wrongfully detained plaintiff's property, it became an involuntary trustee and held property for plaintiff's benefit, was not in conflict with instruction which informed jury of consequences of lawful acquisition but wrongful disposition of plaintiff's property.

10. Trusts ⇐364

Mere acquiescence is not defense to action against trustee for breach of trust.

11. Trial ⇐349(2)

Direction of special verdict is within discretion of trial judge. West's Ann.Code Civ.Proc. § 625.

12. Trial ⇐349(2)

In action by owner of wine destroyed by fire against loss payee for wrongful disbursement of proceeds of fire policy issued to winery on whose premises wine was stored, refusal of court to give defendant's requested instruction that jury must state in its verdict upon which, if any, respective causes of actions they believed any plaintiff was entitled to recover judgment against defendant, was not abuse of discretion.

13. Appeal and Error ⇐1068(4)
Insurance ⇐582

In action by owners of wine destroyed by fire against loss payee for wrongful disbursement of proceeds of fire policy issued to winery on whose premises wine was stored, instruction on measure of damages allowable to each plaintiff was supported by evidence, and was not prejudicial to defendant, where verdicts for both plaintiffs were less than those that could have been returned under court's instructions.

14. Damages ⇐210(4)

In action by owners of wine destroyed by fire against loss payee for wrongful disbursement of proceeds of fire policy issued to winery on whose premises wine was stored, instruction that plaintiffs were entitled to interest from date on which they became aware of transactions, was not erroneous, where plaintiffs' damages were capable of being made certain on that date. West's Ann.Civ.Code, § 3287.

Cosgrove, Cramer, Diether & Rindge, Leonard A. Diether, Los Angeles, and Edward A. Nugent, San Francisco, for appellant.

Jerome Weber and Jack Altman, Los Angeles, for respondent Ferro.

Bronson, Bronson & McKinnon and George K. Hartwick, San Francisco, for respondent Monarch Wine Co., Inc.

TRAYNOR, Justice.

Defendant appeals from judgments in favor of plaintiffs Ferro and Monarch in actions that were separately filed but were consolidated for purposes of trial and appeal. In these actions plaintiffs seek to recover insurance proceeds paid for their wine, which was destroyed by fire while stored with Sunnyside Winery. These

proceeds came into defendant's possession, and plaintiffs contend that defendant held them in trust for the benefit of plaintiffs and that defendant breached that trust by its disposition of these proceeds and by its failure to pay them to plaintiffs.

The storage facilities of Sunnyside Winery were operated as a field warehouse by the Lawrence Warehouse Company. Of the 297,117 gallons of wine stored therein on February 8, 1950, the Lawrence Warehouse Company's inventory showed that Ferro owned 200,237 gallons, Monarch owned 83,000 gallons, Federal Wine and Liquor Company owned 6,100 gallons, Cella Vineyards owned 200 gallons, and Sunnyside owned 7,580 gallons. All of this wine and a part of Sunnyside's winery were destroyed by fire on February 8, 1950. Pursuant to contracts with the owners of the wine, Sunnyside paid the premiums on several policies of insurance covering all of the wine in storage. It also maintained insurance on its buildings and equipment. Defendant was named loss payee in all of these insurance policies. Sunnyside and its president, Felix Butte, had been clients of defendant since 1947 and defendant had occasionally made loans to Sunnyside on its wine. Defendant held the policies as collateral security for its loans and retained possession of them even when there were no loans outstanding in order to facilitate the making of a new loan to Sunnyside when the occasion for it arose.

At the time of the fire Sunnyside owed defendant $81,000 on a note secured by $25,000 in bonds and a deed of trust and a chattel mortgage on its plant and equipment. The insurance policies insured the plant and equipment for a maximum of $800,000. Defendant also held approximately $4,000 worth of trade acceptances on which Sunnyside was in default. On the same date Felix Butte, president of Sunnyside, owed defendant $23,000 on an unsecured personal note; Ferro owed defendant $52,636.67, which was secured by warehouse receipts for the 200,237 gallons of wine stored by Ferro at Sunnyside; and Monarch owed defendant $42,000 on two unsecured trade acceptances representing the purchase price of the wine stored at Sunnyside, which Monarch had purchased through an escrow conducted by defendant.

After the fire the insurance loss for all of the wine was adjusted at $136,440.49 and for the buildings and equipment at $202,000. Defendant insisted that Sunnyside, the named insured, endorse the insurance claim drafts, that defendant be the last to endorse the drafts, and that defendant collect them and control all of the proceeds received therefrom. Before any of the drafts were collected, however, unsecured creditors of Sunnyside, with claims totalling approximately $35,000, attached the monies in the hands of the insurers. On April 20, 1950, Butte arrived at defendant's place of business with the first claim draft from one of the seven wine insurers in the amount of $40,932.15. At this time a conference took place between Butte, defendant, and Ferro's attorney; Monarch was not represented. To obtain a release of the attachments, an agreement was reached whereby defendant would endorse the $40,932.15 draft, which would then be forwarded for payment of Sunnyside's unsecured creditors to the Sheriff of San Francisco, who was named a payee because of the attachment. Ferro signed a written authorization for that disposition of this draft in reliance on the further agreement that defendant would collect all of the remaining proceeds of the wine insurance and the building and equipment insurance and allocate it among the several owners of the property that was destroyed by the fire and in reliance on the assurance of defendant and an insurance adjuster, who was present at the meeting, that the remaining proceeds were more than ample to cover all of the claims.

Defendant endorsed the $40,932.15 draft, and it was forwarded to the Sheriff of San Francisco. Sunnyside's unsecured creditors were paid, the attachments were released, and the balance remaining (approximately $6,000) was paid to Sunnyside. At the time of its endorsement, defendant knew that the claim draft represented proceeds of the wine insurance, and that the proceeds would be used to pay unsecured

creditors of Sunnyside. It was also aware that Sunnyside owned only 7,580 gallons of the wine and that the remainder was owned by Ferro, Monarch, Federal Wine and Liquor Company, and Cella Vineyards, in the proportions indicated in the Lawrence Warehouse Company's inventory, a copy of which was given defendant at the April 20th meeting.

After the attachments were released, defendant collected all but one of the remaining claim drafts on both the wine and the building and equipment insurance. Its collections from the insurers of the wine totalled $85,275.30, and collections from the building and equipment insurers totalled $183,000. The monies thus collected from the different types of insurance were not kept separate, but were commingled, and reduced to cashier's checks drawn on defendant and payable to defendant. The only claim draft that defendant did not collect was one on which the Lawrence Warehouse Company was a payee. Lawrence refused to endorse, and defendant held it until July 27, 1950, when it forwarded the draft to Sunnyside.

By June 27, 1950, defendant's collections were substantially complete, and on that date it took $52,636.67 thereof to satisfy Ferro's debt to it. Late in June, Ferro's attorney learned that defendant had received the insurance money, but when he inquired about it, one of defendant's officers told him that defendant could not give out information about the insurance proceeds without the authorization of Butte. On July 5, 1950, defendant used insurance proceeds to satisfy all of the obligations owed to it by Butte and Sunnyside, except the $81,000 due from Sunnyside on its building loan. Monarch's obligation had come due before the insurance proceeds were collected. At defendant's insistence and in reliance on defendant's assurance that it would be reimbursed out of the insurance proceeds, Monarch paid its obligations on the due date. On July 6, 1950, defendant sent cashier's checks aggregating $60,000 to Sunnyside. Defendant retained another $60,000 in cashier's checks payable to itself as well as the $10,223.04 claim draft on which the Lawrence Warehouse Company was named a payee. Shortly thereafter it received the final payment from the insurers in the amount of $45,000. Neither Ferro nor Monarch had any knowledge of these transactions prior to July 6, 1950.

On July 19, 1950, Monarch wired defendant: "We understand that the insurance moneys were collected on fire loss at Sunnyside Winery, Fresno. Amount due us on fire loss is approximately $35,000. We have been informed money is in your possession. Please be informed that we look to you for check in payment of amount due to us on fire loss." On this date defendant had in its possession commingled insurance proceeds in the amount of $105,000, as well as the $10,223.04 claim draft on which Lawrence Warehouse Company was a payee. On July 21, 1950, defendant used $81,000 of the proceeds in its possession to satisfy Sunnyside's building loan, and the remainder of the proceeds was delivered to Sunnyside. On July 24, 1950, defendant wrote Monarch: "Please be advised that we do not hold any moneys representing insurance proceeds on loss by fire of wine inventory at Sunnyside Winery, Fresno, California. It is respectfully suggested that you communicate with the Sunnyside Winery and Mr. Felix Butte, Jr., to whom or to whose order such proceeds were paid." On July 27, 1950, defendant sent the $10,223.04 draft to Sunnyside. In November 1950 Sunnyside was declared insolvent. Neither Ferro nor Monarch was paid for their wine that was lost in the fire, and in this action they seek to hold defendant responsible for their loss.

The Ferro Case

[1, 2] Ferro pledged, Civ.Code, §§ 2986, 2987, the warehouse receipts for his wine as collateral security for the payment of his debt to defendant. A pledgee of collateral security for the payment of a debt is a trustee of the pledgor. Hudgens v. Chamberlain, 161 Cal. 710, 715, 120 P. 422; Sparks v. Caldwell, 157 Cal. 401, 403, 108 P. 276; Haber v. Brown, 101 Cal. 445, 452, 35 P. 1035; Wade v. Markwell & Co., 118 Cal.App.2d 410, 426, 258 P.2d 497, 37 A.L.R.2d 1363. After the wine was de-

stroyed, the insurance proceeds took the place of the wine, California Ins. Co. v. Union Compress Co., 133 U.S. 387, 410, 10 S.Ct. 365, 33 L.Ed. 730; American Eagle Fire Ins. Co. v. Gayle, 6 Cir., 108 F.2d 116, 119; Century Ins. Co. v. First National Bank, 5 Cir., 102 F.2d 726, 728, and when those proceeds came into defendant's possession they likewise became subject to the trust established by the pledge. Haber v. Brown, supra, 101 Cal. 445, 452, 35 P. 1035; Ponce v. McElvy, 47 Cal. 154, 159–160; Tracy v. Stock Assurance Bureau, 132 Cal.App. 573, 580, 23 P.2d 41; 21 Cal. Jur., "Pledges" § 72; see also, Cushing v. Building Association, etc., 165 Cal. 731, 737–738, 134 P. 324; Lucas v. Associacao Protectora, etc., Da Cal., 61 Cal.App.2d 344, 351–352, 143 P.2d 53. Defendant could properly apply those proceeds to discharge the obligation secured by the pledge, but upon satisfaction thereof, it was obliged to return any surplus that remained to the pledgor, Ferro. Civ.Code § 3008; Hudgens v. Chamberlain, supra, 161 Cal. 710, 715, 120 P. 422; Sparks v. Caldwell, supra, 157 Cal. 401, 403, 108 P. 276; MacDonald v. Pacific Nat. Bank, 66 Cal.App.2d 357, 365, 152 P.2d 360; see also, Baird v. Olsheski, 116 Cal.App. 109, 111, 2 P.2d 493. Its failure to do so was a breach of trust.

[3] Defendant contends, however, that a pledge is an express contract, that it was not pleaded in Ferro's complaint, and that it would therefore be improper to allow recovery on the theory of breach of trust. Ferro did plead a common count for money had and received, but defendant contends that "such a count will not lie to enforce an express contract," citing Barrere v. Somps, 113 Cal. 97, 101, 45 P. 177, 572. The general rule thus stated by defendant does not apply if the plaintiff owes no further performance under the contract and nothing remains to be done thereunder except the payment of money by the defendant. Payment can then be recovered under a complaint stating a common count for money had and received. Willett & Burr v. Alpert, 181 Cal. 652, 659, 185 P. 976; Castagnino v. Balletta, 82 Cal. 250, 257–258, 23 P. 127; Haggerty v. Warner, 115 Cal.App.2d 468, 474, 252 P.2d 373; Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App.2d 157, 165, 85 P.2d 961; see also, McClure v. Alberti, 190 Cal. 348, 351, 212 P. 204. The latter rule was recognized in the Barrere case, for the court there expressly pointed out that the plaintiff's contractual obligation was still executory. Ferro's obligation under the pledge contract was to pay his debt to defendant. When the insurance proceeds for Ferro's wine came into defendant's possession they became subject to the pledge, and when defendant exercised its rights under the pledge to satisfy Ferro's debt out of those proceeds nothing remained to be done but the payment by defendant of the surplus to Ferro. Ferro's complaint therefore properly stated a cause of action for the enforcement of this obligation.

[4] Defendant also contends that because Sunnyside was the named insured in the insurance policies and because the policies provided that the "Loss * * * [shall] be adjusted with and * * * payable to the insured specifically named herein," Sunnyside, rather than Ferro and Monarch, was legally entitled to the insurance proceeds in excess of defendant's insurable interest, which was protected by the commodity loss payable endorsement that appeared on each policy. The simple answer to this contention is that the provision in the insurance policy defines only the obligation of the insurer. Alexander v. Security-First Nat. Bank, 7 Cal.2d 718, 725, 726–727, 62 P.2d 735; Mutual Life Ins. Co. of New York v. Henes, 8 Cal.App.2d 306, 310–311, 47 P.2d 513. The provision is intended to protect the insurer by permitting it to pay the named insured and to be thereafter free of claims by other persons who might have an interest in the lost property. The insurance policy did not give defendant a right to transfer the proceeds to Sunnyside, and did not prevent Sunnyside, Ferro, and defendant from expressly agreeing to a different arrangement (Ibid.), as defendant's satisfaction from the insurance proceeds of Butte's and Sunnyside's unsecured debts clearly shows.

Moreover, defendant's repeated contention that it was merely acting as a collection agent for Sunnyside is rebutted by the testimony of several witnesses that defend-

ant "insisted" that it be the last to endorse the claim draft and that it control the disposition of all of the insurance proceeds, and by Butte's testimony that defendant was not acting as a mere agent of Sunnyside but that, instead, Sunnyside was obliged to "follow the procedure set down by [defendant]" for the handling and disposition of these funds.

The Monarch Case

The judgment in favor of Monarch must also be affirmed on the ground of breach of trust. Shortly after the fire but before any of the insurance proceeds were received, Leo Star, president of Monarch, had two conferences with one of defendant's officers who assured him that there was ample insurance to cover all of the stored wine, including that of Monarch, and that Monarch therefore "had nothing to worry about." On April 20th (the day the first claim draft for $40,932.15 came into defendant's possession) defendant was given a copy of the Lawrence Warehouse Company's inventory showing that Monarch owned 83,000 gallons of wine that had been destroyed. On the same day, and without notice to Monarch, defendant endorsed the $40,932.15 claim draft, which was a part of the proceeds of the wine insurance, and delivered it to Butte with knowledge that it would be used to pay Sunnyside's unsecured creditors. Thereafter, defendant collected all of the proceeds of both the wine and the building and equipment insurance, with the exception of the $10,223.04 claim draft on which the Lawrence Warehouse Company was named a payee. Defendant commingled these proceeds, and reduced them to cashier's checks drawn on itself and payable to itself. Cf. Civ.Code § 2236. From these commingled proceeds it paid itself Ferro's debt, Butte's personal debt, Sunnyside's unsecured debt, and delivered $60,000 to Sunnyside. After these transactions were completed, Monarch wired defendant that it was advised that defendant was in possession of the insurance proceeds and that Monarch was looking to defendant for payment of its claim. At that time defendant had in its possession $105,000 of the commingled proceeds, in addition to the uncollected claim draft on which the Lawrence Warehouse Company was named payee. The day after receiving Monarch's telegram, defendant used $81,000 of the commingled proceeds to pay off Sunnyside's building loan. The remainder of the proceeds was ultimately forwarded to Sunnyside.

[5–7] It is established that insurance proceeds take the place of the insured chattel, and that the named insured holds the proceeds in trust for the owner of the chattel. California Ins. Co. v. Union Compress Co., 133 U.S. 387, 410, 10 S.Ct. 365, 33 L.Ed. 730; American Eagle Fire Ins. Co. v. Gayle, 6 Cir., 108 F.2d 116, 119; Century Ins. Co. v. First National Bank, 5 Cir., 102 F.2d 726, 728; Polley v. Daniels, 238 App. Div. 181, 264 N.Y.S. 194, 197. If these proceeds come into the possession of a third party who has notice of the trust and of the interest of the beneficial owner, he likewise holds them in trust. Ibid.; Lucas v. Associacao Protectora, etc., Da Cal., 61 Cal.App. 2d 344, 351–352, 143 P.2d 53; 3 Scott on Trusts §§ 324.3, 324.4. It is clear that before defendant disposed of any of the insurance proceeds in its possession, it had actual knowledge that Monarch owned 83,000 gallons of the destroyed wine. Thereafter, defendant committed several breaches of trust by allowing proceeds of the wine insurance to be used to pay Sunnyside's unsecured creditors, by commingling the wine insurance proceeds with those of the building and equipment insurance and paying itself Butte's personal debt and Sunnyside's unsecured debt, and by delivering the remainder of the proceeds to Sunnyside without paying Monarch and without notice to Monarch that it was thus disposing of the proceeds. The fact that Sunnyside was also obligated to pay Monarch and that Monarch might have recovered its share of the proceeds from Sunnyside (before its bankruptcy in November 1950) cannot excuse defendant's breach of its trust obligation to Monarch.

Moreover, there is evidence from which it can be inferred that defendant knew at the time it delivered a part of the insurance proceeds to Sunnyside that Sunnyside's financial condition was such that the possibility of Monarch's and Ferro's claims be-

ing paid by Sunnyside was both doubtful and hazardous. For several years before the fire, defendant had a continuous course of dealings with Sunnyside and kept informed of the latter's financial condition. At the time of the fire defendant held approximately $4,000 worth of trade acceptances on which Sunnyside had defaulted. These acceptances were paid from insurance proceeds in July 1950. Defendant knew that Sunnyside urgently needed financing, and it led Sunnyside to believe that it would not call the latter's mortgage obligation of $81,000. Defendant did call that obligation and paid it off from the insurance proceeds in its possession. At that time defendant had in its possession Sunnyside's balance sheet, dated June 15, 1950, which listed the *whole* of the insurance proceeds as an asset of the corporation. In light of these facts the jury could reasonably conclude that defendant should have known that payment of Monarch's claim was rendered both doubtful and hazardous by delivery to Sunnyside of the insurance proceeds remaining after defendant had made the disbursements mentioned above.

Instructions

[8] A number of defendant's objections to the instructions have already been answered by the foregoing discussion. In addition, defendant contends that the jury was inadequately instructed as to what could be found to be a "wrongful" payment by defendant to Sunnyside of the share of the insurance proceeds covering Monarch's wine. Considering the instructions as a whole, and instructions 41 [1] and 42 [2] in particular, it does not appear that the jury could have been under any misapprehension as to the trial judge's meaning in the use of the word "wrongful."

[9] Defendant also contends that instructions 41 and 42 are in conflict with instruction 32.[3] These instructions are not necessarily inconsistent, however, for they were intended to describe the different fac-

1. "The gist and substance of Monarch's claim that a constructive trust has been established is that before the Bank endorsed the first draft of $40,000 it had promised and agreed, or by its conduct led and induced Monarch to believe, as a reasonably prudent person, that when it received the insurance proceeds, it would pay to Monarch that portion of the insurance proceeds that represented payment for Monarch's wine, and that when the Bank did receive such proceeds, it distributed them, or allowed them to be distributed to others, knowing at the time that the financial condition of Sunnyside was such that the disposal of these funds other than to them would probably result in Monarch's being deprived of that portion of the proceeds which represented its wine.

"In this regard you must determine what facts and circumstances have been proved, and whether the facts and circumstances found to be proved, are themselves of such a nature as to establish a trust, the breach of which would entitle Monarch to judgment in the action.

"The question of liability must be determined by what happened before the Bank disbursed the money. Whatever conversations took place or events occurred after the money passed from the hands of the Bank is not to be considered by you in determining the question of liability of the Bank."

2. "In order for Monarch to recover it must be established by a preponderance of the evidence:

"The Bank knew of the ownership of Monarch in the wine destroyed:

"The Bank agreed to pay Monarch, or led or induced Monarch to believe that it would pay Monarch, out of insurance proceeds that came into its possession, the insured value of Monarch's wine.

"That the Bank thereafter paid, or allowed to be paid, to others all of the insurance proceeds, except the amount of Ferro's indebtedness to it, knowing at the time, or having such knowledge that, as a reasonably prudent person it should have known, that by such action Monarch would not be paid for its wine, or that such payment would be doubtful and hazardous."

3. "You are instructed that a person who wrongfully detains the property of another, or a person who gains property by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the property gained, for the benefit of the person who would otherwise have had it."

tual situations on which defendant's liability could be predicated. Instruction 32 informed the jury that if defendant wrongfully acquired or wrongfully detained plaintiff's property, it became an involuntary trustee and held the property for plaintiff's benefit. Instructions 41 and 42 informed the jury of the consequences of lawful acquisition but wrongful disposition of plaintiff's property. There was evidence to warrant the giving of each of these instructions.

[10] The jury was instructed that if Ferro "authorized or consented" or "consented and agreed" to the payment by defendant to Sunnyside he could not recover. Defendant contends that these instructions are in conflict with an earlier instruction using the words "assented to or acquiesced in" in that any reference to Ferro's "acquiescence" is omitted. The instructions were not inconsistent, if the word "acquiescence" in the earlier instruction referred to laches. If "acquiescence" was intended to mean "passive submission or acceptance", see, Webster's New International Dictionary [2d ed. 1942], p. 23, defendant was not prejudiced thereby since a mere acquiescence is not a defense to an action against a trustee for breach of trust. (Rest., Trusts, § 216(1), comment a; 2 Scott on Trusts 1151.)

[11, 12] Defendant contends that it was prejudicial error for the court to refuse to give its requested instruction that the jury must "state in [its] verdict upon which, if any, of the respective causes of action you believe any plaintiff is entitled to recover judgment against defendant * * *." Both Ferro and Monarch stated alternative theories of recovery in three separate counts of their complaints. The instruction requested by defendant in effect asked for special verdicts on each of the six counts. The direction of special verdicts is within the discretion of the trial judge. Code Civ. Proc. § 625; House Grain Co. v. Finerman & Sons, 116 Cal.App.2d 485, 498, 253 P.2d 1034; Lloyd v. Kleefisch, 48 Cal.App.2d 408, 417, 120 P.2d 97. Nothing appears herein to indicate that the refusal to give defendant's requested instruction was an abuse of discretion.

[13] Defendant contends that the following instruction on the measure of damages was erroneous and prejudicial:

> "If you should return a verdict for one or more of the plaintiffs against the defendant, you shall determine the amount of money the particular plaintiff is entitled to, and return a verdict for that amount, together with interest from the 6th day of July, 1950.
>
> "Plaintiff Ferro seeks to recover on the basis of [4] 14 cents a gallon for the wine destroyed by the fire.
>
> "Plaintiffs [*sic*] Monarch seeks to recover the amount paid per gallon by the insurance companies for its wine stored in the Sunnyside Warehouse."

The instruction was correct. Ferro's prayer for $29,174.32 was based on the assumption that he owned 208,388 gallons of wine. Evidence was introduced to show that normal shrinkage had reduced Ferro's wine to 200,237 gallons. The jury accepted this evidence and multiplied that figure by 39 cents. From that total ($78,092.43) it subtracted the amount of Ferro's debt to defendant ($52,636.67) and returned a verdict for the remainder, $25,455.76. Monarch's loss was found to be the amount that Monarch paid for the destroyed wine, which was less than the amount of insurance pro-

4. This prayer was based on the theory, which was presented at the trial, that Ferro's wine was worth 39 cents a gallon and that his debt to defendant was the equivalent of 25 cents a gallon. Since that debt had been paid he contended that he was entitled to the remaining 14 cents. This method of computation was the result of a practice established before the fire. Ferro had agreed to sell his wine to Sunnyside in accordance with the latter's needs from time to time. As Sunnyside withdrew irregular lots and appropriated them to its own use, it would send a check for the amount withdrawn, computed at 39 cents a gallon, to defendant. Defendant would retain the equivalent of 25 cents a gallon and apply it to Ferro's obligation to defendant. The equivalent of 14 cents a gallon would then be forwarded by defendant to Ferro.

ceeds attributable to that wine. Thus, the verdicts for both plaintiffs were less than those that could have been returned under the court's instructions.

Defendant contends, however, that it "received" only $85,275.30 of the total wine insurance proceeds of $136,440.49, and thus that plaintiffs are at most entitled to a share of that sum equivalent to the proportion that their wine bore to the total amount of the destroyed wine and, in Ferro's case, less the amount of his debt to defendant. Such a computation would result in a verdict for Ferro in the amount of $4,830.35, and for Monarch in the amount of $23,821.74. This argument is based on the assumption that it is proper to exclude from the computation the $40,932.15 draft that was used to pay Sunnyside's attaching creditors and the $10,233.04 draft on which the Lawrence Warehouse Company was named a payee. These drafts cannot be excluded. Defendant had these drafts as well as the remainder of the proceeds within its possession and control. It delivered the $10,233.04 draft to Sunnyside without notice to either plaintiff, and Ferro's agreement to the use of the $40,932.15 draft to pay Sunnyside's creditors was made in reliance on defendant's assurance that he would be paid from the remaining proceeds. Defendant had knowledge of each plaintiff's interest in the wine insurance proceeds and it assured each of them that those proceeds would be adequate to pay their claims. Defendant was a trustee of those funds and was obligated to protect plaintiffs' interests therein.

[14] It is contended that the court's instruction that plaintiffs were entitled to interest from July 6, 1950, was error and that plaintiffs are entitled to interest only from the date of judgment. Section 3287 of the Civil Code provides that "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *." See, Lineman v. Schmid, 32 Cal.2d 204, 209–213, 195 P.2d 408, 4 A.L.R.2d 1380. Plaintiffs' damages were "capable of being made certain" on July 6, 1950, except for the dispute over the amount of shrinkage on Ferro's wine. There was no question but that Ferro was entitled to recover for 200,237 gallons of wine, and the dispute over the amount of shrinkage from the original 208,388 gallons cannot affect the certainty of that figure. Since the jury limited recovery to 200,237 gallons, there was no error in allowing interest.

The judgments are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 533

Chester Lee FREEMAN, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF SAN DIEGO, and Bessie Meriam Freeman, Respondents.

L. A. 23643.

Supreme Court of California.
In Bank.
April 29, 1955.

Certiorari to annul order of Superior Court adjudging petitioner guilty of contempt for failure to obey order requiring him to pay counsel fees and court costs in divorce action. The Supreme Court, Spence, J., held that disputable presumption that attorney, who represented petitioner in court at time order requiring payment of counsel fees and costs was made and who was thereafter served with a copy of order, had communicated to petitioner information as to such order was sufficient to support finding that petitioner had full knowledge of provisions of order, notwithstanding his affidavit to the contrary.

Order affirmed.

1. Contempt ⇐67

Certiorari will lie to review and annul a contempt order rendered without or in excess of jurisdiction.

2. Contempt ⇐40, 67

A contempt proceeding, though for the purpose of imposing punishment for violation of an order made in a civil action, is of a criminal nature and not a civil action, and hence no presumptions of validity may be indulged in support of a judgment in contempt, as would be the case with respect to ordinary judgments

3. Contempt ⇐67

On petition for certiorari to annul order adjudging petitioner guilty of contempt, the whole record before trial court will be examined to determine whether there was any substantial evidence before trial court to sustain its exercise of jurisdiction.

4. Contempt ⇐54(1), 58(1), 61(1)

The affidavit on which prosecution for constructive contempt is based constitutes the complaint, and the affidavit of defendant constitutes the answer or plea, and the issues of fact are thus framed by the respective affidavits serving as pleadings and a hearing must be had upon such issues.

5. Contempt ⇐54(3), 60(3)

While affidavit initiating contempt proceeding may be based upon information and belief, under hearsay rule, such affidavit is insufficient as evidence to sustain a contempt conviction.

6. Contempt ⇐23

That alleged contemnor had notice or knowledge of the order which he is charged with violating is a jurisdictional prerequisite to the validity of a contempt order.

7. Contempt ⇐54(4)

Affidavit initiating prosecution for constructive contempt is fatally defective unless it alleges that alleged contemnor had notice or knowledge of the existence of order at the time he is claimed to have violated it.

8. Contempt ⇐23

That one is a party to litigation does not of itself charge him with knowledge of an order or judgment made in connection with the litigation so as to afford basis for contempt proceeding.

9. Attorney and Client ⇐104

General rule of agency that notice to or knowledge possessed by an agent is imputable to his principal, applies for certain purposes in the relation of attorney and client.

10. Principal and Agent ⇐182

Where agent has acquired knowledge which it was his duty to communicate to his principal, the presumption is that he has performed such duty, and such presumption is deemed conclusive for the purposes of civil actions.

11. Criminal Law ⇐324

Presumption that agent, having acquired information which it was his duty to communicate to his principal, has performed such duty should not be deemed conclusive for the purpose of a proceeding of a criminal nature, such as a contempt proceeding, but for such purpose, it may be treated as a disputable presumption

12. Criminal Law ⇐324

Disputable presumptions are sufficient to sustain a finding in criminal proceedings, even though accused by way of oral testimony or by affidavit presents uncontradicted evidence to the contrary.

13. Attorney and Client ⇐104

In prosecution for constructive contempt for failure to obey order requiring husband to pay counsel fees and court costs in divorce action, disputable presumption that attorney, who had represented husband in court at time order was made and who had thereafter been served with a copy of order, had communicated to husband information as to existence of order was sufficient to support finding that husband had full knowledge of provisions of order, notwithstanding his affidavit that he had no knowledge of order prior to its service on him along with papers initiating contempt proceeding.

14. Certiorari ⇐68

A determination of fact made by trial court from conflicting evidence is not open to review on certiorari.

Vincent Whelan, San Diego, for petitioner.

Edgar B. Hervey and James Edgar Hervey, San Diego, for respondents.

SPENCE, Justice.

Petitioner seeks to annul the order of respondent court adjudging him guilty of contempt for failure to pay the sum of $195 theretofore ordered to be paid by him as counsel fees and court costs. He contends that his conviction of contempt was an act in excess of jurisdiction because there was no evidence to show that he had knowledge or notice of the provisions of the order which he allegedly disobeyed. However, the record in the contempt proceeding does not sustain his contention, and his conviction of contempt must be affirmed.

On July 9, 1954, petitioner was ordered to pay said sum in an action for divorce filed against him by respondent Bessie Meriam Freeman. Payment was not made. On September 10, 1954, the attorney for Mrs. Freeman initiated the contempt proceeding by an affidavit alleging in part, upon information and belief, that petitioner "* * * had full knowledge of the provisions of said order * * *." Petitioner filed an answering affidavit denying that he had "knowledge of the making or provisions of" the order at any time prior to September 16, 1954, when a copy was served upon him. He further alleged that he "was not in court at the time said order was made and believed that his obligation to pay attorneys' fees was based upon a written stipulation which he signed on a date which he [did] not remember but which he believe[d] was approximately August 16, 1954." On the hearing of the contempt proceeding, petitioner was not present, but was represented by his attorney. No testimony was introduced, and the matter was submitted upon the record in the divorce action, together with the above-mentioned affidavits. The court found that petitioner had at all times "full knowledge of the provisions of the order," had the ability to comply with its terms, and that his failure to do so was willful and contumacious. Petitioner was thereupon convicted of contempt.

[1–3] Respondents do not question the rule that certiorari lies to review and annul a contempt order rendered without or in excess of jurisdiction. 12 Cal.Jur.2d § 80, p. 101; Weber v. Superior Court, 26 Cal.2d 144, 148, 156 P.2d 923; Wilson v. Superior Court, 31 Cal.2d 458, 459, 189 P.2d 266. A contempt proceeding is not a civil action but is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action. Phillips v. Superior Court, 22 Cal.2d 256, 257, 137 P.2d 838. Accordingly, no presumptions of validity may be indulged in support of judgments in contempt, as would be the case with respect to ordinary judgments. 12 Cal.Jur.2d § 79, p. 101; In re Wells, 29 Cal.2d 200, 201, 173 P.2d 811; In re Du Bois, 120 Cal.App.2d 890, 892, 262 P.2d 340. But an examination will be made of the whole record before the trial court to determine whether there was any substantial evidence before it to sustain its exercise of jurisdiction. Bridges v. Superior Court, 14 Cal.2d 464, 485, 94 P.2d 983; City of Vernon v. Superior Court, 38 Cal.2d 509, 517, 241 P.2d 243.

[4, 5] In a prosecution for constructive contempt the affidavit on which the proceeding is based constitutes the complaint, Frowley v. Superior Court, 158 Cal. 220, 222, 110 P. 817; Mitchell v. Superior Court, 163 Cal. 423, 424, 125 P. 1061, the affidavit of defendant constitutes the answer or plea, Hotaling v. Superior Court, 191 Cal. 501, 505, 217 P. 73, 29 A.L.R. 127, and the issues of facts are thus framed by the respective affidavits serving as pleadings. 12 Cal.Jur.2d § 67, p. 89; Uhler v. Superior Court, 117 Cal.App.2d 147, 151, 255 P.2d 29, 256 P.2d 90. A hearing must be had upon these issues. Hotaling v. Superior Court, supra, 191 Cal. at page 505, 217 P. 73. While the affidavit initiating the contempt proceeding may be based upon information and belief, Golden Gate Con. H. M. Co. v. Superior Court, 65 Cal. 187, 190–191, 3 P. 628; Ex parte Brown, 66 Cal.App. 534, 537, 226 P. 650, it is insufficient as evidence to sustain a contempt conviction, under the hearsay rule. Gay v. Torrance, 145 Cal. 144, 152, 78 P. 540.

[6–8] The parties agree that the alleged contemnor's notice or knowledge of the order that he is charged with violating is a jurisdictional prerequisite to the validity of a contempt order. 12 Cal.Jur.2d § 25, p. 41; Phillips v. Superior Court, supra, 22 Cal.2d 256, 257, 137 P.2d 838. Thus, the initiating affidavit is fatally defective if it fails to allege that the accused had notice or knowledge of the existence of the order at the time he is claimed to have violated it. Phillips v. Superior Court, supra, 22 Cal.2d at page 258, 137 P.2d 838, disapproving Ex parte Grigoris, 99 Cal. App. 455, 456, 278 P. 873, and Mattos v. Superior Court, 30 Cal.App.2d 641, 647, 86 P.2d 1056, insofar as they indicate that the recital of the jurisdictional fact in the affidavit is not necessary. The dispute here does not concern the sufficiency of the initiating affidavit, but rather the sufficiency of the evidence to sustain the contempt order. Petitioner contends that there was no showing of the essential fact that he had notice or knowledge of the order. He claims that the initiating affidavit is the only evidence bearing on this jurisdictional point and argues as follows: the recital there was on information and belief; his defense affidavit controverted this material allegation; and the hearsay evidence of the initiating affidavit on this essential point was not competent to sustain the contempt adjudication. The fact that one is a party to litigation does not, of itself, charge him with knowledge of an order or judgment made in connection with it. 12 Cal.Jur.2d § 25, p. 42; Phillips v. Superior Court, supra, 22 Cal.2d at page 258, 137 P.2d 838.

[9–11] But contrary to petitioner's claims, the record is not devoid of competent evidence to support the trial court's finding. It affirmatively appears from the record that when the order for payment of counsel fees and court costs was made, petitioner was represented in court by his attorney, who was thereafter served with a copy of the order. The general rule of agency, that notice to or knowledge possessed by an agent is imputable to the principal, applies for certain purposes in the relation of attorney and client. 6 Cal.Jur. 2d § 152, p. 333; 5 Am.Jur. § 74, p. 302; annotation, 4 A.L.R. 1592. The rule rests on the premise that the agent has acquired knowledge which it was his duty to communicate to his principal, and the presumption is that he has performed that duty. Ibid; Lazzarevich v. Lazzarevich, 39 Cal. 2d 48, 50, 244 P.2d 1. While under our law the presumption is deemed conclusive for the purposes of civil actions, Wittenbrock v. Parker, 102 Cal. 93, 104, 36 P. 374, 25 L.R.A. 197, we do not believe that it should be given that effect for the purpose of a proceeding of a criminal nature, such as a contempt proceeding. On the other hand, there appears to be no valid objection to treating the presumption as a disputable presumption for the purpose of a contempt proceeding. This was no doubt the rule which the court intended to enunciate in Mattos v. Superior Court, supra, 30 Cal.App.2d 641, at page 647, 86 P.2d at page 1059, when it said, that if the accused person is represented by an attorney at the time an injunction is granted, such person "is deemed to have actual notice thereof."

[12] Disputable presumptions have been held sufficient to prove a fact in criminal proceedings, People v. Fitzgerald, 14 Cal. App.2d 180, 191–192, 58 P.2d 718; People v. Van Wie, 72 Cal.App.2d 227, 230–231, 164 P.2d 290; and such presumptions are sufficient to sustain a finding even though the accused may give uncontradicted testimony to the contrary. People v. Milner, 122 Cal. 171, 179, 54 P. 833; see People v. Agnew, 16 Cal.2d 655, 662–663, 107 P.2d 601. The same rule applies regardless of whether the uncontradicted testimony is presented by way of oral testimony or by affidavit. Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657; Berg v. Journeymen's Plumbers, etc., Union, 5 Cal.App.2d 582, 583, 42 P.2d 1091.

[13, 14] Here the only testimony which contradicted the disputable presumption was the affidavit of petitioner to the effect that he had no knowledge of said order prior to its service on him along with the papers initiating the contempt proceeding, September 16, 1954. He admitted, however, in the affidavit that he was aware of

his obligation to pay counsel fees and costs, but stated that he believed that his obligation arose from "a written stipulation which he signed" some time in August. The trial court was not required to believe petitioner's denial of knowledge of the order, but on the contrary, was justified in finding that he had such knowledge in accordance with the disputable presumption. It follows that the trial court merely resolved a conflict in the evidence, which determination of fact is not open to review on certiorari. Bridges v. Superior Court, supra, 14 Cal.2d 464, 485, 94 P.2d 983. As the trial court had sufficient evidence before it to support the contempt finding, petitioner cannot prevail in his challenge of its jurisdiction.

The order adjudging petitioner guilty of contempt is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 426

The PEOPLE of the State of California, Plaintiff and Respondent

v.

Harold E. BERRY, Defendant and Appellant.

Cr. 5656.

Supreme Court of California.
In Bank.
April 26, 1955.

Prosecution of life prisoner for assault upon fellow inmate with malice aforethought and by means of force likely to produce great bodily injury. From conviction in Superior Court, Monterey County, Ben V. Curler, J., and from two orders denying motions for new trial, defendant appealed. The Supreme Court, Spence, J., held that evidence sustained the implied finding of the jury that defendant was serving a life sentence.

Affirmed.

1. Statutes ⇐223.5(4)

Where Legislature used, in penal statute, same phrase, "malice aforethought", as in earlier penal statute, Legislature was presumed to have known of decision construing phrase in prior statute and to have intended phrase to have same meaning in the subsequent statute. Pen.Code, § 4500.

2. Convicts ⇐5

Term "malice aforethought" in statute pertaining to assault by person serving life sentence in state prison denotes purpose and design in contradistinction to accident and mischance, and it was unnecessary for court to supply meaning in violation of principle of separation of powers. Pen. Code, § 4500; West's Ann.Const. art. 3, § 1.

See publication Words and Phrases for other judicial constructions and definitions of "Malice Aforethought".

3. Convicts ⇐5

In prosecution of prisoner serving life sentence in state prison for assault upon person of another by means of force likely to produce great bodily injury, evidence sustained jury's implied finding that defendant was serving life sentence. Pen.Code, § 4500.

4. Criminal Law ⇐476

In prosecution of life prisoner for assault with malice aforethought on fellow prisoner, pathological findings of autopsy surgeon and his opinion as to cause of death were relevant in determination of amount of force used and of defendant's mental attitude at time of assault and could not be excluded merely because they might have tendency to influence jury against defendant. Pen.Code, § 4500.

5. Criminal Law ⇐800(3), 1172(1)

In prosecution of life prisoner for assault with malice aforethought on fellow inmate, trial court properly submitted to jury the meaning of "malice aforethought" as denoting purpose and design in con-

tradistinction to accident and mischance and also statutory definition of word "malice", but even if submission of general definition of "malice" was improper, it was not prejudicial. Pen.Code, §§ 7, subd. 4, 4500.

6. Criminal Law ⇐1036(6)

In prosecution of life prisoner for assault upon fellow inmate, objection that doctors who testified that defendant was sane at time of commission of assault had not taken into consideration so-called objective symptoms at time of assault and that their opinions might not be creditable as of earlier date of attack could not be raised for the first time on appeal. Pen. Code, §§ 1027, 4500.

7. Criminal Law ⇐695(5)

In prosecution of life prisoner for assault upon fellow inmate, objection that doctors who had testified that defendant was sane as of time of assault had not taken into consideration so-called objective symptoms at time of assault and that their opinions were not creditable as of earlier date of attack merely went to weight to be accorded to testimony, and such weight was question of fact for jury's determination. Pen.Code, §§ 1027, 4500.

8. Criminal Law ⇐778(2, 7)

In prosecution of life prisoner for assault upon fellow inmate, instruction that defendant was presumed sane and had burden of proving insanity at time of assault and instruction, given in view of evidence that defendant had suffered from schizophrenia some months before assault, that condition once shown to have existed is presumed to continue until contrary is proved, properly stated applicable law, and were not objectionable as confusing jury. Pen.Code, §§ 1027, 4500.

9. Criminal Law ⇐822(9)

In prosecution of life prisoner for assault upon fellow inmate, instructions on sanity issue would be considered as whole in light of record, in determining whether two instructions on subject caused confusion to jury. Pen.Code, §§ 1027, 4500.

10. Criminal Law ⇐48

Recognized test of insanity as defense to criminal prosecution is whether defendant was suffering from such defect of reason or disease of mind as not to know nature and quality of act he was doing, or if he did know it, that he did not know that he was doing what was wrong. Pen. Code, § 1027.

11. Constitutional Law ⇐70(1)

If any change is to be made in accepted standard, i. e., the right or wrong test, for determining criminal guilt in relation to insanity plea, change is matter for the Legislature rather than for the courts. Pen.Code, § 1027.

William Kirk Stewart, Pacific Grove, and Thomas S. Montgomery, Monterey, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant, while confined in Soledad State Prison, was charged with violating section 4500 of the Penal Code. That section provides: "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another * * * by any means of force likely to produce great bodily injury, is punishable with death." The jury found defendant guilty of the offense and sane at the time of its commission. Defendant appeals from the judgment of conviction and from two orders denying his motions for a new trial.

Defendant contends, with regard to the main trial on the issue of guilt: (1) That section 4500 is unconstitutional in failing to define the element of "malice aforethought"; (2) that there was insufficient evidence to establish that he was undergoing a life sentence; (3) that evidence of the victim's death was improperly admitted; and (4) that the trial court erred in defining "malice" in general terms in the instructions. Defendant further contends, with regard to the trial on the issue of sanity: (5) That the findings of the two court-appointed alienists were not made

in accord with his rights as prescribed by section 1027 of the Penal Code; (6) that the trial court erred in instructing the jury on the presumption of sanity; and (7) that the long-accepted legal test of sanity based upon knowledge of "right and wrong" should be changed by overruling the prior decisions. Our examination of the record compels the conclusion that defendant's contentions are without merit.

Defendant took an iron bar approximately 24 inches long and 1 inch in diameter, a part of a clothes-pressing unit, and struck a fellow prisoner, Johnnie Nelson, two blows over the head, cracking his skull. The attack occurred about 9:30 a. m., March 16, 1954, while both defendant and Nelson were at work in the laundry. As the result of the extensive skull fracture and brain damage, Nelson died that night.

While at breakfast on the morning of the attack, the two men engaged in a heated argument, and Nelson apparently had agitated defendant by mimicking the latter's muscular twitching or facial "tick." The guard on duty that morning testified that he heard the two men arguing; that defendant told him that he, defendant, was going to kill Nelson if he did not stop agitating him; and that defendant stated that he "was in for murder" and was "not afraid to draw blood." Defendant and Nelson were thereafter locked in their cells, which were within visual range of each other. They were released about 8:00 o'clock that morning to go to work. Defendant claimed that he tried to keep busy with his laundry duties so as to forget Nelson but he could not, with the result that he finally grabbed the iron bar and struck Nelson. There were some fifty persons working in the laundry at the time. Fellow inmates testified that they observed defendant stand with the bar in his hand some two or three minutes awaiting the chance to strike Nelson from the back—the first blow felling Nelson and the second hitting him as he lay on the floor.

After the assault defendant ran into the laundry office. At the direction of the laundry supervisor, defendant dropped the bar to the floor. He repeatedly said: "I hope I killed him, I hope I killed him, the punk." As Nelson was carried on a stretcher past defendant on the way to the prison dispensary, defendant spat in his face and wished him dead, adding "If you don't (die), it isn't my fault." Defendant was then taken to the captain's office, where he freely and voluntarily told prison officials about the morning's events, admitting his attack on Nelson in these words: "I don't know what I hit him with or how many times. All I know is I hit him." Defendant apparently realized that he could "be gassed" for the crime, for he said: "I am serving a life sentence and I know that it is automatic, if you draw blood on another man while you are under a life sentence, it is an automatic gas chamber sentence."

Defendant analyzes the crime specified in section 4500 of the Penal Code as one consisting of four elements: (1) an assault; (2) with force likely to produce great bodily injury; (3) committed with malice aforethought; (4) by a person undergoing a life sentence in a state prison. He admits elements (1) and (2)—the assault on Nelson with the stated force—but he claims that there was no evidence to prove elements (3) and (4)—the required malice aforethought and his status as a life-term prisoner. Neither contention has merit.

[1, 2] Defendant argues that the failure of the Legislature to define the term "malice aforethought" renders the statute unconstitutional for uncertainty, and the courts may not supply the meaning without violating the principle of the separation of powers. Const. art. III, § 1. It is a sufficient answer to state that such argument overlooks the statutory history of the section and its interpretation. In 1901, the statute now numbered section 4500 was enacted as section 246 of the Penal Code. Stats.1901, ch. 12, p. 6. In People v. McNabb, 1935, 3 Cal.2d 441, at page 456, 45 P.2d 334, at page 341, this court construed "malice aforethought" as used in section 246 to "denote *purpose* and *design* in contradistinction to accident and mis-

chance." In 1941, section 246 was repealed and reenacted, in identical wording, as section 4500. Stats.1941, ch. 106, § 15, p. 1124. When the Legislature so acted, it is presumed to have known of the prior decision construing the language of the earlier statute, In re Halcomb, 21 Cal.2d 126, 129, 130 P.2d 384, and to have used the identical language in the later statute with the intent that it be given the same meaning. People v. Superior Court, 118 Cal.App.2d 700, 703, 258 P.2d 1087, and cases cited. Accordingly, the term "malice aforethought" has been similarly defined in relation to section 4500, People v. Wells, 1949, 33 Cal. 2d 330, 338, 202 P.2d 53; People v. Silva, 1953, 41 Cal.2d 778, 782, 264 P.2d 27, and there can be no doubt as to its established meaning.

[3] Likewise without merit is defendant's claim that there was no evidence that at the time of the commission of the assault he was undergoing a life sentence. The official custodian of the records at Soledad State Prison testified, without objection, that defendant was serving a life sentence. Cf. People v. Wells, supra, 33 Cal.2d 330, 338, 202 P.2d 53, where testimony of the record clerk of Folsom State Prison that the defendant was carried on the prison roll as a "life termer" was sufficient to justify the Grand Jury's return of an indictment. Moreover, in recounting the attack and the morning's events to the prison officials in the captain's office, defendant stated: "I'm serving a life sentence." Also, there was introduced in evidence a certified copy of defendant's conviction of murder, upon which the life imprisonment term was based. Under the circumstances, there can be no question as to defendant's status as a person undergoing a life sentence.

[4] Defendant argues that it was improper to admit evidence of Nelson's death as the result of the assault. The allegedly objectionable evidence was the testimony of the autopsy surgeon concerning his pathological findings when he examined Nelson the next day, and his statement that cerebral hemorrhage was the cause of death. Defendant urges that such testimony was wholly unnecessary in view of his having admitted that he had committed the assault, and that it only served to prejudice him in the eyes of the jury. Disregarding defendant's failure to make more than a general objection to this evidence, People v. Nelson, 85 Cal. 421, 428, 24 P. 1006; People v. Sellas, 114 Cal.App. 367, 378, 300 P. 150; People v. Agajanian, 97 Cal.App.2d 399, 405, 218 P.2d 114; People v. Simon, 107 Cal.App.2d 105, 119, 236 P.2d 855, the challenged evidence was relevant. Although defendant had admitted commission of the assault, he still maintained that he had not acted with malice aforethought. The pathological findings of the autopsy surgeon and his opinion as to the cause of death were relevant in the determination of the amount of force used and, consequently, of defendant's mental attitude at the time of the assault, and could not rightly be excluded merely because such "showing [of] the details of the crime * * * might have a tendency to influence the jury against the defendant." People v. Silva, supra, 41 Cal.2d 778, 782–783, 264 P.2d 27, 30.

[5] Nor did the trial court err in its instructions on the element of malice. In addition to giving the accepted meaning of "malice aforethought" as denoting "*purpose* and *design* in contradistinction to accident and mischance", People v. McNabb, supra, 3 Cal.2d 441, 456, 45 P.2d 334, 341; People v. Wells, supra, 33 Cal.2d 330, 338, 202 P.2d 53, the court also gave the statutory definition of the word "malice" as importing a "wish to vex, annoy, or injure another person, or an intent to do a wrongful act". Pen.Code, § 7, subd. 4. Both terms as defined were properly submitted to the jury for the determination of defendant's guilt under Penal Code, section 4500. People v. Silva, supra, 41 Cal.2d 778, 782, 264 P.2d 27. But even if it were deemed inappropriate to give the general definition of "malice" as distinguished from the essential element of "malice aforethought," it would not be prejudicial. People v. Waysman, 1 Cal.App. 246, 248, 81 P. 1087. It was so held in a prosecution for murder when the jury was given both the

general statutory definition of malice, Pen. Code, § 7, subd. 4, and also its precise meaning "in the language of section 188 of the Penal Code." People v. Chavez, 37 Cal.2d 656, 667, 234 P.2d 632, 639.

[6, 7] Turning now to defendant's claims with respect to the order denying his motion for a new trial on his plea of not guilty by reason of insanity, defendant first argues that his rights under Penal Code, section 1027, were not protected. That section requires the court-appointed alienists "to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question." The record shows that two alienists were appointed by the trial court, and each thoroughly examined defendant. The separate examinations were made from four to six weeks following the assault, and each lasted about two hours. Both doctors examined the psychiatric file on defendant. In the light of their examinations and their investigation of defendant's background, the doctors testified that in their opinion defendant was legally sane at the time of his commission of the assault. The doctors were fully cross-examined by counsel for defendant. Defendant argues that the doctors did not take into consideration his so-called objective symptoms at the time of the assault—his glassy stare and jerking of his head. He therefore claims that their opinions as to his sanity might be creditable as of the time of their examination but not as of the earlier date of the attack. However, defendant made no such objection at the trial as to the qualifications of these doctors to testify. The objection comes too late now for consideration on appeal. People v. Woods, 19 Cal.App.2d 556, 560, 65 P.2d 940; People v. Messerly, 46 Cal.App.2d 718, 722, 116 P.2d 781. Moreover, in effect, defendant is dealing only with the weight to be accorded to the medical expert testimony, which, of course, is a question of fact for the jury's determination. See People v. Martin, 87 Cal.App.2d 581, 584, 197 P.2d 379.

[8, 9] Defendant next contends that the trial court gave confusing instructions to the jury on the sanity issue. The jury was instructed that defendant was presumed sane, and that he had the burden of proving his insanity at the time of the assault. There was evidence that defendant was suffering from schizophrenia some months before the assault. Accordingly, the court instructed that a condition once shown to have existed is presumed to continue until the contrary is proved; and therefore if the jury should find that at some time prior to the commission of the assault, defendant was suffering from some form of insanity, then it would be presumed that he was suffering from such form of insanity when he committed the assault. Considering these instructions on the sanity issue as a whole in the light of the record, People v. Chessman, 38 Cal.2d 166, 182–183, 238 P.2d 1001; People v. Hess, 104 Cal.App.2d 642, 684, 234 P.2d 65, and reasonably interpreting them as complementing one another, People v. Rhoades, 93 Cal.App.2d 448, 451, 209 P.2d 33, it is clear that they properly stated the applicable law and furnish no basis for assuming that the jury was caused any confusion thereby.

[10, 11] Defendant finally contends that the long-established legal standard of sanity based on the knowledge of "right and wrong" should be re-examined. The recognized test is whether at the time the offense was committed the defendant was suffering such "'a defect of reason, from disease, of the mind * * * as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.'" People v. Wells, supra, 33 Cal.2d 330, 350, 202 P.2d 53, 65. The doctors who testified here were thoroughly examined on this accepted theory of insanity, and all agreed that defendant was sane at the time of the assault. Defendant stresses various matters in his psychopathic case history and his background of treatment. He suggests that in the light of these factors, the prime question should be whether he was a man responsible for his actions at the time, and not whether he knew the difference between right and wrong when he committed the assault. However, regardless of the doubtful merit

of defendant's suggestion as a generally workable test, if any change is to be made in the accepted standard for determining criminal guilt in relation to the insanity plea, the arguments for such change should be addressed to the Legislature rather than to the courts. People v. Daugherty, 40 Cal. 2d 876, 893–894, 256 P.2d 911.

The judgment and orders appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ.

44 Cal.2d 523

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
William E. RAVEN, Defendant and Appellant.
Cr. 5677.

Supreme Court of California.
In Bank.
April 28, 1955.

As Modified May 18, 1955.

Defendant was convicted of receiving stolen property. The Superior Court, Riverside County, O. K. Morton, J., rendered judgment, and defendant appealed. The Supreme Court, Gibson, C. J., held that trial court had power to allow witness, from whom defendant had bought the property and who testified for prosecution, to be recalled and cross-examined by defendant, at any point in trial, for purpose of laying a foundation to impeach witness' testimony to effect that defendant had known property was stolen, and, in absence of a showing how trial court would have exercised its discretion had it not improperly determined that it was powerless to grant request, denial of recall was prejudicial error.

Judgment reversed.

Opinion 275 P.2d 626, vacated.

1. Witnesses ⇐388(10)

Before a witness may be impeached by an inconsistent statement, it must be related to him with circumstances of time, place and persons present, and he must be asked whether he made it and must be allowed to explain it if he admits making it. West's Ann.Code Civ.Proc. § 2052.

2. Criminal Law ⇐1170½(1)
Witnesses ⇐283

Trial court in prosecution for receiving stolen property had power to allow witness, from whom defendant had bought property and who testified for prosecution, to be recalled and cross-examined by defendant, at any point in trial, for purpose of laying a foundation to impeach witness' testimony to effect that defendant had known property was stolen, and, in absence of a showing how trial court would have exercised its discretion had it not improperly determined that it was powerless to grant request, denying recall was prejudicial error. Pen.Code, § 496; West's Ann.Code Civ.Proc. §§ 2050, 2052.

3. Criminal Law ⇐507(5)

A thief and one knowingly receiving stolen property from him are guilty of distinct and separate substantive offenses and are not accomplices, unless thief and receiver conspire together in prearranged plan whereby one is to steal and the other is to buy. Pen.Code, § 1111.

4. Criminal Law ⇐507(5)

Where it did not appear, in prosecution for receiving stolen property, that defendant and person from whom defendant had purchased property had entered into a conspiracy whereby one was to steal and the other to buy, person from whom defendant bought property was not an accomplice and his testimony needed no corroboration for conviction. Pen.Code, § 1111.

J. Frederick Rosen, Coachella, and William W. Shaw, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., and W. B. Thayer, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant appeals from a judgment of conviction of receiving stolen property in violation of section 496 of the Penal Code.[1] The admitted thief, Diggs, sold two jeep tires and three power tools to defendant, who was in the business of buying and selling used merchandise.

The testimony of Diggs, the principal witness for the prosecution, was substantially as follows: The stolen goods were sold to defendant in three separate transactions. In a conversation with defendant, Diggs mentioned that he had some new jeep tires which he would like to sell, and defendant told him to "go get them." When Diggs returned with the tires, he informed defendant that they were stolen but did not say where they came from. Several days later, Diggs told defendant that he knew where he could get a drill and a sander which had been stolen, and he indicated that he was acting for the thieves. He then brought the tools, and defendant purchased them. The third transaction took place on the following day when Diggs sold defendant another tool, after informing him that it had been stolen.

Diggs had previously purchased merchandise from defendant and had, on a number of occasions, sold defendant goods rightfully in his possession. Defendant had sometimes obtained receipts from Diggs in connection with legitimate sales, but Diggs did not give him any receipts for the money paid for the stolen property. There was evidence that the tires and tools for which defendant paid a total sum of $37 were worth approximately $250.

A captain of police testified that, when he visited defendant's place of business with a list of some of the stolen tools, defendant readily acknowledged buying the tools from Diggs. Defendant volunteered the information that he had purchased other items from Diggs, including the tires, and expressed a wish to "turn over" all property bought from Diggs to determine whether it was stolen.

Defendant, testifying in his own behalf, denied that he knew the tires or tools were stolen when he purchased them. His version of the transactions was that Diggs represented that the tires were obtained in payment for work he had done, that two of the power tools were being sold for another person, and that the third tool came from a garage which Diggs had previously operated. Defendant testified that he first learned that any of the property was stolen when, several days after the purchases were made, Diggs called him by telephone and said, "Get rid of everything I sold you. It is all hot."

[1] After the prosecution had closed its case, defendant called Diggs' wife as a witness for the purpose of impeaching Diggs by showing that he had made a prior statement to her which was inconsistent with his present testimony. Before a witness may be impeached by an inconsistent statement, it must be related to him with the circumstances of time, place, and persons present, and he must be asked whether he made it and must be allowed to explain it if he admits making it. Code Civ.Proc., § 2052. The required foundation had not been laid by defendant when Diggs was on the stand, and attempts to impeach him were objected to by the prosecution on that ground. In the course of the arguments on the objections, counsel for defendant stated that he was prepared to prove by the testimony of Mrs. Diggs that Diggs had told her that defendant did not know the property was stolen when he purchased it. In order to lay a foundation for the impeachment, defendant applied to the court for permission to recall Diggs on cross-examination. The request was de-

1. Section 496 of the Penal Code provides in part: "Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the same to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than one year."

nied on the ground that the court was without power to permit further cross-examination of Diggs unless the prosecution reopened its case.

[2] The reason given by the court for refusing to permit further cross-examination of Diggs was clearly erroneous. The court had the power to allow the witness to be recalled and cross-examined by defendant, at any point in the trial, for the purpose of laying a foundation to impeach him. Reed v. Clark, 47 Cal. 194, 202; see People v. Shaw, 111 Cal. 171, 177, 43 P. 593; Code Civ.Proc., § 2050. Nothing in the record shows how the court would have exercised its discretion had it not improperly determined that it was powerless to grant defendant's request. We are of the view that there was no sound basis for preventing introduction of the impeaching testimony which defendant proposed to introduce. That testimony was vitally important to the defense because it would have contradicted the only direct evidence of defendant's guilty knowledge. It is argued that, because Diggs was an admitted thief and had been impeached by evidence that he had previously been convicted of a felony on three separate occasions, the testimony of Mrs. Diggs would have been merely cumulative and that, therefore, defendant was not prejudiced. There is, however, a significant difference between discrediting a witness by evidence of former convictions and impeaching him by showing that he has made a specific statement directly contrary to his testimony, especially where proof of the fact in question is dependent upon his testimony and is essential to establish the guilt of the defendant. Under the circumstances, the error of the court in failing to exercise its discretion must be considered prejudicial.

[3, 4] The next question is whether the court erred in refusing to instruct the jury that defendant could not be convicted on the uncorroborated testimony of Diggs. Section 1111 of the Penal Code provides that a "conviction cannot be had upon the testimony of an accomplice unless it be corroborated" and defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." It is settled that the thief and the one knowingly receiving stolen property from him are guilty of distinct and separate substantive offenses and are not accomplices of each other. In re Morton, 179 Cal. 510, 513–514, 177 P. 453; People v. Burness, 53 Cal.App.2d 214, 218–219, 127 P.2d 623; People v. Gordon, 41 Cal.App. 2d 226, 227, 106 P.2d 208; See People v. Lima, 25 Cal.2d 573, 576, 154 P.2d 698. An exception to the rule is recognized when the thief and the receiver conspire together in a prearranged plan whereby one is to steal and the other is to buy. People v. Lima, 25 Cal.2d 573, 578–579, 154 P.2d 698; People v. Coakley, 108 Cal. App.2d 223, 227, 238 P.2d 633. The evidence here however, does not warrant a conclusion that defendant and Diggs entered into such a conspiracy, and, accordingly, no corroboration of the testimony of Diggs was required.

Defendant also contends that other errors were committed, but, since the matters complained of are not likely to arise on a retrial of the case, they need not be discussed here.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

44 Cal.2d 527

Gertrude Elsbeth MUELLER, Plaintiff and Respondent,

v.

Kurt Hans MUELLER, Defendant and Appellant.

L. A. 23320.

Supreme Court of California.
In Bank.
April 29, 1955.

Action commenced by wife for divorce on ground of extreme cruelty, husband cross-complained alleging extreme cruelty and adultery. Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment granting each party interlocutory decree of divorce and awarding alimony, custody of children and support money to wife. Husband appealed from entire judgment except part granting divorce to him. The Supreme Court, Traynor, J., held that trial court's finding of marital fault on part of both parties was justified and trial court did not abuse its discretion in granting each party a divorce and alimony to wife.

Affirmed.

Edmonds, Shenk, and Spence, JJ., dissented.

Opinion 276 P.2d 693, vacated.

1. Divorce ⇐124

In wife's action for divorce on ground of extreme cruelty wherein husband cross-complained for divorce on grounds of extreme cruelty and adultery, evidence justified findings that legitimate objects of marriage had been destroyed and its continuation was impairing wife's health and threatening husband's health and was deleterious to interests of children.

2. Divorce ⇐12

Where legitimate objects of marriage had been destroyed and its continuation was impairing wife's health and threatening husband's health and was deleterious to interests of children, the marriage was properly terminated.

3. Divorce ⇐154

When each of the parties has given the other grounds for divorce, the court may grant a divorce to both. West's Ann. Civ.Code, § 122.

4. Divorce ⇐55

When each party has given the other grounds for divorce, the comparative guilt of the parties may have an important bearing upon whether either or both should be granted a divorce. West's Ann.Civ. Code, § 139.

5. Divorce ⇐237

Where a divorce is granted to both parties, alimony may be awarded to either, for basis of liability for alimony is the granting of a divorce against person required to pay it. West's Ann.Civ.Code, § 139.

6. Divorce ⇐238

The adultery of wife does not compel trial court to deny her alimony when both of the parties have been guilty of marital fault. West's Ann.Civ.Code, § 139.

7. Divorce ⇐235

Where wife sued for divorce on ground of extreme cruelty and husband cross-complained for divorce on grounds of extreme cruelty and adultery and trial court found both parties guilty of extreme cruelty and wife guilty of adultery and granted judgment of divorce to both, trial court's refusal to deny wife alimony was not an abuse of discretion. West's Ann. Civ.Code, § 139.

Krag & Sweet and William L. Mock, Alhambra, for appellant.

Dockweiler & Dockweiler and Frederick C. Dockweiler, Los Angeles, for respondent.

TRAYNOR, Justice.

On September 30, 1952, plaintiff Gertrude Mueller filed this action for divorce against defendant Kurt Mueller alleging extreme cruelty. Defendant cross-complained for divorce alleging extreme cruelty and adultery. The parties were married in 1936

and have three children who were 15, 12, and 9 years of age at the time of the trial. Plaintiff testified that it had been a bad marriage and that she had wanted a divorce when she was first pregnant. Defendant frequently cursed plaintiff and broke dishes and on one occasion he brandished a poker over her and one of the children and then dashed it into the fireplace. He threw a radio out of the house when plaintiff's playing it disturbed him, and on at least two occasions he beat her. She was afraid of him, and her mental health has been seriously impaired. On one occasion when she left the house in fear, he threatened to break everything in the place if she did not return at once, and when she returned she found that he had taken pills and was unconscious on the floor. She admitted committing adultery with two men in August, September, and October of 1950 and testified that she had told her husband about these incidents and that they had continued regular sexual relations thereafter. Defendant denied much of the foregoing testimony, but he admitted that he had beaten plaintiff on one occasion. He also testified that she made unfounded accusations of infidelity against him. Both parties made attempts to reconcile their difficulties but to no avail. On the basis of the foregoing evidence and other evidence, much of which was corroborated by other witnesses, the trial court found that each of the parties had treated the other with extreme cruelty and that plaintiff had committed adultery. It also found that both of the parties were fit and proper persons to have custody of the children and that it was for their best interests that their custody be awarded to plaintiff. Judgment was entered granting each of the parties an interlocutory decree of divorce against the other, awarding custody of the children to plaintiff, dividing the community property, and awarding plaintiff $200 per month alimony and $210 per month for the support of the children. Defendant appeals from the entire judgment except that part thereof granting him an interlocutory decree of divorce from plaintiff.

Defendant contends that the trial court erred in failing to find that his cause of action for divorce was in bar of plaintiff's cause of action (see, Civil Code, § 122), and in awarding alimony to a wife found guilty of adultery. We cannot agree with these contentions.

[1, 2] The trial court was justified in concluding that the legitimate objects of the marriage had been destroyed, that its continuation was seriously impairing plaintiff's health and threatening defendant's health, and that it involved an atmosphere of bitterness and hatred in the home that was clearly deleterious to the interests of the children. Accordingly, it did not err in determining that the marriage should be terminated. De Burgh v. De Burgh, 39 Cal.2d 858, 872–873, 250 P.2d 598; Phillips v. Phillips, 41 Cal.2d 869, 876–877, 264 P.2d 926. It remains to be determined, however, whether it erred in granting a divorce to both of the parties and awarding alimony to plaintiff.

[3–5] When each of the parties has given the other grounds for divorce, the court may grant a divorce to both, and it "is clothed with a broad discretion to advance the requirements of justice in each particular case." The comparative guilt of the parties "may have an important bearing upon whether or not either one or both should be granted relief", and when "a divorce is granted to both, alimony may be awarded to either, for the basis of liability for alimony is the granting of a divorce against the person required to pay it. See Civil Code, § 139." De Burgh v. De Burgh, supra, 39 Cal.2d 858, 872–874, 250 P.2d 598, 606; Phillips v. Phillips, supra, 41 Cal.2d 869, 877, 264 P.2d 926; Hendricks v. Hendricks, 125 Cal.App.2d 239, 242, 270 P.2d 80. Although there is authority to the contrary, see, Phelps v. Phelps, 176 Ky. 456, 195 S.W. 779, 780; Knight v. Knight, 209 Ga. 131, 70 S.E.2d 770, 771; 9 A.L.R.2d 1026, in the absence of statutory provisions expressly prohibiting an award of alimony to a wife guilty of adultery, see, Borden v. Borden, 156 Fla. 770, 23 So.2d 529, 34 A.L.R.2d 313, 349, it has frequently been held in other jurisdictions that the wife's adultery does not necessarily cause her to forfeit her right to alimony. Pauly v.

Pauly, 14 Okl. 1, 76 P. 148; Cross v. Cross, 63 N.H. 444, 446; Jaffe v. Jaffe, 74 App. D.C. 394, 124 F.2d 233, 234; Buerfening v. Buerfening, 23 Minn. 563, 564; Graves v. Graves, 108 Mass. 314, 318; Lunsford v. Lunsford, 232 Ala. 368, 168 So. 188, 190; Ashcroft v. Ashcroft [1902] Prob. 270, 277, C.A.; Edwards v. Edwards [1894] Prob. 33, 38; see also, Alldredge v. Alldredge, 119 Utah 504, 229 P.2d 681, 685, 34 A.L.R. 2d 305; MacDonald v. MacDonald, Utah, 236 P.2d 1066, 1069; Patrick v. Patrick, 43 Wash.2d 139, 260 P.2d 878, 881; Burch v. Burch, 3 Cir., 195 F.2d 799, 812; Larson v. Larson, 2 Ill.2d 451, 118 N.E.2d 433, 434; Edwards v. Edwards, 222 Ark. 626, 262 S.W.2d 130, 133. Although many of these cases arose in jurisdictions that permit an award of alimony to a guilty wife even if her husband is blameless, the principle they enunciate is even more applicable in a state such as California in which the guilty wife may receive alimony only if she is granted a divorce against a husband who is also guilty of marital fault. They recognize that comparative guilt is only one factor in determining whether alimony should be awarded and that the needs of the wife and the ability of the husband to provide for her are also important, and they protect the interest of society in not having a wife left destitute. They counsel the wisdom of caution before adopting any arbitrary rule that would fetter discretion and require the trial court to deny alimony merely because the wife has been guilty of adultery. As pointed out by the Supreme Court of Utah in dealing with a similar problem, "Great caution is necessary to prevent the contentions and strife which frequently exist in contested divorce cases from distorting the judgment by placing extraordinary emphasis on particular instances of blameworthy conduct or some unusual sacrifice or contribution in some one phase of the over-all picture." MacDonald v. MacDonald, supra, 236 P.2d 1066, 1069. "It certainly does not comport with good conscience to turn such an unfortunate individual out to fend for herself after having given 29 years to this marriage, good or bad as her conduct may have been." Ibid. "* * * a wife of long standing does not forfeit all right to alimony or a share in the property because of recent misconduct nor in cases where the husband may be equally at fault nor in cases where there is a doubtful preponderance against the wife because judges, being human, cannot penetrate the family drama with complete understanding. Perhaps such a forfeiture of alimony may not be out of proportion in the case where a young wife guilty of acts of moral turpitude, has opportunity to start married life anew but in a case such as this it would be out of all proportion." Alldredge v. Alldredge, supra, 119 Utah 504, 229 P.2d 681, 685, 34 A.L.R.2d 305.

[6] Our conclusion that the adultery of the wife does not compel the trial court to deny her alimony, when both of the parties have been guilty of marital fault finds further support in the cases in which divorces were denied on the ground of recrimination. Were we to overrule the De Burgh case, as defendant contends we should do, his own fault would prevent granting him the divorce he sought and secured, and despite her adultery, his duty to support plaintiff would remain. Mattson v. Mattson, 181 Cal. 44, 48, 183 P. 443; Mohr v. Mohr, 33 Cal.App.2d 274, 276–278, 91 P.2d 238; Goetting v. Goetting, 80 Cal. App. 363, 370, 252 P. 656; Broad v. Broad, 35 Cal.App. 646, 647, 170 P. 658. The fact that the legitimate objects of matrimony have been destroyed and that no purpose is served by maintaining the marriage do not, standing alone, provide a basis for allowing defendant to escape the obligation of support he assumed and which he would be compelled to discharge if a divorce were denied.

[7] It is true, as the De Burgh case recognized, that the comparative guilt of the parties may have an important bearing on the relief that is granted. As pointed out above, however, it is only one of the considerations that are important in determining whether alimony should be granted. Moreover, in any particular case adultery may or may not constitute greater fault than that of the other party, and in the

present case we cannot say as a matter of law that plaintiff's infidelities occurring over a period of three months approximately two years before the action was filed were necessarily more outrageous than defendant's course of continuous cruel conduct toward plaintiff that involved physical attacks and beatings and seriously endangered her health. Plaintiff had been married to defendant for 16 years when this action was commenced, she is the mother of three children who need her care, and her health has been impaired to such an extent that her earning capacity is problematical for the immediate future. Under these circumstances the trial court did not abuse its discretion in refusing to deny her alimony on the ground of her own marital fault.

The judgment is affirmed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

EDMONDS, Justice (dissenting).

I adhere to the conclusions which I stated in De Burgh v. De Burgh, 39 Cal.2d 858, 874–882, 250 P.2d 598. By mandate of the Legislature, a divorce "must be denied" upon a showing of recrimination. Civil Code, § 111. Recrimination is defined as "a showing by the defendant of any cause of action against the plaintiff, in bar of the plaintiff's cause of action." In my opinion, because of these statutes there is no legal basis whatever for allowing each party to an action for divorce to obtain a decree severing the marital relationship.

The contrary conclusion reached in the De Burgh case rests upon a totally untenable construction of the words "in bar". It allows the trial judge to grant a divorce in a situation in which, under section 111 of the Civil Code, relief *must* be denied. To some persons that result may seem to be a desirable social policy. In my opinion, it amounts to a repeal, by judicial decision, of the legislative mandate.

I would overrule the De Burgh case and the decisions which have followed it and reverse the present judgment.

SHENK and SPENCE, JJ., concur.

44 Cal.2d 539

Charles M. GILEO, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellant.

S. F. 19090.

Supreme Court of California.
In Bank.
April 29, 1955.

Railroad's carman welder brought action against railroad under the Federal Employers' Liability Act to recover for injuries sustained by welder while welding corners on new gondola car being constructed by railroad's subsidiary. The Superior Court of the City and County of San Francisco, Clarence W. Morris, J., entered judgment for welder, and railroad appealed. The Supreme Court, Gibson, C. J., held that the act was applicable.

Judgment affirmed.

Opinion, 269 P.2d 150, vacated.

1. Commerce ⇐8(6)

The 1939 amendment of the Federal Employers' Liability Act providing that any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce shall be considered as being employed by carrier in such commerce and shall be considered as entitled to benefits of the act, was enacted to include injured employees previously excluded and to eliminate confusion and hardship to which they were subjected in choosing whether to bring suit under state or federal law. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Commerce ⇐8(6)

In order to effectuate purposes of Federal Employers' Liability Act as amended in 1939 to provide that any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce, shall, for purposes of

the act, be considered as employed by such carrier in such commerce and shall be considered as entitled to benefits of the act, all doubts should be resolved in favor of applicability of the act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Commerce ⇐27(8)

Railroad employee is entitled to benefits of the Federal Employers' Liability Act if his duties further interstate commerce or affect it in any way directly or closely and substantially, regardless of whether work which he is doing may be classified as new construction or repairs. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Commerce ⇐27(8)

Federal Employers' Liability Act was applicable to railroad's carman welder, who was injured while welding corners on new gondola cars being constructed by railroad's subsidiary. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Arthur B. Dunne and Dunne, Dunne & Phelps, San Francisco, for appellant.

Hildebrand, Bills & McLeod, Oakland, Sheridan Downey, Jr., Los Angeles, D. W. Brobst and Clifton Hildebrand, Oakland, for respondent.

GIBSON, Chief Justice.

Plaintiff was employed by defendant, a common carrier by railroad, when he was injured while working on the construction of new railroad cars. In this action, which was brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., the parties stipulated to the existence of negligence and the amount of plaintiff's damages. The sole question left for determination was whether the act was applicable. The trial court concluded that plaintiff was entitled to the benefits of the act, and defendant has appealed from the ensuing judgment.

In February 1951, after being employed by defendant for ten years to repair railroad cars already in service, plaintiff began working as a carman welder on the construction of new cars. The cars were being built in accordance with a resolution adopted by defendant's board of directors which provided for the acquisition of 5,000 new cars and for their assignment to defendant and a subsidiary, the Texas and New Orleans Railroad Company. Another subsidiary, the Southern Pacific Equipment Company, undertook the construction of 2,000 of the units, including 1,000 gondola cars allotted to the Texas Company. Defendant supplied the labor and shop facilities, paid the workmen and billed the equipment company for labor and certain other maintenance costs. The gondola cars, when completed, were to be shipped out of state and leased to defendant, which in turn, was to sublease them to the Texas Company. Plaintiff was injured in July of 1951 while "welding corners" on one of the gondola cars.

In the shop where plaintiff worked there was a department for repairs and another for new construction, and positions in both departments were filled from the same seniority list. Every day some of the employees ordinarily engaged in making repairs were placed on new construction in order to offset vacancies created by absenteeism. Men on new construction could be transferred to repair work, and this was done on a few occasions, but plaintiff worked exclusively on new construction after being assigned to it.

The Federal Employers' Liability Act provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." 53 Stats. 1404; 45 U.S.C.A. § 51.

It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaging in interstate commerce. This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way " 'directly or closely and substantially' ". Ericksen v. Southern Pacific Co., 39 Cal.2d 374, 378, 246 P.2d 642, 645.

[1, 2] The 1939 amendment was enacted to include injured employees previously excluded and to eliminate confusion and hardship to which they were subjected in choosing whether to bring suit under state or federal law. See Shelton v. Thomson, 7 Cir., 148 F.2d 1; Wright v. New York Cent. R. Co., 263 App.Div. 461, 33 N.Y.S.2d 531; Ermin v. Pennsylvania R. Co., D.C., 36 F. Supp. 936, 940; Sen.Rep.No. 661, 76th Cong., 1st Sess. (1939). In order to effectuate the purposes of the amended act, all doubt should be resolved in favor of its applicability. See Lewis v. Industrial Acc. Comm., 19 Cal.2d 284, 286, 120 P.2d 886.

The duties of plaintiff were at least as intimately connected with interstate commerce as those involved in a number of cases where the act, as it now reads, has been applied. Shelton v. Thomson, 7 Cir., 148 F.2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which moved in interstate commerce]; Brainard v. Atchison, Topeka & Santa Fe Ry. Co., D.C., 87 F. Supp. 921 [assembling railroad switches and "frogs" later to be installed on lines of track, including the main line carrying interstate commerce]; Agostino v. Pennsylvania R. Co., D.C., 50 F.Supp. 726 [constructing new tracks to replace existing tracks used in interstate commerce]; Ericksen v. Southern Pacific Co., 39 Cal.2d 374, 246 P.2d 642 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used in repairing tracks carrying interstate traffic]; Southern Pac. Co. v. Industrial Acc. Comm., 19 Cal. 2d 283, 120 P.2d 888 [repairing a freight car used in interstate and intrastate commerce]; Wills v. Terminal R. Ass'n of St. Louis, 239 Mo.App. 1144, 205 S.W.2d 942 [installing a ventilating pipe in the roof of a building in which iron parts were forged for use in repairing equipment, including some used in interstate commerce]; Trucco v. Erie R. Co., 353 Pa. 320, 45 A.2d 20 [constructing "strap hangers" used to replace parts in engines, some of which were devoted to interstate commerce]; Jordan v. Baltimore & Ohio R. Co., 135 W.Va. 183, 62 S.E.2d 806 [laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced].

[3, 4] Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. New York Central R. Co. v. White, 243 U.S. 188, 192, 37 S.Ct. 247, 61 L.Ed. 667; Raymond v. Chicago, M. & St. P. R. Co., 243 U.S. 43, 45, 37 S.Ct. 268, 61 L.Ed. 583; see Pedersen v. Delaware, L. & W. R. Co., 229 U.S. 146, 152, 33 S.Ct. 648, 57 L.Ed. 1125. The only case decided after 1939, however, in which such a distinction was applied is Moser v. Union Pac. R. Co., 1944, 65 Idaho 479, 147 P.2d 336, 153 A.L.R. 341, where a divided court held that an employee working on the construction of four miles of new

track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way "directly or closely and substantially," regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 543

Roque ARANDA, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Appellant.

Sac. 6521.

Supreme Court of California.
In Bank.
April 29, 1955.

Action was brought under the Federal Employers' Liability Act against railroad by railroad's molder of freight car wheels at foundry to recover for burns sustained when molten metal spilled from ladle. The Superior Court of Sacramento County, Grover W. Bedeau, J., entered judgment for molder, and railroad appealed. The Supreme Court, Gibson, C. J., held that the act was applicable.

Judgment affirmed.

1. Commerce ⇐27(8)

Applicability of Federal Employers' Liability Act to action against railroad by molder of freight car wheels in foundry operated by railroad, to recover for injuries, depended on whether molder's duties were in furtherance of interstate commerce or affected it in any way directly or closely and substantially. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Commerce ⇐27(8)

Federal Employers' Liability Act was applicable to railroad's molder of freight car wheels in railroad's foundry. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇐101(8)

Degree of care required by Federal Employers' Liability Act is that which a person of ordinary prudence would have exercised under the circumstances. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and Servant ⇐265(2)

In action under the Federal Employers' Liability Act against railroad by railroad's molder of freight car wheels at foundry to recover for burns sustained when molten metal spilled from ladle, on ground that railroad failed to provide molder with safe place to work, evidence of custom in the molding of wheels was not indispensable. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Master and Servant ⇐286(16)

In action under Federal Employers' Liability Act against railroad by railroad's molder of freight car wheels at foundry to recover for burns sustained when molten metal spilled from ladle, on ground that railroad failed to provide molder with safe place to work, issues were properly submitted to jury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Devlin, Diepenbrock & Wulff, Sacramento, and Arthur B. Dunne, San Francisco, for appellant.

Nathaniel S. Colley and Mamoru Sakuma, Sacramento, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., seeking recovery for injuries sustained while working as a molder of freight car wheels in a foundry operated by defendant railroad company. He set forth three causes of action in his complaint, alleging that his injuries resulted, first, from negligent operation of a crane, second, from negligent maintenance of the crane, and, third, from failure to provide him with a safe place to work. The court, sitting without a jury, determined that the federal act was applicable, and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, and judgment was entered accordingly. Defendant appeals, contending that the federal act was not applicable and that there was not sufficient evidence to warrant submission to the jury of the issues raised by the third cause of action.

[1] Applicability of the Federal Employers' Liability Act depends on whether plaintiff's duties were in the furtherance of interstate commerce or affected it " 'in any way directly or closely and substantially' ". Gileo v. Southern Pacific Co., Cal., 282 P.2d 872; 45 U.S.C.A. § 51. The freight car wheels which he molded were manufactured in accordance with annual orders from defendant's store department. Although the amount of production varied according to current demand, the wheels were not made for particular railroad cars and were taken, when completed, to defendant's storehouse. A few were sold to other companies, but almost all were sold to the Southern Pacific Equipment Company, a subsidiary of defendant, for construction of new cars or were used by defendant for maintenance purposes, including replacement of wheels on cars which defendant already operated in interstate commerce.

[2] Federal coverage has been extended to employees injured while performing duties similar to those involved here. Shelton v. Thomson, 7 Cir., 148 F.2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which were operated in interstate commerce]; Ericksen v. Southern Pacific Co., 39 Cal.2d 374, 246 P.2d 642 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used to repair tracks carrying interstate traffic]; Trucco v. Erie R. Co., 353 Pa. 320, 45 A.2d 20 [constructing "strap hangers" used to replace parts of engines, some of which were devoted to interstate commerce]. In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act. Gileo v. Southern Pacific Co., Cal., 282 P.2d 872.

It is conceded that the evidence is sufficient to support the verdict based upon the first and second causes of action in which it was alleged that plaintiff's injuries resulted from the negligent operation of a crane and from the negligent maintenance of a crane. It is contended, however, that there was no evidence that defendant failed to provide plaintiff with a safe place to work, as alleged in the third cause of action and that the court erred in submitting this issue to the jury. Plaintiff worked near a large crane which stood in a circular area at the center of two concentric rings of wheel molds. Access to the crane through the double ring of molds was afforded by two openings, each 21 feet wide. The crane was equipped with a horizontal boom and with a cable which was attached to the end of the boom and was strung down through several pulleys to a hook. Molten metal was carried from a furnace to the 21-foot openings by means of a bucket-shaped ladle placed on a movable platform. When the molder and his helper were ready

to fill the molds, the crane hook was fastened to the handle of the ladle, and the crane raised the ladle vertically and maintained it in a position several inches above the molds. The ladle, which was about two feet in diameter, was open at the top and was designed to drain from the bottom. The molder was required to be close to the ladle in order to adjust it over each mold and to fill the mold by opening the stopper at the bottom of the ladle.

At the time of the accident, plaintiff was standing between the inner and outer rings of molds and was preparing to open the stopper. The cable attached to the end of the boom slipped from three clamps which were holding it, and the ladle dropped against a mold, tipping and spilling the contents of the ladle. Plaintiff, in attempting to escape from the molten metal, jumped over the inner ring of molds and landed in some of the spilled metal, suffering severe burns.

[3–5] The degree of care required by the Federal Employers' Liability Act is that which a person of ordinary prudence would have exercised under the circumstances, and although there was no proof as to the practice in the industry with respect to the method commonly employed in the molding of wheels, evidence of custom is not indispensable. Chicago, M. & St. P. R. Co. v. Moore, 8 Cir., 166 F. 663, 668. The fact that the metal was drained from the bottom of this container permitted an inference that, once the ladle was filled, a lid could have been placed on it without impeding the molding process. Pictures of the ladle and of the manner in which it was used were shown to the jury, and we cannot say as a matter of law that the jury could not properly conclude that it was feasible to equip the ladle with a lid which would have prevented the accident and that, in view of the hazard to workmen, defendant should have provided such a lid. Accordingly, the issues raised by the third cause of action were properly submitted to the jury.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 547

Epimenio MORENO, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Sac. 6520.

Supreme Court of California.
In Bank.
April 29, 1955.

Action was brought against railroad under the Federal Employers' Liability Act by railroad's employee, who was injured while laying rails in a retarder yard, which railroad was constructing to facilitate movement of freight trains, and which was opened to interstate traffic four months after injury. The Superior Court of Sacramento County, James O. Moncur, J., entered judgment for railroad notwithstanding verdict for employee, and employee appealed. The Supreme Court, Gibson, C. J., held that the act was applicable.

Judgment reversed with directions to enter judgment for employee in accordance with verdict.

1. Commerce ⇐27(8)

Question whether Federal Employers' Liability Act was applicable to railroad's employee, who was injured while laying rails in retarder yard, which railroad was constructing to facilitate movement of freight trains, and which was opened to interstate traffic four months after injury, depended on whether employee's duties furthered interstate commerce or affected it in any way directly or closely and substantially. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Commerce ⇐27(8)

Federal Employers' Liability Act was applicable to railroad's employee who was injured while laying rails in a retarder yard, which railroad was constructing for purpose of facilitating movement of freight trains, and which was opened to interstate traffic four months after injury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇐278(17)

In action against railroad under the Federal Employers' Liability Act to recover for injuries sustained by railroad's employee while engaged in laying rails, when rail, which was being lowered by crane, dropped and struck employee's foot, evidence supported implied finding that railroad was negligent.

Nathaniel S. Colley, Sacramento, for appellant.

Dunne, Dunne & Phelps, San Francisco, Devlin, Diepenbrock & Wulff, Sacramento, and Arthur B. Dunne, San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff appeals from a judgment against him in an action brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for injuries he sustained while working for defendant railroad company. The court, sitting without a jury, took evidence on the question of whether the federal act applied and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, but the court entered judgment notwithstanding the verdict on the ground that there was not sufficient evidence of negligence.

The first question presented is whether the Federal Employers' Liability Act is applicable. Plaintiff started working for defendant on October 3, 1951, and was injured on December 19, while laying rails in a retarder yard which defendant was constructing for the purpose of facilitating the movement of freight trains by means of a new method of "switching" and classifying railroad cars. The yard was to be used in connection with defendant's main line of track and was opened to interstate traffic four months after plaintiff's injury.

Federal coverage has been extended to an employee laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced. Jordan v. Baltimore & Ohio R. Co., 135 W.Va. 183, 62 S.E.2d 806. The act has also been held applicable to an employee laying rails on a new section of roadbed which, upon completion, was to be used in connection with the main line of track carrying interstate commerce. Agostino v. Pennsylvania R. Co., D.C., 50 F.Supp. 726. The court in the Agostino case stated that "the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair * * *." 50 F.Supp. at page 730.

[1, 2] In the present case, the construction was new, but the yard was intended as a substitute for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it "in any way directly or closely and substantially". Gileo v. Southern Pacific Co., Cal., 282 P.2d 872; 45 U.S.C.A. § 51. We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. Gileo v. Southern Pacific Co., Cal., 282 P.2d 872.

[3] The question remaining is whether there is substantial evidence supporting the implied finding of the jury that defendant was negligent. At the time of the accident, plaintiff was working as a member of a crew of three men. One of the men would operate a crane to lift a rail, and, while it was suspended horizontally, plaintiff and the other man would each take hold of one of its ends and guide it laterally until it was in the desired position over the roadbed on which it was to be laid. The crane operator would then be notified by signals to lower it. As plaintiff was guiding one end of a rail he slipped on a piece of metal and fell. The rail, which was suspended about three feet above the ground, dropped and struck his foot. No lowering signal had been given, and the rail came to rest 18 inches away from the point where it should have been laid. There is testimony that the crane operator could see plaintiff "at all times,"

and it may reasonably be inferred from the evidence that the rail which struck plaintiff was lowered prematurely due to the negligence of the crane operator.

The judgment is reversed with directions to enter judgment for plaintiff in accordance with the verdict.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 881

Albert EUFRAZIA, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Sac. 6522.

Supreme Court of California.
In Bank.
April 29, 1955.

Railroad's advanced carman helper brought action against railroad under the Federal Employers' Liability Act to recover for injuries sustained while assembling ends for new gondola cars being constructed by railroad's subsidiary. The Superior Court of Sacramento County, Malcolm C. Glenn, J., entered judgment for railroad, and carman helper appealed. The Supreme Court held that the act was applicable.

Judgment reversed.

Commerce ⇐27(8)

Federal Employers' Liability Act was applicable to railroad's advanced carman helper, who was injured while assembling ends for new gondola cars being constructed by railroad's subsidiary. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Thomas C. Perkins, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, and Arthur B. Dunne, San Francisco, for respondent.

PER CURIAM.

Plaintiff was injured while employed by defendant railroad company as an advanced carman helper in the construction of parts for new railroad cars, and he brought this action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

On June 13, 1951, plaintiff, who had worked for defendant during the previous nine months repairing railroad cars already in service, began assembling "ends" for new gondola cars and did this work exclusively until he was injured on July 10. When assembled, the "ends" were conveyed to a main assembly line in another part of the shop and were there attached to the cars. The construction project was the same as that involved in Gileo v. Southern Pacific Co., Cal., 282 P.2d 872, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

44 Cal.2d 882

Charles EELK, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Sac. 6523.

Supreme Court of California.
In Bank.
April 29, 1955.

Railroad's carman helper brought action against railroad under the Federal Employers' Liability Act to recover for injuries sustained while working on the construction of new railroad cars. The Superior Court of Sacramento County, John Quincy Brown, J., entered judgment adverse to carman helper, and he appealed. The Supreme Court held that the act was applicable to the carman helper.

Judgment reversed.

Commerce ⇐27(8)

Federal Employers' Liability Act was applicable to railroad's carman helper, who was injured while working on the construction of new railroad cars. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Anthony J. Scalora, Sacramento, for appellant.

Horace B. Wulff, Devlin, Diepenbrock & Wulff, Sacramento, Dunne, Dunne & Phelps and Arthur B. Dunne, San Francisco, for respondent.

PER CURIAM.

Plaintiff, who was employed by defendant railroad company as a carman helper, was injured while working on the construction of new railroad cars, and he brought this action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

Defendant first employed plaintiff on November 7, 1950, and assigned him to repairing railroad cars already in service. He was placed on construction of new railroad cars from December 1 until January 8, 1951, at which time, apparently due to a shortage of construction materials, he was reassigned to repairs. On February 13, he again started doing new construction work, and he was so engaged exclusively until June 22 when he was injured while riveting sides on a new gondola car. The construction project was the same as that involved in Gileo v. Southern Pacific Co., Cal., 282 P.2d 872, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

44 Cal.2d 378

In re ESTATE of George A. CALHOUN, Deceased.

Daisy OREB, Contestant and Appellant,

v.

Walter William PETTIT, Petitioner and Respondent.

L. A. 22987.

Supreme Court of California.
In Bank.
April 26, 1955.
Rehearing Denied May 25, 1955.

Proceeding on application for letters of administration. The Superior Court, Los Angeles, Stanley Mosk, J., entered order revoking letters of administration issued to natural daughter of adoptive mother of decedent and ordered that letters be issued to blood brother of decedent, and natural daughter appealed. The Supreme Court, Edmonds, J., held that where adopted child who died intestate, left natural brothers and sisters, natural daughter of adoptive parents was not intestate's sis-

ter within statute directing line of succession, and was not entitled to letters of administration in his estate.

Order affirmed.

Traynor and Carter, JJ., dissented.

Opinion, 272 P.2d 541, vacated.

1. Executors and Administrators ⇐17(2)

Under statute specifying persons entitled to have letters of administration issued to them, foster sister, if otherwise qualified, may claim right to letters of administration. Probate Code, § 422.

2. Executors and Administrators ⇐17(2)

Requirement of Probate Code provision specifying persons entitled to have letters of administration issued to them that relative may claim priority to such letters only when he is entitled to succeed to decedent's estate or to some portion of it, is in addition to other qualifications listed therein. Probate Code, § 422.

3. Adoption ⇐1
Descent and Distribution ⇐1

Rights of inheritance, as well as subject of adoption and rights and obligations resulting from it, are entirely matters of statutory regulation.

4. Adoption ⇐22

Where adopted child who died intestate left natural brothers and sisters, natural daughter of adoptive parents was not intestate's sister within statute directing line of succession, and was not entitled to letters of administration in his estate. Probate Code, §§ 225, 226, 228, 257, 422; West's Ann.Civ.Code, §§ 227, 228, 229.

5. Constitutional Law ⇐70(1)

Courts may not usurp legislative function to change statutory law which has been uniformly construed by long line of judicial decisions.

6. Descent and Distribution ⇐11

Rights of parties are not affected by circumstance that estate in dispute was derived entirely from adopting parent.

Charles C. Morrison, West Los Angeles, for appellant.

Richard McLeod, Los Angeles, for respondent.

Louis Thomsen, Los Angeles, as amicus curiae on behalf of respondent.

EDMONDS, Justice.

Letters of administration in the estate of George A. Calhoun were issued to Daisy Oreb, the natural daughter of Calhoun's adoptive parents. Her appeal from an order revoking those letters and appointing Walter William Pettit, a natural brother of the decedent, as administrator, presents for determination the conflicting claims of Mrs. Oreb and the blood relatives of Calhoun to the right to succeed to his estate.

These facts were stipulated:

George was the youngest of four children born to William and Anna Fortna. Each of the children, when less than four years old, was adopted into a different family. Elder sisters, Leona and Ruth, were taken into families whose identities are not shown by the record. His brother, James William, in 1913 at the age of two years was adopted by the Pettit family and given the name of Walter William. In 1917, when four years old, George was adopted by Ezra and Victoria Calhoun, who had an older daughter, Daisy.

The decedent's estate consists entirely of his share of the estate of Victoria Calhoun, his adoptive mother, who predeceased him by about two years. Surviving him were Daisy Oreb, Walter Pettit, his natural sister Ruth Rice, and the issue of his deceased sister, Leona. Both his natural parents and adoptive parents predeceased him. There are no other surviving relatives.

[1] Mrs. Oreb petitioned for letters of administration upon the ground that she is the decedent's sister. Section 422 of the Probate Code,[1] which specifies the persons entitled to have letters issued, includes "brothers and sisters". Subd. (5). Although that subdivision has not been con-

1. "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only

strued in connection with the question as to whether foster brothers and sisters are included within it, the terms used to designate other relationships have been deemed sufficiently broad to include those resulting from adoption. Cf. In re Estate of Camp, 131 Cal. 469, 470, 63 P. 736 (child); In re Estate of Mercer, 205 Cal. 506, 507, 271 P. 1067 (issue of predeceased spouse); In re Estate of Grazzini, 31 Cal.App.2d 168, 172–173, 87 P.2d 713 (children); In re Estate of Summers, 51 Cal.App.2d 39, 40, 124 P.2d 94 (grandchild). For the purposes of the present case, it may be assumed that a foster sister, if otherwise qualified, may claim the right to letters of administration.

[2] According to section 422, a relative may claim priority to letters of administration only when he is entitled to succeed to the decedent's estate or to some portion of it. This requirement is in addition to his other qualifications. In re Estate of Sayers, 203 Cal. 753, 756, 265 P. 924; cf. In re Estate of Herriott, 219 Cal. 529, 531, 28 P.2d 355. As the parties agree, the controlling issue is whether Calhoun's natural brother or his foster sister is entitled to succeed to his estate.

[3] Rights of inheritance, as well as the subject of adoption and the rights and obligations resulting from it, are entirely matters of statutory regulation. In re Estate of Jobson, 164 Cal. 312, 315, 128 P. 938, 43 L.R.A.,N.S., 1062; In re Darling's Estate, 173 Cal. 221, 223, 159 P. 606. Necessarily, the claim of each of the parties to the right to share in Calhoun's estate depends upon the effect to be given to section 225 of the Probate Code, which provides: "If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, * * * or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation."

Mrs. Oreb's position is that the words "brothers and sisters" must be read as referring to the relationships resulting from the decedent's adoption, and as excluding his natural brothers and sisters. She contends that adoption effects a complete change in the child's status, terminating the right of his natural relatives to inherit from him and substituting as heirs his adoptive relatives. A somewhat different theory is that she is entitled to succeed to Calhoun's estate as the issue of her deceased parents. Pettit argues that an adoption affects the right of inheritance only between the child and his natural parents and between him and his adoptive parents.

The earliest California statute regulating adoption made specific provision as to its effect upon inheritance. It declared in part: "A minor, when adopted, shall be entitled to the name of the party adopting, and the two thenceforth shall bear towards each other the legal relation of parent and child, and the minor shall enjoy all the legal rights and [be] subject to all the duties appertaining to that relation; except, however, that if the adopted child leaves descendants, ascendants, brothers or sisters, the party adopting, nor his relatives, shall not inherit the estate of the adopted child * * *." Stats.1869–70, pp. 530, 531. When the Civil Code was enacted, a similar provision was included in it. However, that statute omitted the clause in regard to inheritance. It read: "A child, when adopted, takes the name of the person adopting it, and the two thenceforth sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation." § 228. Minor changes in wording were made the following year, and as so revised

when they are entitled to succeed to the estate or some portion thereof:

"(1) The surviving spouse, or some competent person whom he or she may request to have appointed.

"(2) The children.

"(3) The grandchildren.

"(4) The parents.

"(5) The brothers and sisters.

"(6) The next of kin entitled to share in the estate.

"(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

"(8) The public administrator.

"(9) The creditors.

"(10) Any person legally competent."

the section has remained unchanged until the present time. Amendments to the Codes, 1873–74, p. 195.

Other sections of the Civil Code enacted at the same time included 227, which provided that upon adoption the judge should "make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting" and section 229 which declares: "The parents of an adopted child are, from the time of adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

In re Newman's Estate, 75 Cal. 213, 16 P. 887, 888, construed these sections in connection with subdivision 1 of former section 1386 of the Civil Code[2] with regard to the right of an adopted child to succeed by inheritance to the estate of the adopting parent. The court concluded that it was necessary to read "child" and "children" in section 1386 of the Civil Code as including adopted children, in order to give effect to the requirements that an adopted child, by virtue of that status, is to be " 'regarded and treated in all respects as the child of the person adopting' " and is to " 'have all the rights, and be subject to all the duties, of the legal relation of parent and child' ". Accord In re Williams' Estate, 102 Cal. 70, 82, 36 P. 407; cf. In re Johnson's Estate, 98 Cal. 531, 33 P. 460, 21 L.R.A. 380; In re Evans' Estate, 106 Cal. 562, 564–566, 39 P. 860.

In Estate of Jobson, 164 Cal. 312, 128 P. 938, 43 L.R.A.,N.S., 1062, the right of the natural parent of an adopted child to succeed to his estate was considered. The court noted that section 229 of the Civil Code relieved the parents of an adopted child "of all parental duties towards, and all responsibility for, the child" and of all right over it. It was held that the statutes relating to adoption implied that "the natural relationship between the child and its parents by blood is superseded." 164 Cal. at page 317, 128 P. at page 939. The question of the right of inheritance of collateral relatives of the child and adopting parents was expressly left open.

However, when In re Darling's Estate, 173 Cal. 221, 159 P. 606, concerning the right of an adopted child to succeed to the estate of his natural grandparent, came before the court, it said: "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who, by the express terms of the section, after adoption 'shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation,' and it is the parents by blood who, from the time of the adoption, are 'relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it,' and are, in the eyes of the law, no longer its parents. The adoption simply fixes the *status* of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent.

"It is only in so far as it is necessary to protect the full rights of the child as a child of the adopting parents and the corresponding rights of the adopting parents as father and mother of the adopted child

2. "When any person having title to any estate dies without disposing of the estate by will, it is succeeded to, and must be distributed, in the following manner:—

"1. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children, by right of representation."

In 1931, the provisions of former section 1386 of the Civil Code were reenacted in the Probate Code as sections 220–229, and 231. Stats.1931, c. 281, pp. 596–598.

that the statutes relative to adoption can play any part in the construction of section 1386, of the Civil Code, the inheritance statute here involved. As was said in Hockaday v. Lynn, 200 Mo. 456, 98 S.W. 585, 8 L.R.A.,N.S., 117, 118: 'In fact, it may be laid down as a general conclusion that while the statute of adoption must be read into the statute of dower and that of descents and distribution, it is with this singularity, always to be observed, viz., that the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent.'

"This was followed by the statement, 'and the door to inheritance is shut and its bolt shot at that precise point,' a statement which appears to be sustained by the authorities generally in the absence of plain statutory provision to the contrary." 173 Cal. at pages 225–226, 159 P. at page 608.

Cases arising in other states were reviewed extensively and were said to be consistent with this conclusion. "So far as we have been able to find, there is no decision given under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents, or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his parents by blood." 173 Cal. at page 226, 159 P. at page 608.

In Re Estate of Pence, 117 Cal.App. 323, 4 P.2d 202, the adopted son of decedent's predeceased brother sought to succeed as next of kin, pursuant to former section 1386 of the Civil Code, subdivision 5, now Prob.Code, § 226. Upon the reasoning of the Darling case, it was held that "the rights of inheritance of an adopted child, although complete with respect to the adopting parents, do not extend to the collateral relatives of that parent." 117 Cal.App. at page 333, 4 P.2d at page 206.

In these cases, all of which were decided prior to 1931, the statutes relating to the right of succession considered in connection with those relating to adoption, had been construed as follows: (1) the adopted child inherits from his adopting parents and they inherit from him; (2) upon adoption he ceases to inherit from his natural parents, and they cease to inherit from him; (3) the adopted child's status with regard to other natural relatives is not changed, and his right to inherit from them is not cut off by the adoption; and (4) by the adoption the child does not gain the right to inherit from collateral relatives of the adopting parents. Although no case squarely decided that collateral relatives of the adopting parents may not inherit from the child, it was stated in the Jobson case, supra, "[w]hatever the rule may be with respect to the right of succession, it must apply to both parties alike." 164 Cal. 315, 128 P. 939.

In 1929, the Legislature created a Code Commission to revise, codify and restate the probate law. Stats.1929, p. 1427. The commissioners' report was accepted, and in 1931 the Probate Code was enacted. Sections 227, 228 and 229 of the Civil Code relating to adoption were not changed but the new code included a new provision which reads: "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child." Sec. 257, Prob.Code.

This statute did not change the existing law relating to the right of inheritance by and from adopted children, but is a restatement of it. "The commissioners realized that they were not authorized to propose changes in the substance of the existing laws, for in the report which they submitted with the draft of the Probate Code they stated: 'By the statute creating the code commission, its powers are limited to preparing such "restatement as would best serve clearly and correctly to express the existing provisions of law", and it is not within the province of the code commission to embody in its report any substantial changes in the existing laws'. Cal.Prob. Code, Commissioners' Report, 1930, p. 10."

In re Estate of Hebert, 42 Cal.App.2d 664, 667–668, 109 P.2d 729, 731.

In the Hebert case, the effect of the enactment of section 257 of the Probate Code upon an adopted child's right to succeed by representation was considered. The court said: "The same legislature which enacted the Code section above quoted [section 257 of the Probate Code] also enacted section 222 of the Probate Code, which was based upon section 1386 of the Civil Code. Both of these sections provide that the issue of a decedent shall inherit by right of representation. At the same time the legislature continued in effect the adoption provisions of the Civil Code, sections 227–229. These sections had theretofore been construed as granting inheritance rights to the children of a predeceased adopted child of the adopting parent. (Citations.)

"If a statute has been judicially construed and is later re-enacted in the same or substantially the same terms it is presumed that the legislature was familiar with the construction which had been placed upon the statute by the courts and that such construction, in the absence of an express provision requiring a different construction, was adopted by the legislature as a part of the law. (Citations.) It is clear that if section 257 had been omitted when the Probate Code was enacted it would have been the clear duty of the court to declare the respondents to be the heirs of decedent. We find nothing in section 257 requiring any other determination, since it is a 'restatement' designed to 'clearly and correctly express the existing provisions of law' as interpreted by the courts." 42 Cal.App. 2d 668, 109 P.2d 731.

That reasoning is equally applicable to the other provisions of former section 1386 of the Civil Code reenacted in the Probate Code. It must be presumed that the construction placed upon them by previous decisions, to the effect that adoption effects a change in status for the purpose of inheritance only between the child and his natural parents and between him and his adoptive parents, was carried into the new sections, and that section 257 of the Probate Code is a restatement of that construction.

Since 1931, the cases considering section 257 have uniformly so construed it, and have applied it so as to exclude a right of inheritance between an adopted child and kindred of the adopting parents. In re Estate of Jones, 3 Cal.App.2d 395, 400, 39 P.2d 847 (holding an adopted daughter of the testatrix' husband's predeceased brother was not the husband's "heir"); In re Estate of Stewart, 30 Cal.App.2d 594, 598, 86 P.2d 1071 (holding that the adopted children of the testator's cousin are not "next of kin"); In re Estate of Kruse, 120 Cal.App. 2d 254, 256, 260 P.2d 969 (holding that the adopted daughter of the testatrix' sister is not an "heir"); see also In re Estate of Pierce, 32 Cal.2d 265, 269, 196 P.2d 1; comment 25 Calif.L.Rev. 81, 85–87. As stated in the Kruse case, "It has been consistently held that an adopted child while he inherits *from* his adopting parents does not inherit *through* them from the relatives of the adopting parents." 120 Cal.App.2d 256, 260 P.2d 969.

[4] In no decision has the court determined the status of an adopted child as a "brother or sister" within the meaning of section 225 of the Probate Code. However, the basis for excluding rights of inheritance in cases concerning members of the adopting family other than the parents is that adoption affects only the rights between the child and his natural parents and between him and his adopting parents. From that principle it logically follows that inheritance between an adopted child and his foster brothers and sisters is excluded.

Dictum in Re Estate of Esposito, 57 Cal. App.2d 859, 135 P.2d 167, supports this conclusion: "It has never been held," said the court, "so far as we are advised, that adoption does more than substitute foster parents for natural parents, without affecting the relationship of the child toward its relatives by blood and without creating new relationships with the kindred of the foster parents. So far as the right of inheritance is concerned, the child does not acquire new brothers and sisters in the persons of the natural children of the adoptive parents (citation) nor lose the brothers and sisters

of its own blood." 57 Cal.App.2d at pages 865–866, 135 P.2d at page 171.

Mrs. Oreb relies upon several decisions as indicating a legislative intent to make a more complete substitution in the status of the adopted child than is indicated in the cases which have been discussed. These decisions, however, do not involve the right of intestate succession except insofar as that right stems from a statute applicable because of the child's status in relationship to the adopting parent. They are consistent with the principle of the Darling case, and many of them expressly recognize and approve its reasoning. Cf. In re Estate of Mercer, 205 Cal. 506, 508, 271 P. 1067 (adopted daughter of predeceased husband as "child" under former subdivision 8 of section 1386 of the Civil Code; now Prob.Code § 228); In re Estate of Winchester, 140 Cal. 468, 74 P. 10, and In re Estate of Morris, 56 Cal.App.2d 715, 133 P.2d 452 (considering an adopted child as "issue" for the purposes of inheritance tax exemptions); In re Estate of Wardell, 57 Cal. 484 (pretermitted heir statutes); In re Estate of Esposito, supra, 57 Cal.App.2d 859, 135 P.2d 167 (anti-lapse statute; see comment, 25 Calif.L.Rev. 81, 85–87.

Both Mrs. Oreb and Pettit have cited many decisions in other jurisdictions. These and other cases are collected in annotations in 38 A.L.R. 8, and 120 A.L.R. 837, where the determination of the question here concerned is said to depend upon the wording of the particular statute involved. Because of the various and conflicting provisions of the statutes, there is no basis upon which the cases in other states may be reconciled.

When the original adoption statutes were enacted, adoptions were infrequent and most often occurred when the parents consented to the adoption of their child by persons known to them or as a consequence of the assumption of care and custody of an orphan by a blood relative. Under present-day conditions it may be the better social policy to substitute the relationship of the adoptive family for that of the blood relatives. With many children placed for adoption by agencies licensed for that purpose, there has developed a demand for secrecy as to the identity of the blood relatives, and in most cases, for all practical purposes, an adopted child is entirely cut off from his natural family relationships.

[5] This court may not usurp the legislative function to change the statutory law which has been uniformly construed by a long line of judicial decisions. See In re Estate of Stewart, 30 Cal.App.2d 594, 598, 86 P.2d 1071; note 2 U.C.L.A.Law Rev. 269. Moreover, any change should be made only after a complete examination of all of the consequences. If adoption is to effect a complete substitution in family relationship, the legal rights of collateral relatives should be fully considered in connection with statutes relating to pretermitted heirs, inheritance taxes and the like.

[6] Finally some significance is attached to the fact that Calhoun's estate consists of property to which Mrs. Oreb would have succeeded had George predeceased his adoptive mother, and to the alleged fact that he had never known his natural parents or natural brother. The record is silent upon the latter point, and the former is fully answered by the court in the Jobson case: "It may properly be observed * * * that the rights of the parties are not affected by the circumstance that the estate in dispute was derived entirely from the adopting parent. The source from which the property came may well influence one's notions of the natural equity of the appellant's claim. But our statute of succession in providing for the disposition of the separate property of one dying intestate, makes no distinctions based upon the channel through which the property may have come to the decedent." 164 Cal. 314, 128 P. 938.

The order is affirmed.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

The interpretation placed upon the relevant statutes by the majority opinion results

in consequences totally at variance with the objective of making the relationship between adoptive parents and their adopted child as close to the natural relationship as possible. See, Adoption of McDonald, 43 Cal.2d 447, 274 P.2d 860; In re Santos' Estate, 185 Cal. 127, 130, 195 P. 1055; 2 Armstrong, California Family Law 1242–1243. Children who have been raised together as brothers and sisters are set against one another whenever intestate succession from another than their parent is involved, and rights of natural kindred whose existence or identity will frequently be unknown to the adoptive family are allowed to intervene between foster brothers and sisters who have known no others. Although the Legislature has made detailed provisions for the issuance of new birth certificates and the sealing of original records in cases of adoption to promote and protect the adoptive relationship, Health and Safety Code §§ 10251–10254, in many cases of intestate succession this policy of secrecy will have to be evaded or the estates of adopted children will perforce escheat to the state. In other cases, natural grandchildren who have been adopted will be permitted to claim as pretermitted heirs of natural grandparents who had no knowledge of their existence or identity. Probate Code § 90. The statutes do not expressly provide for these results, and in my opinion by adopting the Probate Code in 1931 the Legislature did not accept and approve of the interpretation placed upon the superseded provisions of the Civil Code by In re Darling's Estate, 173 Cal. 221, 159 P. 606.

As the majority opinion points out, by enacting section 257 of the Probate Code,[1] the Legislature did not change the existing law governing intestate succession by or from adopted children, see also, In re Estate of Hebert, 42 Cal.App.2d 664, 667–668, 109 P.2d 729, and that section only governs rights of inheritance between the adopted child and adoptive parents and the adopted child and natural parents. Thus, to determine whether an adopted child may inherit through an adoptive parent or whether natural relatives may inherit from an adopted child through its natural parent, it is necessary to construe the provisions of the Probate Code in the light of the provisions of the Civil Code governing the status of an adopted child.

Section 228 of the Civil Code provides: "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." Section 229 provides: "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." In interpreting these statutes in In re Darling's Estate, supra, the court stated: "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who, by the express terms of the section, after adoption 'shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation,' and it is the parents by blood who, from the time of the adoption, are 'relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it,' and are, in the eyes of the law, no longer its parents. The adoption simply fixes the *status* of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent." 173 Cal. 221, 225–226, 159 P. 606, 608. It is immediately apparent that the court in the Darling case failed to give effect to the

1. "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child."

provision of the statute that the adopted child shall have "all of the rights" of "the legal relation of parent and child," and accordingly recognized only a restricted and imperfect "legal relation of parent and child". Thus a child is entitled to inherit from his grandparent only because he is the child of the deceased child of the grandparent and thus solely because of the parent-child relationship. An adopted child is not given all of the rights of that relationship if he may not also inherit from his adoptive grandparent or through his adoptive parent in any case in which a natural child could do so.

The conclusion that the court erred in its interpretation of section 228 in the Darling case finds further support in legislative history. The forerunner of section 228, after providing that the adoptive parent and child should "bear toward each other the legal relation of parent and child," and that the child should "enjoy all the legal rights and [be] subject to all the duties appertaining to that relation," expressly stated "except, however, that if the adopted child leaves descendants, ascendants, brothers or sisters, the party adopting, nor his relatives, shall not inherit the estate of the adopted child * * *." Stats.1869–70, p. 530–531. Thus the Legislature clearly recognized that the legal relation of parent and child would result in the child's becoming a member of the adoptive family for all purposes of inheritance and expressly provided for the exceptions thought desirable, and it must be presumed that it intended to change the law when it deleted the exception in 1872. In re Trombley, 31 Cal.2d 801, 806–807, 193 P.2d 734.

The rationale of the Darling case has never been consistently followed. In other situations involving adopted children it has been recognized that the adoptive relationship necessarily affects the status of the adopted child with respect to third parties. Thus, even in In re Darling's Estate it was recognized that if an adopted child is to have "all the rights" of the parent-child relationship, his children must in turn be allowed to inherit from their adoptive grandfather, 173 Cal. 221, 225, 159 P. 606, 607; see also, In re Estate of Winchester, 140 Cal. 468, 469–470, 74 P. 10, and in Re Estate of Pierce, 31 Cal.2d 265, 270, 196 P.2d 1, 4, it was pointed out in discussing the anti-lapse statute, Probate Code § 92, that "'The law * * * creating the status is found in section 228 of the Civil Code providing that "after adoption the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." * * * That such adopted child is to be considered as "issue" and a lineal descendant of the adopting parent, has been on several occasions recognized by our courts. * * * To exclude adopted children from its scope would be to say that they are not entitled as to the adopting parent, to the full rights of natural children, which is contrary to the express provision of the statute.'" Quoting from In re Estate of Moore, 7 Cal.App.2d 722, 724, 47 P.2d 533, 48 P.2d 28; see also, In re Estate of Tibbetts, 48 Cal.App.2d 177, 178, 119 P.2d 368; In re Estate of Esposito, 57 Cal.App. 2d 859, 865, 135 P.2d 167. Although the Pierce, Tibbetts, and Esposito cases recognized the rule of the Darling case, none of them explained why the provisions of section 228 must be read into section 92 of the Probate Code but be ignored in considering intestate succession through an adoptive parent, and the statutes themselves provide no basis for such a distinction. If section 228 of the Civil Code requires that the adopted child be allowed to take from his adoptive grandparent under the anti-lapse provisions of section 92 of the Probate Code, it must also require that he be allowed to take by intestate succession. In either situation he can take only because he is a child of the adoptive parent, and if the adoption changes his status with respect to the adoptive grandparent in one situation it must do so also in the other.

If it is true that the Legislature adopted the rule of the Darling case when it enacted the Probate Code in 1931, it might be suggested that the Moore, Tibbetts, and Esposito cases, decided since that time, should be disapproved. The Darling case did not, however, represent a settled rule in this state at the time it was decided, see, In re Estate of Jobson, 164 Cal. 312, 317, 128 P.

938, 43 L.R.A.,N.S., 1062, expressly leaving the question open, and the cases that have followed it were all decided after the Probate Code was enacted. In re Estate of Pence, 117 Cal.App. 323, 333, 4 P.2d 202; In re Estate of Jones, 3 Cal.App.2d 395, 398, 39 P.2d 847; In re Estate of Stewart, 30 Cal.App.2d 594, 596–597, 86 P.2d 1071; In re Estate of Kruse, 120 Cal.App.2d 254, 255–256, 260 P.2d 969. Moreover, in 1928, the court rejected the rationale of the Darling case in Re Estate of Mercer, 205 Cal. 506, 271 P. 1067, and held that an adopted child of a predeceased spouse could take under the predecessor of section 228 of the Probate Code on the death of the surviving spouse. "Appellant admits that the word 'issue' in several places in said section does include an adopted child. Again, an adopted child has been held to be a lineal descendant of the adopting parent. [Citations]. If this be conceded, it argues strongly for the rule that an adopted child is entitled to any legacy the law gives to the children of an adopting parent." 205 Cal. 506, 511, 271 P. 1067, 1069. Although the Mercer case has been distinguished from the Darling case on the ground that the adopted child in the Mercer case did not inherit through her predeceased adoptive mother but indirectly from her, see, In re Estate of Kruse, 120 Cal.App.2d 254, 257, 260 P.2d 969, this distinction is not justified in the light of the cases that have considered the character of succession under section 228. That section "is as much a part of the law of succession as any other, and those who inherit under it take as heirs of the decedent widow or widower, not as heirs of the predeceased spouse." In re Estate of Watts, 179 Cal. 20, 23, 175 P. 415, 416. "The respondent's relationship to her deceased mother would be the determining factor in establishing her status as an heir of [her step-father]; but the title to the property she is entitled to receive by reason of that status would not relate back for its origin, to her mother. It would come directly to her from her stepfather. She would take as * * * [his] heir * * *." In re Estate of Marshall, 42 Cal.App. 683, 687, 184 P. 43, 44; see also, In re Estate of Jobson, 164 Cal. 312, 314, 128 P. 938, 43 L.R.A.,N.S., 1062. Moreover, the Mercer case was not decided on the theory that the adopted child inherited indirectly from her predeceased adoptive parent but on the ground, as noted above, that she was [205 Cal. 506, 271 P. 1069] "entitled to any legacy the law gives to the children of an adopting parent."

It thus appears that both before and after the enactment of the Probate Code the cases have been in essential conflict with respect to inheritance by or from adopted children. Given the conflicting theories relied upon in the cases decided before the enactment of the Probate Code and the fact that the last decision before that time was clearly not in harmony with the rationale of the Darling case, it cannot reasonably be said that the Legislature adopted the rule of that case when it enacted the Probate Code. Accordingly, this court is free to resolve the conflict in the decisions in the light of the clearly expressed policy of section 228 of the Civil Code and Sections 10251 to 10254 of the Health and Safety Code. Whatever doubts there may have been with respect to that policy in the past, it is clear today that the objective of adoption is the "consummation of the closest conceivable counterpart of the relationship of parent and child," in which the child becomes a member "to all intents and purposes, of the family of the foster parents." In re Santos' Estate, supra, 185 Cal. 127, 195 P. 1055, 1057; see also, Adoption of McDonald, supra, 43 Cal.2d 447, 274 P.2d 860. Only by treating the adoptive child as a natural child for all purposes of inheritance is that objective obtained.

The order should be reversed.

CARTER, J., concurs.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

44 Cal.2d 416

Arthur W. STOWE, Plaintiff and Appellant,

v.

FRITZIE HOTELS, Inc., a corporation, et al., Defendants,

Fritzie Hotels, Inc., a corporation, Respondent.

L. A. 23638.

Supreme Court of California. In Bank.

April 26, 1955.

Rehearing Denied May 25, 1955.

Action by tenant of hotel apartment for injuries sustained when lamp fell upon him. The Superior Court, Los Angeles County, James G. Whyte, J., sustained demurrer to complaint and plaintiff appealed. The Supreme Court, Edmonds, J., held that complaint which alleged that owner held out and orally represented and warranted to plaintiff that lamp was in safe and usable condition and fit for purposes for which it was intended including purpose for which he used it, was sufficient to state cause of action upon theory of express warranty whether plaintiff was tenant or lodger.

Judgment reversed with directions.

Opinion, 277 P.2d 504, vacated.

1. Innkeepers ⇐10.1

Where relationship of owner of hotel and guest exists, although proprietor is not absolutely liable for injuries suffered, he owes duty, at all times, to maintain premises, in reasonably safe condition.

2. Landlord and Tenant ⇐164(1)

Proprietor of furnished apartment is not liable to tenant for injuries caused by property leased in absence of fraud, concealment or covenant in lease.

3. Pleading ⇐205(1)

As against general demurrer, negligence may be pleaded in general terms.

4. Landlord and Tenant ⇐169(3)

Facts to establish exception to general rule of non-liability of landlord to tenant, such as fraud, concealment, or covenant in lease, must be specifically pleaded to state cause of action for injuries to tenant.

5. Innkeepers ⇐8

Chief distinction between "tenant" and "lodger" lies in character of possession, and tenant has exclusive legal possession of premises and is responsible for their care and condition, whereas lodger has only right to use premises, subject to landlord's retention of control and right of access to them.

See publication Words and Phrases, for other judicial constructions and definitions of "Lodger" and "Tenant".

6. Landlord and Tenant ⇐164(1)

To make one a tenant, as respects an owner's liability for injuries sustained by occupant on premises, he must have exclusive possession and control.

7. Innkeepers ⇐8

When premises are under direct control and supervision of owner and rooms are furnished and attended to by him, he or his servants retaining keys to them, person renting such room is a "lodger" and not a tenant.

8. Innkeepers ⇐8
Landlord and Tenant ⇐1

"Apartment" in its usual and ordinary connotation signifies that its occupant acquires exclusive possession and is tenant rather than roomer.

See publication Words and Phrases, for other judicial constructions and definitions of "Apartment".

9. Innkeepers ⇐10.9

Complaint seeking recovery for injuries sustained by tenant of hotel apartment when lamp fell upon him, which alleged that defendants were owners, proprietors, and managers of multiple unit, that defendants managed, maintained and operated such premises for profit, that defendants owned and retained and exercised full and exclusive control, management and supervision of such premises was consistent with conclusion that tenant was "lodger" and was sufficient to establish cause of action based on negligence of landlord.

10. Pleading ⇐34(2)

Where there is any inconsistency between specific allegations upon which conclusion must be based and the conclusion, specific allegations control.

11. Pleading ⇐34(2)

Rule that where there is ambiguity or uncertainty and plaintiff refuses to amend after such defects are pointed out by demurrer, ambiguities must be resolved against him, is applicable if ambiguous allegations are of equal strength, but where ambiguity is between specific allegations and conclusions, former must control.

12. Innkeepers ⇐10.9

In complaint by tenant of hotel apartment to recover for injuries sustained when lamp fell upon him, plaintiff was not required to allege facts negating or anticipating possible defense of contributory negligence.

13. Fraud ⇐13(2)

To be actionable deceit, representation need not be made with knowledge of actual falsity, but need only be an assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true and made with intent to induce recipient to alter his position to his injury or his risk.

14. Innkeepers ⇐10.9
Landlord and Tenant ⇐169(3)

Complaint by tenant of hotel apartment for injuries sustained when lamp fell upon him, which alleged that owner held out and orally represented and warranted to plaintiff that lamp was in safe and usable condition and fit for purposes for which it was intended including purpose for which he used it, was sufficient to state cause of action upon theory of express warranty whether plaintiff was tenant or lodger.

15. Landlord and Tenant ⇐164(1)

Lessor of furnished apartment who warrants safety of furniture and agrees to keep it in repair, is liable for injuries resulting from his failure to do so.

16. Landlord and Tenant ⇐164(1)

After one receives assurances on part of management that furniture is safe, he has right to assume that landlord knew and had means of knowing that everything required for ordinary use and occupancy was free from any fault inconsistent with proper use and enjoyment of room, and actual knowledge on part of lessor is not required.

17. Innkeepers ⇐10.9

Complaint by tenant of hotel apartment for injuries sustained when lamp fell upon him, which alleged that owner knew, or could have known, of dangerous condition and injury resulting from failure to provide safe premises, was sufficient to state cause of action based on negligence. West's Ann.Civ.Code, §§ 1714, 1833, 1955.

18. Appeal and Error ⇐854(3)

Rule that judgment of dismissal should be affirmed if special demurrer is well taken upon any ground is applicable when demurrer is sustained with leave to amend and court does not specify ground of its ruling.

19. Appeal and Error ⇐1178(1)
Pleading ⇐223

When demurrer based upon both general and special grounds is sustained and order mentions only general ground, impliedly the ruling was made either without consideration of special grounds or upon determination that they are not well taken, and if general demurrer was sustained erroneously, trial judge should be directed to consider special grounds.

Harold D. Kraft and Robert F. Reynolds, Los Angeles, for appellant.

Frank W. Woodhead, Robert E. Morrow and Henry F. Walker, Los Angeles, for respondent.

EDMONDS, Justice.

Arthur W. Stowe sued for damages for bodily injuries, naming as defendants Fritzie Hotels, Inc., and Fritzie Hotels, Inc., doing business as St. Francis Hotel and Apartments. His appeal from a judgment of dismissal presents questions concerning the sufficiency of his complaint.

The complaint is in three counts. In the first five paragraphs of count one, Stowe alleges that the defendants "were the owners, proprietors and managers of a multiple unit hotel and furnished apartment premises * * *; that at all times said premises included numerous furnished apartments and hotel rooms * * * and a certain furnished unit known as number

425, * * *; that at all said times defendants managed, maintained and operated the said premises for profit * * *; that said premises were operated as a hotel and that defendants at all times during the tenancy of plaintiff hereinafter described * * * and at the time of the occurrence of the accident hereinafter referred to, owned and retained and exercised full and exclusive control, management and supervision of all of the said unit number 425 and all of its general furniture and furnishings including a certain heavy standard lamp which had at its top as its shade a large glass bowl; that plaintiff is informed and believes and on this ground alleges that said bowl weighed about ten pounds and was much larger and heavier than the base of the lamp which was made of metal and separated from the shade by a standard about five feet long. That * * * plaintiff rented the said furnished apartment or hotel unit number 425 including said lamp from defendants * * * for the agreed use * * * as dwelling accommodations; that * * * at the time of the occurrence of the accident hereinafter referred to, plaintiff was upon said premises pursuant to and by virtue of said renting * * * as the tenant, business guest and invitee of defendants. * * * That defendants supplied said unit 425 and plaintiff as the tenant thereof with complete daily maid service at all times during said tenancy of plaintiff."

Stowe then pleads that "the defendants negligently, carelessly, recklessly and unlawfully maintained, managed, operated, controlled and cared for said standard lamp" at a place about five feet from a bed which he used for sleeping purposes, so that it fell and the glass bowl struck his right leg as he lay asleep in bed, causing the injuries for which damages are demanded.

In the second count, Stowe incorporates the first five paragraphs of the first one and alleges that during his tenancy and "in hiring and letting said rental unit * * * the defendants orally represented and warranted * * * that the said lamp was in a safe and usable condition and fit for the purpose for which it was intended, including the purpose of use by plaintiff as a lamp in the proximity of plaintiff's bed where defendants placed and maintained it, and * * * plaintiff believed said facts, * * * to be true and at all times relied on them."

"That all during said tenancy * * * the said lamp was in an unsafe and dangerous condition in that it was top-heavy, loosely put together, and liable to lean and topple over without cause beyond its own make-up plus the force of gravity and the normal vibrations of said hotel premises, and was unfit for use by human beings or by this plaintiff, which facts were unknown to plaintiff and the said unsafe, dangerous and unfit conditions were latent and not known by or ascertainable by this plaintiff. That the defendants at all times herein mentioned knew, or could have known had they exercised reasonable care and diligence, that the said lamp was at all said times in an unsafe, dangerous and unfit condition, but notwithstanding defendants' knowledge of said unsafe, dangerous and unfit condition, defendants let and hired to plaintiff for the use and occupancy of plaintiff and his wife the said rental unit. * * *"

The third cause of action is the same as the second one, omitting only the allegations concerning the oral representation and warranty.

The demurrer charges that the complaint fails to state facts sufficient to constitute a cause of action, and that it is uncertain, ambiguous and unintelligible in various particulars. Upon hearing, the court ordered: "General Demurrer to Complaint Sustained —10 days to amend." Stowe having failed to amend, the action was dismissed.

Does Count I State a Cause of Action?

[1, 2] What duty did the defendants owe Stowe under the facts alleged? If the relationship was that of an owner of a hotel and a guest, the rule is that, although the proprietor is not absolutely liable for injuries suffered, he owes a duty, at all times, to maintain the premises in a reasonably safe condition. Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Wallace v. Speier, 60 Cal. App.2d 387, 140 P.2d 900; and see: 18 A.L.R.2d 973. On the other hand, the proprietor of a furnished apartment is not liable to a tenant for injuries caused by the

property leased in the absence of fraud, concealment or a covenant in the lease. Wilson v. Ray, 100 Cal.App.2d 299, 303, 223 P.2d 313; Forrester v. Hoover Hotel & Investment Co., 87 Cal.App.2d 226, 232, 196 P.2d 825; Hunter v. Freeman, 105 Cal.App.2d 129, 131, 233 P.2d 65. In the Forrester and Hunter cases, the court refused to impose a higher duty of care than that of the landlord-tenant relationship although the plaintiff urged that various statutes created a different standard.

[3, 4] As against a general demurrer, negligence may be pleaded in general terms. Stafford v. Shultz, 42 Cal.2d 767, 774, 270 P.2d 1; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1. If the facts pleaded by Stowe show that he was a guest in a hotel, his complaint states a cause of action. But it fails to do so if his allegations present only the relationship of landlord and tenant of a furnished apartment. In this count there is no allegation of fraud or concealment, or a covenant. Facts to establish one of those exceptions to the general rule of non-liability must be specifically pleaded to state a cause of action for injuries to a tenant. Wilson v. Ray, 100 Cal.App.2d 299, 303, 223 P.2d 313.

[5–8] The chief distinction between a tenant and a lodger lies in the character of possession. A "tenant" has exclusive legal possession of premises and is responsible for their care and condition. A "lodger" has only the right to use the premises, subject to the landlord's retention of control and right of access to them. To make one a tenant, as respects an owner's liability for injuries sustained by occupant on the premises, he must have exclusive possession and control. Marden v. Radford, 229 Mo.App. 789, 84 S.W.2d 947, 954; see also 64 Yale Law Journal 391–411. When premises are under the direct control and supervision of the owner and rooms are furnished and attended to by him, he or his servants retaining the keys to them, a person renting such a room is a lodger and not a tenant. Fox v. Windemere Hotel Apartment Co., 30 Cal.App. 162, 165, 157 P. 820. The word "apartment" in its usual and ordinary connotation signifies that its occupant acquires exclusive possession and is a tenant rather than a roomer. Washington Realty Co. v. Harding, D.C.Mun.App., 45 A.2d 785, 786.

[9–11] Each fact pleaded by Stowe in regard to his status is consistent with the conclusion that he was a "lodger" except that the words "tenant" and "tenancy" are used. He speaks of the premises as a "furnished apartment or hotel room." These are but conclusions or ultimate facts. Where there is any inconsistency between the specific allegations upon which a conclusion must be based and the conclusion, the specific allegations control. See Denman v. City of Pasadena, 101 Cal.App. 769, 777, 282 P. 820; Willis v. Page, 19 Cal.App. 2d 508, 512, 65 P.2d 944.

In support of the judgment, it is argued that where there is ambiguity or uncertainty and the plaintiff refuses to amend after those defects are pointed out by demurrer, the ambiguities must be resolved against him. See: Witkin, 2 California Procedure, Pleading, § 213, p. 1192. This rule would apply if the ambiguous allegations were of equal strength. But here the ambiguity is between specific allegations and conclusions, and the former must control.

[12] It is also suggested that the complaint is defective because it fails to allege that Stowe did not know of the defect and the allegations indicate that he should have realized the danger, or was in as good a position to determine the danger as was the owner. But as the pleading asserts that there was owed to him the duty of reasonable care to maintain the premises in a safe condition, the point relied upon presents only the question as to whether Stowe was contributively negligent. The plaintiff is not required to allege facts negating or anticipating possible defenses. See: Jaffe v. Stone, 18 Cal.2d 146, 158, 114 P.2d 335, 135 A.L.R. 775; Canfield v. Tobias, 21 Cal. 349, 350.

Does Count II State a Cause of Action?

[13] Stowe claims that the second count states a cause of action based on a representation, relied upon by him, that the premises and the lamp were safe. "To be actionable deceit, the representation need not

be made with knowledge of actual falsity, but need only be an 'assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' (citations) and made 'with intent to induce [the recipient] to alter his position to his injury or his risk * * *' (citations)." Gagne v. Bertran, 43 Cal.2d 481, 487, 275 P.2d 15, 20. The allegation that the statement concerning the lamp was made by the owner, and relied upon by Stowe in conjunction with the averment that the owner "knew or could have known" of the lamp's unsafe condition sufficiently pleads the cause of action.

[14–16] This count also clearly states a cause of action upon the theory of an express warranty whether Stowe was a tenant or a lodger. He alleges that the owner "held out and orally represented and warranted to plaintiff that the said lamp was in a safe and usable condition and fit for the purposes for which it was intended including" the purpose for which he used it. In Fried v. Buhrmann, 128 Neb. 590, 259 N.W. 512, 513, the court said that the lessor of a furnished apartment who warrants the safety of the furniture and agrees to keep it in repair, is liable for injuries resulting from his failure to do so. This rule finds support in Shattuck v. St. Francis Hotel and Apartments, 7 Cal.2d 358, 361, 60 P.2d 855, 857, where the court held that, after one receives assurances on the part of the management that the furniture is safe, he has "the right to assume that the landlord knew and had means of knowing that everything required for ordinary use and occupancy was free from any fault inconsistent with the proper use and enjoyment of the room." Actual knowledge on the part of the lessor is not required. In the present case if, as pleaded, the owner orally represented and warranted that the lamp was safe, he assumed the duty to have the premises in a safe condition at the time they were rented. The allegation that at all times the lamp was in an unsafe and dangerous condition sufficiently states a breach of that duty.

It is argued that, if the lamp were defective, there is no allegation which explains why the defect was not as obvious to Stowe as to the owner. See: Toner v. Meussdorffer, 123 Cal. 462, 56 P. 39. But from the allegation in Stowe's complaint that daily maid service was furnished, it may be inferred that the owner, or his agents, were in a better position to notice the top-heaviness of the lamp while moving it in the process of cleaning the room.

Does the Third Count State a Cause of Action?

[17] Stowe argues that in this count he has alleged a breach of an implied warranty. Such a warranty is said to be established by sections 1714, 1833 and 1955 of the Civil Code. For that rule Stowe cites Fisher v. Pennington, 116 Cal.App. 248, 2 P.2d 518; Charleville v. Metropolitan Trust Co., 136 Cal.App. 349, 29 P.2d 241; Monroe v. East Bay Rental Service, 111 Cal.App.2d 574, 245 P.2d 9; Sharpless v. Pantages, 178 Cal. 122, 172 P. 384, and Shattuck v. St. Francis Hotel and Apartments, 7 Cal.2d 358, 60 P.2d 855. In the Fisher case, the court held that the landlord of a furnished apartment impliedly warrants the safety of the premises and the furnishings to the same extent as an innkeeper. However, this language was disapproved in Forrester v. Hoover Hotel & Investment Co., 87 Cal. App.2d 226, 196 P.2d 825 and Hunter v. Freeman, 105 Cal.App.2d 129, 131, 233 P.2d 65, on the ground that such a rule would make the landlord a virtual insurer of the safety of the tenant. The Charleville case was based entirely on the Fisher rule. The other decisions cited by Stowe are not in point. The Monroe case involved an inherently dangerous instrument. The suit of Sharpless was that of a patron against a theatre, and in the Shattuck case the action was upon an express warranty.

This count pleads, as does count one, that the owner knew, or could have known, of the dangerous condition and injury resulting from failure to provide safe premises. These facts sufficiently charge negligence.

[18] For the reasons stated, each of the three counts of the complaint pleads facts sufficient to state a cause of action, as against the general demurrer, and it should not have been sustained. But the owner

insists that the judgment of dismissal should be affirmed if the special demurrer was well taken upon any ground, Stowe not having amended when given the opportunity to do so. That clearly is the rule when the demurrer is sustained with leave to amend and the court does not specify the ground of its ruling. Evarts v. Jones, 104 Cal.App.2d 109, 231 P.2d 74; Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 195 P. 2d 492; Sanders v. Allen, 83 Cal.App.2d 362, 188 P.2d 760; Jensky v. State Board of Equalization, 67 Cal.App.2d 612, 155 P. 2d 87.

The same rule has been invoked when one of the two grounds for general demurrer is specified by the court in its ruling sustaining the demurrer. In Southall v. Security Title Insurance and Guarantee Co., 112 Cal.App.2d 321, 246 P.2d 74, 75, the grounds of demurrer were that it failed to plead facts sufficient to state a cause of action and also that it was barred by the statute of limitations. The demurrer was sustained upon the latter ground. Upon appeal, it was held that the complaint did not state a cause of action, and "if the demurrer should have been sustained upon any of the grounds urged, the judgment will not be reversed."

A number of cases suggest that when the demurrer is sustained on the ground that the complaint does not state a cause of action, upon appeal the judgment of dismissal will be affirmed if either the special or general ground was well taken. People v. Central Pacific R. Co., 76 Cal. 29, 18 P. 90; Wakeham v. Barker, 82 Cal. 46, 22 P. 1131; Sechrist v. Rialto Irrigation District, 129 Cal. 640, 62 P. 261; Davey v. Southern Pacific Co., 116 Cal. 325, 48 P. 117; Burke v. Maguire, 154 Cal. 456, 98 P. 21; Stratford Irrigation District v. Empire Water Co., 44 Cal.App.2d 61, 111 P.2d 957. None of these cases expressly decides this question. In the Central Pacific case, apparently the demurrer was sustained in general terms. This court held that the complaints in the Wakeham, Burke and Stratford Irrigation District cases failed to state a cause of action. In Sechrist v. Rialto Irrigation District, the trial court specifically ruled on all grounds presented by the demurrer. The question presented in Davey v. Southern Pacific Co., concerned the admissibility of evidence and not one of pleading.

In Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 462, 165 P.2d 15, 17, 163 A.L.R. 838, the court said, "The order of the court sustaining the demurrers is general in its terms and does not indicate the grounds upon which the court acted. *In such situation* the law is settled that 'If the demurrer is well taken as to any of the grounds stated therein, then the order of the court sustaining the demurrer must be affirmed by the reviewing court.'" (Emphasis added.) Also, in Bernstein v. Piller, 98 Cal.App.2d 441, 443, 220 P.2d 558, 559, the rule was stated to be that "On appeal from a judgment entered after the sustaining of a demurrer the order of the trial court *if in general terms* must be affirmed by an appellate court if the demurrer is well taken as to any of the grounds stated therein." (Emphasis added.) In both of these cases the order was in general terms.

[19] The pleader should be entitled to rely upon a statement in the order sustaining the demurrer as to the ground upon which it is made. When a demurrer based upon both general and special grounds is sustained and the order mentions only the general ground, impliedly the ruling was made either without consideration of the special grounds or upon a determination that they are not well taken. If the general demurrer was sustained erroneously, the trial judge should be directed to consider the special grounds. See Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1. Under a contrary rule, the pleader could not profit from the appeal unless he has anticipated the ruling to be made on the special demurrer and amended his pleading to remedy any defects.

The judgment is reversed with directions to the trial court to overrule the general demurrer and to rule on the points presented by the special demurrer.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 508

Roy A. SHARFF et al., Petitioners,

v.

The SUPERIOR COURT OF the CITY AND COUNTY OF SAN FRANCISCO, Respondent; Belfast Beverages, Inc., Real Party in Interest.

S. F. 19214.

Supreme Court of California,
In Bank.
April 28, 1955.

Proceeding for mandamus to compel Superior Court to allow personal injury case to go to trial without requiring plaintiff to submit to an oral and physical examination in absence of her attorneys. The Supreme Court, Gibson, C. J., held that plaintiff in personal injury action who was ordered to undergo a physical examination by defendant's doctor was entitled to have assistance and protection of attorney during examination, and denial of this right imposed an unlawful condition upon plaintiff's right to proceed to trial.

Writ issued.

1. Attorney and Client ⇐96

Attorneys who represented plaintiff in personal injury action had no standing on their own behalf to challenge validity of order requiring plaintiff to submit to oral and physical examination in absence of attorneys.

2. Mandamus ⇐3(2), 10, 12

Mandamus will issue when there is not a plain, speedy and adequate remedy in ordinary course of law to compel performance of an act which the law specifically enjoins or to compel admission of a party to use and enjoyment of right to which he is entitled and from which he is unlawfully precluded. West's Ann.Code Civ.Proc. §§ 1085, 1086.

3. Mandamus ⇐4(3)

Order requiring that plaintiff in personal injury action submit to oral and physical examination in absence of her attorneys was not appealable, and mandamus was available to test validity of order. West's Ann.Code Civ.Proc. §§ 1085, 1086.

4. Damages ⇐206(7)

Where a plaintiff in a personal injury action is ordered to undergo a physical examination by defendant's doctor, doctor should be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding nature and extent of injuries, but should not be allowed to make inquiries into matters not reasonably related to legitimate scope of examination.

5. Damages ⇐206(5)

Where plaintiff's attorney, when present during plaintiff's physical examination by defendant's doctor under order of court, interferes with examination, court may take appropriate steps to provide doctor with reasonable opportunity to complete his investigation.

6. Damages ⇐206(7)

Plaintiff in personal injury action who was ordered to undergo a physical examination by defendant's doctor was entitled to have assistance and protection of attorney during examination, and denial of this right imposed an unlawful condition upon plaintiff's right to proceed to trial.

Roy A. Sharff, San Francisco, and Ivan C. Sperbeck, Oakland, for petitioners.

Thomas W. Loris, Sacramento, amicus curiae on behalf of petitioners.

Bronson, Bronson & McKinnon, San Francisco, for respondent and real party in interest.

Bledsoe, Smith & Cathcart, Peart, Baraty & Hassard, George A. Smith and Alan L. Bonnington, San Francisco, amici curiae on behalf of respondent and real party in interest.

GIBSON, Chief Justice.

After a personal injury action was set for trial, the defendants made a motion for an order requiring the plaintiff to submit to an examination by defendants' doctor in the absence of her attorney. Plain-

tiff consented to the examination but requested that she be permitted to have her attorney present. The respondent court made an order directing that she "submit to an oral and physical examination concerning [her] alleged injuries, which said examination shall be performed in the absence of said plaintiff's attorney * * * and that further proceedings by plaintiff in the above entitled action be stayed until said plaintiff * * * submits to said examination." This proceeding was brought to compel respondent court to allow the case to go to trial without requiring plaintiff to submit to an examination under the conditions specified in the order.

[1] Two attorneys, who represented plaintiff in the personal injury action, joined with her in requesting relief, but they have no standing on their own behalf to challenge the validity of the order, and the proceeding is dismissed as to them.

[2, 3] Mandamus will issue, where there is not a plain, speedy and adequate remedy in the ordinary course of law, to compel performance of an act which the law specifically enjoins or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded. Code Civ.Proc. §§ 1085, 1086. The order in the present case is not appealable, and plaintiff does not have any plain, speedy and adequate remedy in the ordinary course of law. The writ is, therefore, available to test whether the court by its order has imposed an unlawful condition upon plaintiff's right to proceed to trial.

[4] It has been held that the court may order a plaintiff in a personal injury action to undergo a physical examination by the defendant's doctor. Johnston v. Southern Pacific Co., 150 Cal. 535, 89 P. 348. The doctor should, of course, be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries, but he should not be allowed to make inquiries into matters not reasonably related to the legitimate scope of the examination. See Wood v. Flagg, 1907, 121 App.Div. 636, 106 N.Y.S. 308; Wunsch v. Weber, Com.Pl., 1894, 29 N.Y.S. 1100. Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination. See Williams v. Chattanooga Iron Works, 1915, 5 Tenn.Civ.App. 10, 20–21, affirmed 131 Tenn. 683, 176 S.W. 1031.

[5] It is argued that an attorney, by making groundless objections, may hinder an examination, thereby depriving the defendant of the benefit of an informed medical opinion. The plaintiff, however, should not be left unprotected on the assumption that an attorney will unduly interfere with the examination. Should such interference occur, appropriate steps may be taken by the court to provide the doctor with a reasonable opportunity to complete his investigation of the nature and extent of any injuries the plaintiff may have sustained.

[6] We are of the view that the respondent court, in staying all proceedings until plaintiff should comply with the order directing her to submit to an oral and physical examination without the presence of her attorney, imposed an unwarranted condition on her right to have the case proceed to trial.

Let a writ of mandate issue directing respondent court to allow the case to be tried without requiring plaintiff to submit to a medical examination in the absence of her attorney.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 511

The PEOPLE of the State of California, Plaintiff-Respondent,

v.

Harold JACKSON, also known as Hans M. Anderson, and Joseph Lear, Defendants-Appellants.

Crim. 5658.

Supreme Court of California.
In Bank.

April 28, 1955.

Rehearing Denied May 25, 1955.

Defendants were convicted of kidnapping. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment, and defendants appealed. The Supreme Court, Edmonds, J., held that where great weight of evidence showed a kidnapping for purpose of ransom, but it appeared that, but for trial errors, jury might have found in favor of defendant on charge of kidnapping and inflicting bodily harm on victim, conviction on latter charge would be reversed and sentence imposed as for kidnapping for purpose of ransom.

Judgments reversed with directions.

Carter, Traynor and Schauer, JJ., dissented.

1. Kidnapping ⇐5

In kidnapping prosecution, evidence of trivial injuries inflicted upon victim was insufficient to support finding that defendant had inflicted bodily harm upon victim. Pen.Code, § 209.

2. Criminal Law ⇐1186(4)

In kidnapping prosecution, misconduct of trial judge and prosecuting attorney, together with other errors, would have compelled reversal of convictions except for the overwhelming weight of credible evidence tending to establish guilt of one of the crimes charged. Pen.Code, §§ 209, 1239(b); West's Ann.Const. art. 6, § 4½.

3. Criminal Law ⇐1186(4)

Where great weight of evidence showed a kidnapping for purpose of ransom, but it appeared that, but for trial errors, jury might have found in favor of defendant on charge of kidnapping and inflicting bodily harm on victim, conviction on latter charge would be reversed and sentence imposed as for kidnapping for purpose of ransom. Pen.Code, §§ 209, 1239 (b); West's Ann.Const. art. 6, § 4½.

Valentine C. Hammack and Sidney Feinberg, San Francisco, for appellant Jackson.

Frances Newell Carr, Sacramento, and Robert K. Winters, Benicia, for appellant Lear.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, District Atty. (City and County of San Francisco), and Norman Elkington, Asst. Dist. Atty., San Francisco, for respondent.

EDMONDS, Justice.

Harold Jackson and Joseph Lear were tried jointly upon an indictment which charged that they kidnaped Leonard Moskovitz for ransom or reward, inflicting bodily harm upon the victim. A second count of the indictment alleged that they conspired to commit the crime and that they were armed with a deadly weapon when it was committed. Jackson's prior conviction of a felony was also pleaded. A jury found both men guilty as charged and made no recommendation as to the penalty.

The death sentence was imposed upon Jackson. The trial judge ordered "that the verdict of the jury be modified" as to Lear and fixed his punishment at life imprisonment without possibility of parole. The automatic appeal by Jackson, Pen.Code, § 1239, subd. b, and Lear's appeal from the judgment and an order denying a motion for a new trial have been consolidated.

The evidence concerning these facts is without substantial conflict:

At the time of the asserted kidnaping, Leonard and his twin brother, Alfred, operated a real estate business, assisted in an advisory capacity by their father, Maurice Moskovitz. Both Leonard and Alfred were financially sound and free from pressing obligations. The members of the

Moskovitz family were unacquainted with Jackson and Lear, except possibly for a business transaction between Jackson and the father several years previously.

On January 13th, the Wednesday preceding Leonard's abduction, Jackson called at Leonard's office and introduced himself as "Mr. Lund." He asked to see some real estate and arranged to do so upon the following weekend. On Saturday morning, he telephoned to Leonard and made an appointment to meet him a short time later at a designated location. When Leonard arrived, Jackson persuaded him to drive to a house where his wife and brother-in-law assertedly were waiting for them.

After they entered the house, Jackson ordered Leonard to remove his coat and then pushed him to a sitting position upon the couch. Jackson held his arms as Lear entered the room, brandishing a knife which he placed at Leonard's throat, saying, "One peep out of you and you are dead." Leonard's wrists and ankles were chained and his wallet and papers removed from his pocket. He was then told he was to be held captive until ransom in the amount of $500,000 had been received.

A short time later, the chain on one of Leonard's wrists was removed. At Jackson's dictation, he wrote a letter to his father, demanding the payment of ransom and directing him to communicate with the kidnapers through the personal column of a local newspaper. The chains then were refastened and ear plugs placed in his ears and adhesive tape over his mouth. He was taken to the bedroom with the warning not to "attempt anything", that there were five members of the gang, some of whom were watching the house constantly.

When Leonard did not return to his office, his father became alarmed and called the police. On Saturday evening, the first ransom letter was received by Leonard's mother and shown to police officers. A communication to the kidnapers was prepared and telephone officials alerted.

In the evening, Leonard was given food and then was made to lie chained on a mattress in the living room throughout the night. On Sunday morning he was compelled to write a second letter, repeating the demand for ransom and describing the manner in which the money was to be accumulated. During the day he remained chained and blindfolded. That evening, he was shown a newspaper personal message that his family could not raise the sum demanded and that they wished to negotiate. After some discussion, Jackson and Lear agreed to reduce their demands to $300,000. Lear dictated several letters to Leonard, specifying the method to be followed by his family in delivering the money. These letters were not mailed and subsequently were destroyed.

On Monday morning, a second message appeared in the newspaper, notifying the kidnapers of acquiescence in their demands. Extensive discussions were had at that time between Lear, Jackson and Leonard as to the method of delivering the money. Leonard persuaded them that the previous plan was "too complicated", suggesting instead that they contact his brother. After some argument, Jackson and Lear agreed. They drove that night to a public telephone where Leonard was allowed to talk to Alfred. Arrangements were made to communicate with the family later.

When they returned to the house, there was more discussion regarding the method to be followed for delivery of the ransom. They settled upon a plan by which the money was to be placed in two suitcases and delivered to a specified telephone booth. Leonard was returned unchained and unbound to the bedroom while Lear left to make a telephone call. He was apprehended while attempting to do so. Upon interrogation by police officers, he admitted the kidnaping and directed them to Jackson and Leonard. When the officers broke into the house, they found Jackson in the living room, clad only in his shorts, and Leonard hiding in a closet in the bedroom.

Jackson's defense was that the asserted kidnaping was a hoax devised to extort money from Leonard's father. According to the evidence presented by him, he had known Leonard for several years. He had

met with Leonard a few months before the purported kidnaping to work out a plan for accomplishing it. He denied that Leonard had been chained other than on the first day at the house.

Lear's position was that he had no knowledge of the kidnaping until Jackson appeared at the house with Leonard. He testified, however, that he assisted Jackson thereafter out of fear for himself and his stepson. His account of the events was similar in most parts to those related by witnesses for the prosecution. He concluded that the kidnaping was "phoney" when he observed Leonard unchained and there was jesting between Leonard and Jackson when the ransom notes were written. As he related the discussions with regard to delivery of the ransom money, it was agreed that Leonard was to receive either $100,000 or $200,000.

Numerous points are made by Jackson and Lear as grounds for reversing the judgment of conviction. The most important of them relate to the sufficiency of the evidence to show "bodily harm" and acts of asserted prejudicial misconduct by the trial judge and the prosecuting attorney. Other assignments of error include challenges of the rulings upon the admission of evidence and instructions to the jury.

Section 209 of the Penal Code, which prescribes the punishment for the crime of kidnaping [for ransom, reward, extortion or robbery,] was amended in 1933 to provide that one convicted of that crime "shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm." The 1933 amendment, Stats. 1933, p. 2617, was patterned after the federal Lindbergh Law, which authorizes the imposition of the death penalty for kidnaping except when the victim has been liberated "unharmed."

The uncertainties of the federal statute were the subject of comment in Robinson v. United States, 324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944, involving a prosecution under that act. There the evidence showed that the victim had suffered injuries from two violent blows on the head with an iron bar and abrasions to the lips from repeated applications of tape. Reading the word "unharmed" as meaning "uninjured", the Supreme Court stated: "Two possible reasons suggest themselves * * * as to the motivation of Congress in making the severity of a kidnapper's punishment depend upon whether his victim has been injured. The first reason is the old belief that the severity of the injury should measure the rigor of the punishment. If this be the reasoning implicit in the statute, it would appear that Congress intended that for a kidnapper to obtain the benefit of the proviso he must both liberate and refrain from injuring his victim. Congress may equally have intended this provision as a deterrent, on the theory that kidnappers would be less likely to inflict violence upon their victims if they knew that such abstention would save them from the death penalty. This assumption finds some slight support in the legislative history, is not contested by the government, [and] has been accepted in one case [United States v. Parker, D.C., 19 F.Supp. 450; Id., 3 Cir., 103 F.2d 857]. * * * The quality of the injury to which Congress referred is not defined. It may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which Congress had in mind. We need indulge in no speculation in regard to such a category. The injuries inflicted upon this victim were of such degree that they can not be read out of the Act's scope without contracting it to the point where almost all injuries would be excluded." 324 U.S. at pages 283–285, 65 S.Ct. at page 667.

Similar uncertainty exists as to the precise meaning of the words "bodily harm" in section 209 of the Penal Code, to which the Legislature has given no definition. One construction of the statute was based upon the assumption of a legislative intent

to adopt the traditional meaning given those words in the context of an action in tort for a battery. People v. Tanner, 3 Cal.2d 279, 44 P.2d 324. Said the court, "*Bodily harm* is generally defined as 'any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person.'" 3 Cal.2d at page 297, 44 P.2d at page 332. This definition was restated in subsequent decisions, but in both the Tanner case and the decisions following it, the victim of the kidnaping suffered serious bodily harm. People v. Tanner, supra [victims bound with wire, tortured and nearly suffocated]; People v. Britton, 6 Cal.2d 1, 3, 56 P.2d 494 [victims bound with wire and one of them struck on the head]; People v. Brown, 29 Cal.2d 555, 559, 176 P.2d 929 [victim forcibly raped and struck by defendant]; People v. Chessman, 38 Cal.2d 166, 185, 238 P.2d 1001 [forcible rape and a violation of section 288a of the Penal Code].

The only evidence of injury to Leonard is that his wrists were bound tightly by the chains so as to "cut in" and impair to some extent the circulation of blood. There was no breaking of the skin, but "a few little marks" similar to those which would be made by the band of a wrist watch. His captors loosened the chains when he complained of their being tight. He was allowed to exercise, was given food, cigars and a newspaper to read. He was permitted to go to the bathroom, to shave, bathe and brush his teeth. When released, he stated that he felt "wonderful." No physical examination was given him at that time and there appeared to be no necessity for one.

Tested in its application to the facts of the present case, it is seriously questionable whether the definition in the Tanner case states the intention of the Legislature in distinguishing between kidnaping with bodily harm and cases in which no injury to the victim has resulted. If the more serious penalty may be imposed when the only injury is of a nature similar to that shown by the present record, which concededly is almost necessarily an incident to every forcible kidnaping, neither the purpose of enhancement of the penalty for the more heinous crime nor the intention of deterring the kidnaper from killing or injuring his victim is subserved. On the contrary, if there necessarily be bodily injury in almost every kidnaping sufficient to warrant imposition of the more serious penalty, the kidnaper might well reason that the better course for him would be to kill the victim to minimize the probability of identification.

[1] The Attorney General concedes that it is "almost impossible to conceive" of a forcible kidnaping involving more trivial injuries to the victim. Certainly, the evidence viewed most favorably in support of the judgments shows such trivial injury as to compel, as a matter of law, the conclusion that it is not of the nature contemplated by the Legislature in providing the more serious penalty for a kidnaping. In these circumstances, the determinations of the jurors, insofar as they rest upon a finding of bodily harm, cannot be upheld.

The appellants strenuously insist that because of the misconduct of the trial judge and the deputy district attorney the judgments should be reversed in their entirety. In support of this position they present more than twenty acts of asserted misconduct of the trial judge and other assertedly unfair remarks by the prosecuting attorney.

During the voir dire examination of prospective jurors, the judge repeatedly stated that "this is a death case," that they would be "duty bound" to consider the penalty, and that they should determine whether the defendants should suffer the death penalty or be imprisoned for life. Continually, when counsel for the defendants would inquire of a juror whether he would find for a defendant if he believed certain facts to be true, the judge would interrupt to ask if he would find for the prosecution if the evidence showed an opposite state of facts. There are singularly few instances in which, when the prosecuting attorney posed a state of facts, the judge inquired of the juror if he would find for the defendant if such facts were

not found to be true. At one point, when counsel for Lear asked a juror if he believed an innocent man might be brought to trial, the judge interrupted to rule that the question was improper. It should not be suggested, said the judge, that the district attorney would knowingly prosecute an innocent man.

Other statements made by the judge during the course of the trial certainly carried to the jury his belief that bodily harm had been suffered by the victim. At the outset of the trial, in addressing the jurors, he told them that they were "to determine, in the last analysis, whether or not the defendants, and each of them, should suffer the death penalty or be imprisoned for life." At another time, the judge referred to the prosecution as a "capital case" and stated that the jurors would be "duty bound to determine one question of law; that is the question of penalty."

When the defense called as a witness a stenographer present at a conversation to which testimony was given adverse to Lear, she stated that she was unable to relate the conversation without referring to her notes. A request that she be allowed to refresh her recollection for the purpose of impeaching others testifying to the conversation and to present the whole of it was denied. The judge ruled: "*We* will give the counsel an opportunity to have the statement and to impeach Inspector Ahern if he wishes to, or if he thinks he can, but *we* are going to resist any attempt to get a copy of that statement of Joe Lear before Mr. Lear has taken the stand." (Emphasis added.)

During cross-examination of the complaining witness counsel for Lear stated that he was "at a loss to understand" something the witness had said. The judge remarked: "You say you are at loss to understand, but if his testimony is clear, as far as the jury is concerned, Mr. Winters, then it is of no concern what your misunderstanding may be. You are not the trier of the facts here. If the witness has answered the question, that is all he had to do, and he doesn't have to repeat it to satisfy your apparent, as you say, lack of understanding of the answer."

At another point, the judge stated: "You know, Mr. Winters, it is the usual courtroom procedure to permit a witness to explain his answer, and you are not going to stand there and prevent this witness from explaining his answers." When counsel sought to impeach this witness by reference to the transcript of the hearing before the grand jury, the district attorney accused him of trickery. The court declined to allow the reading of a single statement from the transcript and commenced a reading of several pages of it. Objection was made that such reading by the judge would serve to emphasize the statements of the witnesses. In a long colloquy in overruling the objection the judge stated "I feel, in ruling on this matter, that there may be something to the position taken by Mr. Elkington, that there may be a trick in your question." When an objection was made, he denied saying that it was a trick; his statement, he said, was: "There may be something in what Mr. Elkington has said about a tricky question." The same judge was guilty of similar misconduct in People v. Burns, 109 Cal.App.2d 524, 544, 241 P.2d 308, 242 P.2d 9, the conviction being reversed upon that ground.

During the trial, when the prosecuting attorney referred to a subpoena for Lear and counsel challenged him to produce a copy of it, the judge interrupted to say: "He doesn't have to, any more than he has to disclose any segment of his case on behalf of the People. You know that; that is what you have been fishing for, though, for a long while * * *."

On another occasion, just after the noon recess had been called, the judge accused all of the defense counsel of "laughing and grinning" and "jesting and joking," saying: "Let the record show that I don't observe anything funny about this." They denied that there had been any such conduct, and explained that one of them had extended an invitation to another for lunch. The record does not show what was said among defense counsel, but nei-

ther does it substantiate the judge's accusation nor indicate any actions which would justify the judge's remarks before the jury.

In charging the jury, the judge gave 59 of the 63 instructions offered by the district attorney. Counsel for Lear requested 44 instructions; two of them were allowed. Only one of the 37 charges presented by Jackson was given. In the instructions, the judge used the word "guilty" forty-six times, the words "reasonable doubt" five times, and "presumption of innocence" only once. The latter two phrases were included in two instructions. Of the three instructions given at the request of the defendants, one was the definition of reasonable doubt required by section 1096 of the Penal Code.

In presenting to the jury the other instructions requested by the defendants, the judge so remarked as to their source as to create the impression they were not charges by the court. While reading one of them, the judge remarked: "Mrs. Carr and Mr. Winters, I am going to change this instruction #6 in certain particulars" and stated the changes to be made. After giving the instruction requested by counsel for Jackson, the judge stated to him "I take it that this instruction is addressed to the testimony that you have received in relation to the act of Leonard Moskovitz in allegedly accompanying * * *." But when, in closing argument, counsel for Lear referred to "the District Attorney's interpretation of bodily harm," the prosecution interrupted to say that such a definition would come from the court. The trial judge then said: "That is correct. I will give * * * the Jury an instruction on what constitutes bodily harm, and support it with legal authority."

Certain acts of the district attorney are also challenged as being prejudicial misconduct. Although what he said and did is not subject to as much criticism as the conduct of the judge, some of his statements merit discussion.

During the course of argument to the jury, repeated references were made to the Greenlease, Hart, and Lindbergh cases. Objections to these references were overruled and requests to admonish the jury to disregard them denied. These remarks included statements such as these: "[His kidnapers] weren't going to take any chances * * * so they killed Bobby Greenlease and buried him, and then another little act of pseudo kindness, a flower on his grave. That is the same kind of little generosity that was extended to Leonard Moskovitz * * * [when he was allowed] to smoke a couple of cigars;" and if the plan for delivering the ransom had failed "Leonard would have been buried somewhere, just as little Bobby Greenlease was buried * * * I think there is a very close comparison between the Greenlease case and the Moskovitz case, and the only difference in that, unfortunately, Bobby Greenlease wasn't rescued."

The record shows no basis whatever for the excuse that the comments now challenged were invited by any argument of defense counsel. Reference to other cases was made in the opening argument of the district attorney. In reply counsel for Lear stated that they were dissimilar, but there was no extensive discussion of them.

Other misconduct consists of references during the trial to matters, outside the record, including examination regarding other asserted criminal acts by the defendants which could have been made only for the purpose of disparaging their character. Also, the motives of Lear and his counsel were attacked by charging that they were "hiding behind" and "using" Lear's stepson by "deliberately" subjecting him to the courtroom crowds.

[2] If this were not a case in which the overwhelming weight of the credible evidence tends to establish the guilt of the defendants of one of the crimes of which they are charged, the misconduct of the judge and prosecuting attorney, together with other errors, would compel the judgments of conviction to be reversed in their entirety.

[3] Under the mandate of Article VI, section 4½ of the Constitution this court must dispose of the cause in such manner

as to avoid a miscarriage of justice. It is conceded that the great weight of the evidence shows a kidnaping for the purpose of ransom. However, except for the manner in which the trial was conducted, the jury might have found in favor of the defendants on other issues presented by indictment.

The judgments upon all counts of the indictment are reversed with directions to the trial court to impose upon each defendant a sentence of life imprisonment for the crime of kidnaping for the purpose of ransom as charged in count I of the indictment; the orders denying the defendants' motions for a new trial are affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In his first inaugural address (March 4, 1801) Thomas Jefferson declared: "Equal and exact justice to all men * * * freedom of religion, freedom of the press, freedom of person under the protection of the habeas corpus; *and trial by juries impartially selected*,—these principles form the bright constellation which has gone before us." This declaration was predicated on the Bill of Rights adopted ten years previous which is the foundation of the American tradition that every person charged with the commission of a public offense shall be accorded a fair and impartial trial. In my opinion the preservation of that tradition is of greater importance in the perpetuation of the American way of life than any other principle postulated by that immortal document.

There can be no doubt that this tradition has been desecrated by the conduct of the trial judge and the prosecutor in this case. Such conduct, as disclosed by the record and set forth in the majority opinion, could have no other effect than to deprive the defendants of every semblance of a fair and impartial trial. Conceding that evidence of the guilt of the defendants may be overwhelming, I can see no other conclusion than that they were denied a fair and impartial trial and that article VI, section 4½, of the Constitution of California cannot be construed to uphold a verdict and judgment rendered in such an atmosphere of prejudice and unfairness.

I would therefore reverse the judgments and grant each of the defendants a new trial.

TRAYNOR, Justice.

I dissent.

The record of the misconduct of the trial judge and prosecuting attorney as set forth in the majority opinion demonstrates that defendants were denied a fair and impartial trial. Because of the abundant evidence that defendants were guilty of kidnaping, it is contended that they could not have been prejudiced in the determination of this issue. "Regardless of their guilt, however, they were entitled to a fair and impartial trial. Moore v. Dempsey, 261 U.S. 86, 87–88, 92, 43 S.Ct. 265, 67 L.Ed. 543; see concurring opinion of Mr. Justice Jackson in Shepherd v. [State of] Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740. 'Neither can a plea for the application of [Article VI, section 4½] of the constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the constitution.' People v. Mahoney, 201 Cal. 618, 627, 258 P. 607." People v. McKay, 37 Cal.2d 792, 798, 236 P.2d 145, 150.

SCHAUER, J., concurs.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

44 Cal.2d 434

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph C. CAHAN et al., Defendants.

Charles H. Cahan, Defendant and Appellant.

Cr. 5670.

Supreme Court of California.
In Bank.
April 27, 1955.

Rehearing Denied May 25, 1955.

Prosecution for conspiring to engage in horse-race bookmaking and related offenses in violation of bookmaking laws. From order of the Superior Court, Los Angeles County, Harold W. Schweitzer, J., granting one of defendants probation, and order denying that a defendant's motion for a new trial, the defendant appealed. The Supreme Court, Traynor, J., held that where police officers in two instances surreptitiously and without consent of defendants placed microphones on premises occupied by defendants, and in other instances officers made forcible entries and seizures without search warrants, evidence obtained by such conduct was obtained in violation of constitutional guarantees against unreasonable searches and seizures and was inadmissible in prosecution of defendants.

Orders reversed.

Spence, Shenk, and Edmonds, JJ., dissented.

Opinion, 274 P.2d 724, vacated.

1. Searches and Seizures ⇐7(1)

Statute authorizing peace officer, with authorization by head of his office or department or by district attorney, to install a dictograph in a building without consent of owner, lessee or occupant for use in performance of their duties in detecting crimes does not and cannot authorize violations of the Constitution. Pen.Code, § 653h.

2. Criminal Law ⇐394
Searches and Seizures ⇐7(1)

Where police officers in two instances surreptitiously and without consent of defendants placed microphones on premises occupied by defendants, and in other instances officers made forcible entries and seizures without search warrants, evidence obtained by such conduct was obtained in violation of constitutional guarantees against unreasonable searches and seizures and was inadmissible in prosecution of defendants for violation of bookmaking laws. U.S.C.A.Const. Amends. 4, 14; West's Ann. Const. art. 1, § 19; 18 U.S.C.A. §§ 241, 242; 42 U.S.C.A. § 1983; Pen.Code, §§ 146, 337a, 653h.

3. Constitutional Law ⇐266

Decision of United States Supreme Court that guarantee of Fourth Amendment applies to states through Fourteenth Amendment does not require states that previously admitted illegally seized evidence to exclude it. U.S.C.A.Const. Amends. 4, 14.

4. Criminal Law ⇐394

Federal rule excluding illegally seized evidence is not an essential ingredient of right of privacy guaranteed by Fourth Amendment, but simply a means of enforcing that right and states may accept or reject rule as they choose. U.S.C.A.Const. Amend. 4.

Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant and fifteen other persons were charged with conspiring to engage in horse-race bookmaking and related offenses in violation of section 337a of the Penal Code. Six of the defendants pleaded guilty. After a trial without a jury, the court found one defendant not guilty and each of the other defendants guilty as charged. Charles H. Cahan, one of the defendants found guilty, was granted probation for a period of five years on the condition that he spend the first ninety days of his probationary period in the County Jail and pay a $2,000 fine. He appeals from the

order granting him probation and the order denying his motion for a new trial.

[1] Most of the incriminatory evidence introduced at the trial was obtained by officers of the Los Angeles Police Department in flagrant violation of the United State Constitution, 4th and 14th Amendments, the California Constitution, Art. I, § 19, and state and federal statutes. Penal Code §§ 146, 602; 18 U.S.C.A. §§ 241, 242; 42 U.S.C.A. § 1983. Gerald Wooters, an officer attached to the Intelligence Unit of that department testified that after securing the permission of the Chief of Police to make microphone installations[1] at two places occupied by defendants, he, Sergeant Keeler, and Officer Phillips one night at about 8:45 entered one "house through the side window of the first floor," and that he "directed the officers to place a listening device under a chest of drawers." Another officer made recordings and transcriptions of the conversations that came over wires from the listening device to receiving equipment installed in a nearby garage. About a month later, at Officer Wooters' direction, a similar device was surreptitiously installed in another house and receiving equipment was also set up in a nearby garage. Such methods of getting evidence have been caustically censured by the United States Supreme Court: "That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversations of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment * * *." Irvine v. People of State of California, 347 U.S. 128, 132, 74 S.Ct. 381, 383, 98 L.Ed. 561. Section 653h of the Penal Code does not and could not authorize violations of the Constitution, and the proviso under which the officers purported to act at most prevents their conduct from constituting a violation of that section itself.

[2] The evidence obtained from the microphones was not the only unconstitutionally obtained evidence introduced at the trial over defendants' objection. In addition there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants.

The forcible entries and seizures were candidly admitted by the various officers. For example, Officer Fosnocht identified the evidence that he seized, and testified as to his means of entry: "* * * and how did you gain entrance to the particular place? I forced entry through the front door and Officer Farquarson through the rear door. You say you forced the front door? * * * Yes. And how? I kicked it open with my foot * * *." Officer Schlocker testified that he entered the place where he seized evidence "through a window located I believe it was west of the front door. * * * [W]hen you tried to force entry in other words, you tried to knock it [the door] down is that right? We tried to knock it down, yes, sir. What with? A shoe, foot. Kick it? Tried to kick it in, yes. And then you moved over and broke the window to gain entrance, is that right? We did." Officer Scherrer testified that he gained entry into one of the places where he seized evidence by kicking the front door in. He also entered another place, accompanied by Officers Hilton and Horral, by breaking through a window. Officer Harris "just walked up and kicked the door in" to gain entry to the place assigned to him.

1. Section 653h of the Penal Code provides: "Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals."

Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the City employs and pays them.

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Although this amendment, like each of the other provisions of the original Bill of Rights, applies only to the federal government, Barron, for Use of Tiernan v. Mayor and Council of City of Baltimore, 7 Pet. 243, 8 L.Ed. 672; Adamson v. People of State of California, 332 U.S. 46, 51, 67 S.Ct. 1672, 91 L.Ed. 1903, "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' [Palko v. State of Connecticut, 302 U.S. 319, 324–325, 58 S.Ct. 149, 82 L.Ed. 288] and as such enforceable against the States through the Due Process Clause [of the Fourteenth Amendment]." Wolf v. People of State of Colorado, 338 U.S. 25, 27–28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782. An essentially identical guarantee of personal privacy is set forth in Article I, section 19 of the California Constitution.

Thus both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in *no* case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional provisions were adopted and the choice was made that all the people, guilty and innocent alike, should be secure from unreasonable police intrusions, even though some criminals should escape.[2] Moreover, the constitutional provisions make no distinction between the guilty and the innocent, and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects.

The constitutional provisions themselves do not expressly answer the question whether evidence obtained in violation thereof is admissible in criminal actions. Neither Congress nor the Legislature has given an answer, and the courts of the country are divided on the question. The federal courts and those of some of the states[3] exclude such evidence. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341,

2. "Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to the individual dignity and self respect. They may have overvalued privacy, but I am not disposed to set their command at naught." Jackson, J., dissenting in Harris v. United States, 331 U.S. 145, 197, 198, 67 S.Ct. 1098, 1120, 91 L.Ed. 1399; see also, United States v. Di Re, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210.

3. Legislation has recently been enacted in Texas, Acts 1953, 53d Leg., p. 669,

58 L.Ed. 652; McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153; see state cases collected in Appendix to Wolf v. People of State of Colorado, supra, 338 U.S. 25, 33–39, 69 S.Ct. 1359. In accord with the traditional common-law rule, see, McCormick on Evidence, p. 296, the courts of a majority of the states admit it, see cases collected in Appendix to Wolf v. People of State of Colorado, supra, 338 U.S. 25, 33–39, 69 S.Ct. 1359, and heretofore the courts of this state have admitted it. People v. Le Doux, 155 Cal. 535, 547, 102 P. 517; People v. Mayen, 188 Cal. 237, 242–253, 205 P. 435, 24 A.L.R. 1383; People v. Gonzales, 20 Cal.2d 165, 169, 124 P. 2d 44; People v. Kelley, 22 Cal.2d 169, 172, 137 P.2d 1.

[3, 4] The decision of the United States Supreme Court in Wolf v. People of State of Colorado that the guarantee of the Fourth Amendment applies to the states through the Fourteenth does not require states like California that have heretofore admitted illegally seized evidence to exclude it now. The exclusionary rule is not "an essential ingredient" of the right of privacy guaranteed by the Fourth Amendment, but simply a means of enforcing that right, which the states can accept or reject: "Granting that in practice the exclusion of evidence may be *an* effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, *if* consistently enforced, *would be* equally effective." Italics added. Wolf v. People of State of Colorado, supra, 338 U.S. 25, at page 31, 69 S.Ct. at page 1362. The court did not state that the other methods of deterring unreasonable searches and seizures must be "consistently enforced" and be "equally effective." Except in extreme cases, see, Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, it is apparently willing to leave the matter of deterring unreasonable searches and seizures by state officers entirely to the states and is not yet ready to condemn methods other than the exclusion of the evidence as falling below "minimal standards" even though the state makes no effort whatever to enforce them and in practical effect, therefore, has no method of making this basic constitutional guarantee effective. It would appear, therefore, that despite earlier statements of the United States Supreme Court that the Fourth or the Fifth Amendment barred the use of evidence obtained through an illegal search and seizure, Gouled v. United States, 255 U.S. 298, 311–313, 41 S.Ct. 261, 65 L.Ed. 647; Amos v. United States, 255 U.S. 313, 315–316, 41 S.Ct. 266, 65 L.Ed. 654; Weeks v. United States, 232 U.S. 383, 391–392, 34 S.Ct. 341, 58 L.Ed. 652, "the federal exclusionary rule", in the words of Mr. Justice Black, "is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Concurring opinion in Wolf v. People of State of Colorado, supra, 338 U.S. 25, at page 39–40, 69 S.Ct. at page 1367; see also, Irvine v. People of State of California, 347 U.S. 128, 135, 74 S.Ct. 381. It would seem that it is also a rule that Congress could make binding on the states to deter state invasions of the Fourth Amendment's guarantee, which is now recognized as limiting state as well as federal action. Cf. Civil Rights Act, Rev.Stats. § 1979, 42 U.S.C.A. § 1983; 18 U.S.C.A. §§ 241, 242; Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; see also, Stefanelli v. Minard, 342 U.S. 117, 120–121, 72 S.Ct. 118, 96 L.Ed. 138.

The rule of the Wolf case that the Fourteenth Amendment does not require the exclusion of evidence obtained by an unreasonable search and seizure was reaffirmed recently in Irvine v. People of State of California, 347 U.S. 128, 74 S.Ct.

ch. 253, § 1, Vernon's Ann.Code Crim. Proc. 727a, North Carolina, Stats.1951, ch. 644, § 1, Gen.Stat. § 15–27, and Maryland, Stat 1947, ch. 752, p. 1849, Stat.1951, chs. 145, 704, 710, Stat.1952, ch. 59, Md.Ann.Code, art. 35, §§ 5, 5A (limited to misdemeanor cases), prohibiting the use of illegally obtained evidence.

381, 386. The decision, as in the Wolf case, was by a divided court. Justice Douglas dissented as he did in the Wolf case, and Justice Clark declared: "Had I been here in 1949 when Wolf was decided I would have applied the doctrine of Weeks v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, to the states. But the Court refused to do so then, and it still refuses today. Thus Wolf remains the law and, as such, is entitled to the respect of this Court's membership. * * * Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction." Justices Frankfurter and Burton, who were among the majority in the Wolf case, would hold that the methods employed in the Irvine cases are so repulsive that evidence so obtained must be excluded as a matter of due process of law. Not only was the court closely divided, but Justice Jackson felt it appropriate to declare for the majority: "Now that the Wolf doctrine [the guarantee of the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth] is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the [exclusionary] rule would be an unwarranted use of federal power." 347 U.S. at page 134, 74 S.Ct. at page 384. Thus, after states that rely on methods other than the exclusionary rule to deter unreasonable searches and seizures have had an opportunity to reconsider their rules in the light of the Wolf doctrine, the way is left open for the United States Supreme Court to conclude that if these other methods are not "consistently enforced" and are therefore not "equally effective" see Wolf v. People of State of Colorado, supra, 338 U.S. 25, 31, 69 S.Ct. 1359, the "minimal standards" of due process have not been met.[4]

Meanwhile, pursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule.

4. The Wolf and Irvine cases would then be brought into line with the cases holding coerced confessions inadmissible. Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Watts v. State of Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; Haley v. State of Ohio, 332 U.S. 596, 601, 68 S.Ct. 302, 92 L.Ed. 224; Malinski v. People of State of New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192. It is now settled that such confessions are excluded, not because they may lack evidential trustworthiness ("a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true." Watts v. State of Indiana, supra, 338 U.S. 49, 50, 69 S.Ct. 1347, 1348; see also Stroble v. State of California, 343 U.S. 181, 190, 72 S.Ct. 599, 96 L.Ed. 872), but because of the manner in which they are obtained. (See, McCormick, Developments in Admissibility of Confessions, 24 Tex.L.Rev. 239, 245.) Lawlessness of state officials in obtaining evidence is common to both coerced confessions and unreasonable searches and seizures. Illegality, alone, of the means of getting confessions cannot be the reason the Due Process Clause compels their exclusion, for consistency would demand exclusion of evidence obtained by unreasonable searches and seizures. The difference in treatment of these two problems may arise from the fact that ordinarily coerced confessions are associated with physical coercion against the defendant's person. This element is usually not present in cases of unreasonable searches and seizures, but see, Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, which may involve only minor intrusions of privacy or result from good-faith mistakes of judgment on the part of police officers. There is no reason, of course, why, if the exclusionary rule is adopted, appropriate exceptions could not be developed to govern these latter situations. On the other hand, deliberate, flagrant violations of the constitutional guarantees like those in the present case and in Irvine v. People of California, 347 U.S. 128, 74 S.Ct. 381, may be as dangerous to ordered liberty as the coercion of confessions. (See, Allen, Due Process and State Criminal Procedures, 48 Nw.L.Rev. 16, 26–27).

It bears emphasis that in the absence of a holding by the United States Supreme Court that the Due Process Clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence. See, McNabb v. United States, 318 U.S. 332, 341, 63 S.Ct. 608, 87 L.Ed. 819; On Lee v. United States, 343 U.S. 747, 756, 72 S.Ct. 967, 96 L.Ed. 1270.

The rule admitting the evidence has been strongly supported by both scholars and judges.[5] Their arguments may be briefly summarized as follows:

The rules of evidence are designed to enable courts to reach the truth and, in criminal cases, to secure a fair trial to those accused of crime. Evidence obtained by an illegal search and seizure is ordinarily just as true and reliable as evidence lawfully obtained. The court needs all reliable evidence material to the issue before it, the guilt or innocence of the accused, and how such evidence is obtained is immaterial to that issue. It should not be excluded unless strong considerations of public policy demand it. There are no such considerations.

Exclusion of the evidence cannot be justified as affording protection or recompense to the defendant or punishment to the officers for the illegal search and seizure. It does not protect the defendant from the search and seizure, since that illegal act has already occurred. If he is innocent or if there is ample evidence to convict him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all. Thus the only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence. Allowing such criminals to escape punishment is not appropriate recompense for the invasion of their constitutional rights; it does not punish the officers who violated the constitutional provisions; and it fails to protect society from known criminals who should not be left at large. For his crime the defendant should be punished. For his violation of the constitutional provisions the offending officer should be punished. As the exclusionary rule operates, however, the defendant's crime and the officer's flouting of constitutional guarantees both go unpunished. "The criminal is to go free because the constable has blundered," Cardozo, J., in People v. Defore, supra, 242 N.Y. 13, 21, 150 N.E. 585, 587, and "Society [is deprived] of its remedy against one lawbreaker because he has been pursued by another." Jackson, J., in Irvine v. California, supra, 347 U.S. 128, at page 136, 74 S.Ct. at page 385; see also, 8 Wigmore on Evidence (3rd ed.) § 2184, p. 40.

Opponents of the exclusionary rule also point out that it is inconsistent with the rule allowing private litigants to use illegally obtained evidence, see, Munson v. Munson, 27 Cal.2d 659, 664, 166 P.2d 268; Oil Workers International Union v. Superior Court, 103 Cal.App.2d 512, 579–580, 230 P.2d 71; cf., Herrscher v. State Bar, 4 Cal.2d 399, 412, 49 P.2d 832, and that as applied in the federal courts, it is capricious in its operation, either going too far or not far enough. "[S]o many exceptions to [the exclusionary] rule have been granted the judicial blessing as largely to destroy any value it might otherwise have had. Instead of adding to the security of legitimate individual rights, its principal contribution has been to add further technicalities to the law of criminal procedure. A district attorney who is willing to pay the price may easily circumvent its limitations. And the price to be paid is by no means high." (Grant, Circumventing the Fourth Amendment, 14 So.Calif.L.Rev.

5. See, 8 Wigmore on Evidence [3rd ed.] § 2184; Waite, Police Regulations by Rules of Evidence, 42 Mich.L.Rev. 679; Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill.L.Rev. 303; Grant, Circumventing the Fourth Amendment, 14 So.Calif.L.Rev. 359; Grant, Illegally Seized Evidence, 15 So. Calif.L.Rev. 60; Grant, Search and Seizure in California, 15 So.Calif.L.Rev. 139; Plumb, Illegal Enforcement of The Law, 24 Corn.L.Q. 337; Judge Cardozo's opinion in People v. Defore, 242 N.Y. 13, 150 N.E. 585, is perhaps the best judicial defense of this position.

359.) Thus, the rule as applied in the federal courts has been held to protect only defendants whose own rights have been invaded by federal officers. If the illegal search and seizure have been conducted by a state officer or a private person not acting in cooperation with federal officers, or if the property seized is not defendant's the rule does not apply. Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; Lustig v. United States, 338 U.S. 74, 78–79, 69 S.Ct. 1372, 93 L.Ed. 1819; Connolly v. Medalie, 2 Cir., 58 F.2d 629; Kelley v. United States, 8 Cir., 61 F.2d 843; Parker v. United States, 9 Cir., 183 F.2d 268; Steeber v. United States, 10 Cir., 198 F.2d 615; United States v. Stirsman, 7 Cir., 212 F.2d 900; cf. Gambino v. United States, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293.[6]

Finally it has been pointed out that there is no convincing evidence that the exclusionary rule actually tends to prevent unreasonable searches and seizures (see, Comment, 47 Nw.L.Rev. 493, 497; cf. Allen, The Wolf Case, 45 Ill.L.Rev. 1, 20; 42 Calif.L.Rev. 120) and that the "disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." Jackson, J., in Irvine v. People of State of California, 347 U.S. 128, at pages 136–137, 74 S.Ct. at page 385.

Despite the persuasive force of the foregoing arguments, we have concluded, as Justice Carter and Justice Schauer have consistently maintained,[7] that evidence obtained in violation of the constitutional guarantees is inadmissible. People v. Le Doux, 155 Cal. 535, 102 P. 517; People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, and the cases based thereon are therefore overruled.[8] We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule

6. Since it was determined in Wolf v. People of State of Colorado, supra, 338 U.S. 25, 69 S.Ct. 1359, that the Fourth Amendment prohibitions are applicable to state officers, it may be that evidence secured illegally by state officers is no longer admissible in federal courts. See, Murphy, J., concurring in Lustig v. United States, 338 U.S. 74, at page 80, 69 S.Ct. 1372, at page 1375. "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." See also, McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L.Ed. 153; United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59; Allen, The Wolf Case, 45 Ill. L.Rev. 1, 24.

A distinction with respect to evidence illegally obtained by private individuals may be justified by the fact that the constitutional provisions only proscribe governmental action. "It is one thing for the government to take advantage of information which one wrongdoer reveals of another, or the revelations which ensue when thieves fall out, and quite another thing for the government to condone or encourage a violation of the law by officers sworn to observe and enforce the law. If peace officers are rewarded for breaching the peace, what more potent influence could induce people generally to hold the law in contempt and to break through legal barriers which stand across the path of their desires!" State v. Owens, 302 Mo. 348, 377, 259 S.W. 100, 108, 32 A.L.R. 383; see also, Allen, The Wolf Case, 45 Ill.L.Rev. 1, 23.

7. See dissenting opinions in People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Kelley, 22 Cal.2d 169, 137 P. 2d 1; People v. Rochin, 101 Cal.App.2d 140, 143, 149, 225 P.2d 1, 913, reversed by United States Supreme Court, Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R. 2d 1396; In re Dixon, 41 Cal.2d 756, 764, 264 P.2d 513.

8. "[S]ince experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule." Sutherland, J., in Funk v. United States, 290 U.S. 371, 381, 54 S.Ct. 212, 215, 78 L.Ed. 369.

have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. "[N]o distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944. Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business." See, McNabb v. United States, 318 U.S. 332, 345, 63 S.Ct. 608, 87 L.Ed. 819. Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants, Lee On v. Long, 37 Cal.2d 499, 502–503, 234 P.2d 9, and cases cited; a fortiori, they should not extend that aid and thereby permit the consummation of illegal schemes of the state itself. See, Roberts, J., concurring in Sorells v. United States, 287 U.S. 435, 453, 53 S.Ct. 210, 77 L.Ed. 413. It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the "concept of ordered liberty." See, Allen, The Wolf Case, 45 Ill.L.Rev. 1, 20. "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal —would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944; see also, State v. Owens, 302 Mo. 348, 377, 259 S.W. 100, 32 A.L.R. 383; Atz v. Andrews, 84 Fla. 43, 94 So. 329, 332; Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860, 866, 13 A.L.R. 1303; State v. Arregui, 44 Idaho 43, 254 P. 788, 792, 52 A.L.R. 463; State v. Gooder, 57 S.D. 619, 234 N.W. 610, 613.

If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be. Rochin v. People of California, supra, 342 U.S. 165, 72 S.Ct. 205. Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights. This peril has been recognized and dealt with when its challenge has been obvious; it

cannot be forgotten when it strikes further from the courtroom by invading the privacy of homes.

If the constitutional guarantees against unreasonable searches and seizures are to have significance they must be enforced, and if courts are to discharge their duty to support the state and federal constitutions they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. If such were the case there would be more force to the argument that a particular criminal should not be redressed for a past violation of his rights by excluding the evidence against him. Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. "Alternatives [to the exclusionary rule] are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all." Murphy, J., dissenting in Wolf v. People of State of Colorado, supra, 338 U.S. 25, 41, 69 S.Ct. 1359, 1369, see also, Weeks v. United States, 232 U.S. 383, 393, 34 S.Ct. 341, 58 L.Ed. 652. "The difficulty with [other remedies] is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion." Jackson, J., in Irvine v. People of State of California, supra, 347 U.S. 128, 137, 74 S.Ct. 381, 386. Moreover, even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer. "Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends." Frankfurter, J., dissenting in Harris v. United States, 331 U.S. 145, 156, 67 S.Ct. 1098, 1104, 91 L.Ed. 1399. There is thus all the more necessity for courts to be vigilant in protecting these constitutional rights if they are to be protected at all. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, was decided over thirty years ago. Since then case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred. On the other hand, reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent. In short, the constitutional provisions are not being enforced.

Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. Moreover, the same considerations that justify the privilege against self-incrimination are not irrelevant here. As Wigmore pointed out, that privilege, just as the prohibition against unreasonable searches and seizures, is primarily for the protection of the innocent. "The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself morally suffer thereby.* The inclination develops to rely

mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." (8 Wigmore on Evidence [3rd ed.] § 2251, p. 309.) Similarly, a system that permits the prosecution to trust habitually to the use of illegally obtained evidence cannot help but encourage violations of the constitution at the expense of lawful means of enforcing the law. See, Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 172, 67 S.Ct. 1098. On the other hand, if courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.

It is contended, however, that the police do not always have a choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves. It was rejected when those provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted. He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught. "It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole." Frankfurter, J., dissenting in Harris v. United States, supra, 331 U.S. 145, 173, 67 S.Ct. 1098, 1112. The situation presented differs only in degree from other situations where the choice must be made between securing convictions by illegal means or allowing criminals to go free. Cases undoubtedly arise where a violation of the privilege against self-incrimination, a coerced confession, the testimony of defendant's spouse, a violation of the attorney-client privilege or other privileges is essential to the conviction of the criminal, but the choice has been made that he go unpunished. Arguments against the wisdom of these rights and privileges, just as arguments against the wisdom of the prohibitions against unreasonable searches and seizures, should be addressed to the question whether they should exist at all, but arguments against the wisdom of the constitutional provisions may not be invoked to justify a failure to enforce them while they remain the law of the land.[9]

We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has intro-

9. "Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is the only sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

"It seems to me inconsistent to challenge the exclusionary rule on the ground

duced needless confusion into the law of criminal procedure. The validity of this contention need not be considered now. Even if it is assumed that it is meritorious, it does not follow that the exclusionary rule should be rejected. In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them. Under these circumstances the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.

The orders are reversed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

The guilt of the appellant is clearly demonstrated by the record before us. See People v. Cahan, Cal.App., 274 P.2d 724. He and his numerous codefendants unquestionably engaged in a far-reaching conspiracy to commit innumerable violations of the laws of the State of California. Six of his codefendants pleaded guilty and seven others, in addition to appellant, were convicted upon the trial. We have before us solely the appeal of defendant Charles H. Cahan.

Upon the trial, certain evidence was admitted over the objection that it had been illegally obtained. The learned trial judge, following precisely the non-exclusionary rule which, until the filing of the majority opinion in this case, had been firmly established as the law of this state, admitted the evidence over the objection. The non-exclusionary rule had been enunciated by this court in the relatively early case of People v. Le Doux, 155 Cal. 535, 102 P. 517, and was reiterated in People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, after the United States Supreme Court had adopted the so-called Weeks doctrine. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. More recently, this court, in a well-reasoned opinion written by Mr. Justice Traynor in People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44, again followed the non-exclusionary rule; and it similarly followed that rule in the later decisions of People v. Kelley, 22 Cal.2d 169, 137 P.2d 1, and People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8. Consistent adherence to the non-exclusionary rule has been further demonstrated by the denial of petitions for hearing by this court in numerous cases, only a few of which need be cited. People v. Peak, 66 Cal.App.2d 894, 153 P.2d 464; People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 168 P.2d 443; People v. Oreck, 74 Cal.App.2d 215, 168 P.2d 186; People v. Tucker, 88 Cal.App.2d 333, 198 P.2d 941; People v. Sica, 112 Cal.App.2d 574, 247 P.2d 72; People v. Allen, 115 Cal.App.2d 745, 252 P.2d 968.

that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of the search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge * * *, the burden is on those who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to the inclusion in this amendment of the one sanction which will give the constitutional provision, however it is defined, genuine meaning." Senator Robert F. Wagner speaking before the New York Constitutional Convention of 1938. (Record of the New York State Constitutional Convention 559–560, reprinted in Allen, The Wolf Case, 45 Ill.L.Rev. 1, 19.)

A reading of the above-mentioned authorities shows that this court has previously considered practically every argument now advanced for the adoption of the so-called exclusionary rule and has consistently determined that such arguments were outweighed by those advanced in favor of the non-exclusionary rule. In adopting and adhering to the non-exclusionary rule, the law of the State of California has thereby been kept in harmony with the law of the great majority of the other states and of all the British commonwealths; as well as in line with the considered views of the majority of the most eminent legal scholars. Only the federal courts and the courts of a relatively few states have adopted the judicially created exclusionary rule. See appendix to Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782. It therefore appears that the great majority of the legal minds which have dealt with this problem have been in accord with the views expressed by our predecessors on this court and with the views expressed by the majority of the present members of this court as declared in People v. Gonzales, supra, 20 Cal.2d 165, 124 P.2d 44, and our other recent decisions. But despite this great wealth of legal precedent pointing to the desirability of the continuance of the non-exclusionary rule, the majority of this court now does a judicial turnabout and declares that "People v. Le Doux, 155 Cal. 535, 102 P. 517; People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, and the cases based thereon are therefore overruled." This is a forthright declaration but, with all due deference to the views of the majority, I cannot join in it.

I agree with the majority that "* * * in the absence of a holding by the United States Supreme Court that the Due Process Clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." The United States Supreme Court has never held that the Due Process Clause requires such exclusion but, on the contrary, has indicated that the federal exclusionary rule "is a judicially created rule of evidence which Congress might negate." Concurring opinion of Black, J., in Wolf v. People of State of Colorado, supra, 338 U.S. 25, 40, 69 S.Ct. 1359, 1367. California, in line with the great weight of authority, has always applied the non-exclusionary rule, and if there is any virtue in the doctrine of *stare decisis*, this court should not overturn this firmly established rule in the absence of compelling reasons for such change. The difference in point of view stems from the fact that the majority apparently have found compelling reasons for such change while I have not.

If the question were an open one in this state, I would still be of the opinion that the non-exclusionary rule should be judicially declared to be the rule in California. The expression of this view does not signify that I condone any illegal search or seizure by any enforcement officer—federal, state or local—or by any other person. On the contrary, the constitutional and statutory rights of every citizen should be respected and protected. The law of this state provides both criminal sanctions, Penal Code § 146, and civil remedies for the violations of such rights; and it has been declared that the federal statutes cover violations by any person of the federal constitutional provisions. Irvine v. People of State of California, 347 U.S. 128, 138, 74 S.Ct. 381. Hence, the main question presented in criminal proceedings of this nature is whether the exclusionary rule, in the light of such relative advantages and disadvantages which may result from its adoption, should be preferred to the non-exclusionary rule. In determining this question we may well consider the experience under the federal rule.

The experience of the federal courts in attempting to apply the exclusionary rule does not appear to commend its adoption elsewhere. The spectacle of an obviously guilty defendant obtaining a favorable ruling by a court upon a motion to suppress evidence or upon an objection to evidence, and thereby, in effect, obtaining immunity from any successful prosecution

of the charge against him, is a picture which has been too often seen in the federal practice. In speaking of an obviously guilty defendant, I refer by way of example to one from whose home has been taken large quantities of contraband, consisting of narcotics or other commodities, the very possession of which constitutes a serious violation of the law. The above-mentioned result, however, is the inevitable consequence of the application of the federal exclusionary rule in those cases in which it may be ultimately determined that a search or seizure has been made illegally, either because of the absence of a search warrant or because of some technical defect in the affidavit upon which the warrant was based. Furthermore, under the present federal practice, the trial of the accused is interrupted to try the question of whether the evidence was in fact illegally obtained. This question is often a delicate one, and the main trial is at least delayed while the question of whether some other person has committed a wrong in obtaining the evidence has been judicially determined; and if the claim of the accused is sustained, the prosecution of the case against the accused, regardless of the fact that his guilt may appear clear, is often frustrated. The delicacy of the question results from the fact that there is still great uncertainty in the law as to the precise circumstances which will render a search or seizure "unreasonable," and as to the precise nature of the defects in the affidavit which will render invalid a search warrant.

It would serve no useful purpose to reiterate all the arguments which have been advanced against the adoption of the exclusionary rule. They have been set forth in numerous authorities cited in the majority opinion in the present case and in the appendix to Wolf v. People of State of Colorado, supra, 338 U.S. 25, 69 S.Ct. 1359. With commendable frankness, many of these arguments are summarized in the majority opinion here. They were discussed extensively in a learned opinion by Justice Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585, where the court unanimously decided against its adoption. And while it may be an overstatement to say, as does Dean Wigmore, that the exclusion of such evidence is based upon "misguided sentimentality" (Wigmore on Evidence, 3rd ed., Vol. VIII, § 2184, p. 36), it is significant that this learned writer should have felt impelled to make such statement. The fact is that the courts have been put to a difficult choice, but there is no doubt that the great majority of courts have determined that the cost of the adoption of the exclusionary rule is too great when compared to the relatively little good that it can accomplish.

The only new argument for the adoption of the exclusionary rule is based upon the fact that the United States Supreme Court has again spoken on the subject in Irvine v. People of State of California, supra, 347 U.S. 128, 74 S.Ct. 381. There the court was again divided, with the dissenting justices, under the particular facts of that case, advocating a reversal but with no unanimity as to the reasons for such reversal. The majority nevertheless affirmed the judgment of conviction and sustained the rule of Wolf v. People of State of Colorado, supra, 338 U.S. 25, 69 S.Ct. 1359. While arguments in favor of any approach to the problem there presented may be found in the opinions of the several justices, I find nothing in the main opinion which would indicate the compulsion for, or desirability of, a change in the established rule in the state. On the contrary, I find statements in the main opinion which give cogent reasons for adhering to the non-exclusionary rule.

In the Irvine case, the main opinion states, 347 U.S. at page 134, 74 S.Ct. at page 384: "The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions."

Again, 347 U.S. on pages 136 and 137, 74 S.Ct. at page 385, it is said in the main Irvine opinion: "It must be remembered

that petitioner is not invoking the Constitution to prevent or punish a violation of his federal right recognized in Wolf or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime. That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them."

The above-quoted language from the main opinion in the Irvine case shows that there is relatively little to be said in favor of the exclusionary rule. If that rule is "no more than a mild deterrent at best" and if "It deprives society of its remedy against one lawbreaker because he has been pursued by another," it seems clear that little good and much harm can come from its adoption. The above-quoted language also shows that this court is under no compulsion to reverse its former holdings and to adopt the federal exclusionary rule.

Furthermore, I cannot ascertain from the majority opinion in the present case the nature of the rule which is being adopted to supplant the well established non-exclusionary rule in California. Is it the exclusionary rule as interpreted in the federal courts with all its technical distinctions, exceptions, and qualifications and embracing "standards as to which [the United States Supreme] Court and its members have been so inconstant and inconsistent." Irvine v. People of State of California, supra, 347 U.S. 128, 134, 74 S. Ct. 384. Apparently not, for the majority opinion here assumes the validity of the contention that "the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure." But after making passing reference to possible "needless refinements and distinctions" and "needless limitations" found in the federal cases, the majority declares that this court is free to reject the rules established by such cases, and it concludes as follows: "Under these circumstances, the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."

The majority does not suggest what these "workable rules" may be nor how "confusion" may be avoided. Neither the federal courts nor the courts of any of the few states which adopted the exclusionary rule have apparently found a satisfactory solution to this problem of developing "workable rules," and it seems impossible to contemplate the possibility that this court can develop a satisfactory solution. At best, this court would have to work out such rules in piecemeal fashion as each case might come before it. In the meantime, what rules are to guide our trial courts in the handling of their problems? If the non-exclusionary rule can be said to have one unquestioned advantage, it is the advantage of certainty. On the other hand, it appears that the exclusionary rule, in the many ramifications of its application to innumerable factual situations, is fraught with such difficulty as to make the formation of satisfactory, certain and workable rules a practical impossibility.

Much of the above discussion has been directed to the undesirability of adopting the exclusionary rule if the question were

a novel one in this state. Of course, the question is not a novel one, for the numerous decisions show that this state had heretofore adopted a fixed and consistent policy on the subject. I find nothing that has occurred since the recent decisions of this court in People v. Gonzales, supra, 20 Cal.2d 165, 124 P.2d 44; People v. Kelley, supra, 22 Cal.2d 169, 137 P.2d 1, and People v. Haeussler, supra, 41 Cal.2d 252, 260 P.2d 8, to furnish compelling reasons for this court to enunciate a change of that policy.

If, however, reasons may be said to exist for a change in the established policy of this state, I believe that the Legislature, rather than the courts, should make such change. This is particularly true in a situation such as the present one, when the change of policy should be accompanied by "workable rules" to implement such change. Otherwise, this court, by the sweeping repudiation of its past decisions, launches the administration of justice upon an uncharted course which the trial courts will find great difficulty in following. In this connection, it is worthy of note that bills have frequently been introduced in the Legislature to accomplish precisely that which is accomplished by the majority opinion, to wit: the supplanting of the non-exclusionary rule by the so-called exclusionary rule, without prescribing any "workable rules" for the latter's application. In the recent legislative sessions of 1951 (see Senate Bill No. 1689 and Assembly Bill No. 3120) and of 1953 (see Assembly Bills Nos. 2896 and 3126), such bills have been introduced but none has ever been brought to a vote in either house. Under the circumstances, it would be far better for this court to allow the Legislature to deal with this question of policy, for the Legislature could accompany any desired change with needed legislation establishing the rules to guide our courts in the application of the new policy.

Returning to the precise situation presented by the record before us, it may be conceded that the illegality in obtaining the evidence was both clear and flagrant. It may be further conceded that the crimes which defendants conspired to commit were not in the class of the more serious public offenses. The fact remains, however, that the exclusionary rule, as adopted by the majority, is a rule for all cases and that it deprives society of its remedy against the most desperate gangster charged with the most heinous crime merely because of some degree of illegality in obtaining the evidence against him. Thus, it appears that the main beneficiaries of the adoption of the exclusionary rule will be those members of the underworld who prey upon law-abiding citizens through their criminal activities. It further appears that the adoption of the exclusionary rule will inevitably lead to unnecessary confusion, delay and inefficiency in the administration of justice. Such is the price that society must pay for the adoption of the exclusionary rule, a rule of uncertain nature and doubtful value which is "no more than a mild deterrent at best."

In my opinion, the cost of the adoption of the exclusionary rule is manifestly too great. It would be far better for this state to adhere to the non-exclusionary rule, and to re-examine its laws concerning the sanctions to be placed upon illegal searches and seizures. If the present laws are deemed inadequate to discourage illegal practices by enforcement officers, the Legislature might well consider the imposition of civil liability for such conduct upon the governmental unit employing the offending officer, in addition to the liability now imposed upon the officer himself. It might also consider fixing a minimum amount to be recovered as damages in the same manner that a minimum has been fixed for the invasion of other civil rights. Civ.Code § 52. These methods would be far more effective in discouraging illegal activities on the part of enforcement officers and such methods would not be subject to the objection, inherent in the adoption of the exclusionary rule, that "It deprives society of its remedy against one lawbreaker because he has been pursued by another." Irvine v. People of State of California, supra, 347 U.S. 128, 136, 74 S.Ct. 385.

In my opinion, we should adhere to our prior decisions and affirm the judgment.

SHENK and EDMONDS, JJ., concur.

Rehearing denied; SHENK and SPENCE, JJ., dissenting.

132 Cal.App.2d 651

Kermit WOODIE and Roger Woodie, d/b/a Lawndale Wrecking Company; Marjorie B. Hyde, Administratrix of the Estate of Oribel Mills Tefft, Deceased; and Clayton B. Mills, Petitioners,

v.

H. L. BYRAM, County Tax & License Collector, and Roy N. Clayton, B. F. Shrimpton, Robert M. Phillco, Bert T. Harvey, Francis J. Heusel and Regional Planning Commission of Los Angeles County, Defendants and Respondents.

Kermit Woodie and Roger Woodie, d/b/a Lawndale Wrecking Company, Appellants.

Civ. 20635.

District Court of Appeal, Second District, Division 1, California.

May 2, 1955.

Rehearing Denied May 23, 1955
Hearing Denied June 29, 1955.

Proceeding in mandate to compel issuance of automobile wrecking yard license to petitioner. The Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment denying petition and petitioner appealed. District Court of Appeal, Drapeau, J., held that although operator had violated both licensing ordinance and fencing ordinance, county which had issued license and renewal, after compliance with fencing ordinance, pursuant to new zoning ordinance permitting the yard as nonconforming use if use was not in violation of zoning ordinance or any other ordinance was estopped from refusing to issue renewal to purchaser.

Reversed.

1. Estoppel ⇐62(1)

Although generally a governmental agency may not be estopped by conduct of its officers and employees, there are many instances in which equitable estoppel will run against the government where justice and right require it.

2. Estoppel ⇐62(3)

Where automobile wrecking business was conducted in violation of both licensing and fencing ordinances but after property was placed in zone where wrecking business was prohibited by new zoning ordinance which permitted continuance of nonconforming use if existing use was not in violation of zoning ordinance or any other ordinance, operators complied with fencing ordinance and county officials with knowledge of prior violations issued license and subsequently renewed it, after purchaser acquired business and executed lease of property in reliance on issuance of license and renewal, county was estopped from complaining of prior violations and could not refuse to issue renewal license to purchaser

James C. Webb, Long Beach, for appellants.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

In October of 1948, Ernest A. Tefft, doing business as Lawndale Wrecking Company, and one of the owners of the realty at 15310 Hawthorne Boulevard in an unincorporated area of Los Angeles County, established an automobile wrecking business thereon. At that time the premises were in Zone M-3 where automobile wrecking yards were permitted. However, said Tefft did not obtain the auto wrecker's license then required by county ordinance No. 431. At all times herein mentioned, county ordinance No. 2174 required an eight foot fence surrounding such wrecking yards, but the instant yard was maintained without such fence until after May 24, 1949.

On the latter date, the Board of Supervisors of Los Angeles County, enacted ordinance No. 5334, effective June 24, 1949, which amended ordinance No. 1494, so as to place the instant premises in Zone C-3. Section 258 of said ordinance No. 1494 prohibited in Zone C-3 the establishment or maintenance of any junk or auto wrecking yard, except as to existing uses, as provided by section 531 thereof, to-wit:

"An exception is granted automatically hereby, so as to permit the continuation of the particular existing uses of * * * any premises existing in the respective zones immediately prior to the time this ordinance, or any amendment thereof becomes effective, if such existing use was not in violation of this or any other ordinance or law * * *"

Thereafter, on September 6, 1949, defendant Byram, as County Tax & License Collector, issued to said Tefft an auto wrecker's license for the premises in question. "* * the said Ernest A. Tefft applied for and obtained said auto wrecking license in attornment to orders from the Sheriff * * *" Both said Byram and the Sheriff knew that from October 18, 1948, said Tefft had continuously conducted the business at said premises. This license was renewed for the calender year of 1950.

Also "* * * during the month of August, 1949, and in attornment to orders to do so from the Sheriff * * * petitioners erected completely around said premises and at all times maintained * * a * * * fence complying in all respects with the provisions of said ordinance No. 2174."

On September 18 or 19, 1950, petitioners Woodie contemplated the purchase of said automobile wrecking business. They inquired of Mr. Camp, an employee of defendant Regional Planning Commission, regarding the zoning of the Hawthorne Boulevard property. He informed them that "from the information available, that the then owner of the property had an automatic exception to conduct an automobile wrecking business which would go with the land, and Kermit and Roger Woodie would have the same rights if they took the property over."

On September 20, 1950, petitioners Woodie bought the wrecking business for $10,000, and executed a lease of the premises for a five year period at a rental of $4,200. They also filed and published their certificate of fictitious firm name of Lawndale Wrecking Company.

On that date, and on the subsequent dates of January, 1951, September 24, 1951 and January, 1952, said petitioners Woodie applied to defendant Byram for a license to conduct the business of automobile wrecking on the said premises, offering to pay the required fee. However, defendant Byram refused to issue same, on the ground such business was prohibited at said location by zoning ordinance No. 5334.

Petitioners sought by the instant proceeding in mandate to compel the issuance to them of a license to conduct said auto wrecking business.

At the conclusion of the trial herein, the court found the facts above recited. It also found, among others, that "on October 18, 1948, the registration division of the Department of Motor Vehicles of the State of California issued to Lawndale Wrecking Company automobile wrecker's license No. 6616, with all the rights and privileges pertaining thereto." And on May 3, 1949, the said state agency again issued to said company automobile wrecker's license No. WR. 6616 for the year 1949.

From the facts found, the court concluded that on June 24, 1949, when the property was placed in Zone C-3, the use of the premises as an auto wrecking yard was in violation of two other ordinances: No. 431, because no license thereunder had been obtained; and No. 2174, because of lack of the required fencing. Therefore, that the exception provided by section 531 of ordinance No. 1494 was not applicable.

From the judgment which followed, denying a writ of mandate, petitioners Woodie appeal.

Respondents admit (1) that prior to June 24, 1949, the subject property was located in Zone M-3 where auto wrecking yards were permitted; (2) that on that date, the property was placed in Zone C-3 where such business was prohibited, except as provided in section 531 of ordinance No. 1494.

Respondents contend, however, that since the original owners conducted the business in deliberate violation of both the licensing ordinance and the fencing ordinance on the date when ordinance No. 1494 became effective, the continued nonconforming use of

the premises is not protected by section 531 thereof.

Appellants urge that respondents are estopped to raise the question of violation of the licensing and fencing ordinances. This for the reason that respondent Byram with knowledge of such violations issued the auto wreckers' licenses for the years 1949 and 1950. Also, that appellants were given assurance prior to their investment in the business that they would be able to obtain the necessary licenses to continue it as a nonconforming use.

Neither the petition for the writ of mandate nor the stipulation of facts is included in the record on appeal.

However, the findings of fact reveal that from the day the business was established on October 18, 1948, to the date of its sale to appellants on September 20, 1950, the original owners were licensed to operate it, to-wit:

1. Pursuant to auto wrecker's license issued by the State of California, for the balance of the year 1948, and for the year of 1949;

2. Pursuant to auto wrecking license issued by the County of Los Angeles on September 6, 1949, which was renewed for the year 1950.

It was not until the business was sold and the purchasers took possession that a license was denied, on the ground that automobile wrecking was not permitted by zoning ordinance No. 5334.

The findings also reveal that in August of 1949, appellants' predecessors complied with the fencing regulation. And that on September 6, 1949, when the county license was issued, both respondent Byram and the Sheriff knew that the business had been operated continuously from October 18, 1948.

From the facts disclosed by the trial court's findings an inference arises that when appellants paid the purchase price of $10,000 and executed a five year lease of the property, they did so in reliance on the license issued by respondent Byram on September 6, 1949, and its renewal for the year 1950.

[1] As stated in Farrell v. County of Placer, 23 Cal.2d 624, 627, 145 P.2d 570, 571, 153 A.L.R. 323: "It has been said generally that a governmental agency may not be estopped by the conduct of its officers or employees (10 Cal.Jur. 650–651), but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. (Citation of authorities.) It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government", it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' 48 Harv.L.Rev. 1299."

[2] In the instant case the facts clearly establish that respondents should be estopped to complain of the so-called violations of the original owners of the instant business, in order to deprive appellants of the exception granted by section 531 of ordinance No. 1494.

Accordingly, it is concluded that the judgment appealed from is not supported by the findings, because the material findings are in favor of appellants, and the judgment, nevertheless, is against them. (24 Cal.Jur. 999, sec. 220.)

For the reasons stated, the judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

132 Cal.App.2d 642

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald C. KING, Defendant and Appellant.

Cr. 1019.

District Court of Appeal, Fourth District, California.

April 29, 1955.

Prosecution for manslaughter. The Superior Court, San Diego County, Arthur Coats, J., Assigned, entered judgment of conviction. Accused appealed. The District Court of Appeal, Mussell, J., held that evidence was sufficient for conviction.

Judgment and order affirmed.

Homicide ⇐250

Evidence was sufficient to establish, prima facie, corpus delicti, and to sustain conviction of manslaughter. Pen.Code, § 192, subd. 1.

Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

The defendant was charged with the crime of Manslaughter, Penal Code, § 192, subd. 1, in that on or about July 17, 1953, he did "wilfully, unlawfully and feloniously, without malice, kill one Otto Joseph Meyer, a human being." A jury returned a verdict of "Guilty of the crime of voluntary manslaughter as charged in the information." Defendant's motion for a new trial was denied and he was sentenced to imprisonment in the State's prison. He appeals from the judgment of conviction and the order denying his motion for a new trial and contends that the corpus delicti of the crime was not established independent of extrajudicial statements of appellant, and that the evidence is legally insufficient to support the judgment; that therefore the trial court erred in denying appellant's motion for an advised verdict at the close of the People's case, and in denying appellant's motion for a new trial.

On July 18, 1953, between 4:30 and 5:00 p. m., the body of Otto Meyer was found on the floor of the living room of his home near Rancho Santa Fe in San Diego county. A deputy sheriff who was called to the scene, and who arrived at about 7:00 p. m., observed Meyer lying on his back in the living room area just inside the doorway leading from the kitchen. His legs were slightly drawn up and a white bed pad was partially over and partially under his body. There was a pillow near his head and what appeared to be some drapery material underneath the pillow. The officer testified that Meyer's physical appearance showed he was dead and rigor mortis had set in; that Meyer had a bruised black right eye; that his nose and lips were bruised; that he had a few superficial scratches on his legs and a small laceration on his right forehead; that he was dressed in a pair of shorts only; that there was dried blood underneath his nose; that there was blood along side of the pillow, on the pillow, on the floor, and on the doors adjacent to the wall, as well as on the edge of the door jambs about five feet from the floor; that there were indications in one area that the blood had been cleaned up; that there were traces of what apparently was blood in the vicinity of a small partition or serving counter; that the house was quite untidy but that there was no evidence of any furniture having been overturned or of anything having been broken; that on top of the deepfreeze was a pair of glasses which the defendant subsequently identified as his and that there was some red substance spattered on them.

At about 10:00 p. m., July 18, 1953, Dr. Lloyd, a pathologist, performed an autopsy on the body of Meyer and his examination showed that the deceased was about forty-three years of age, about five feet, eleven inches in height, and weighed about 150 pounds. The anterior portion of the chest was flat, there was a bruise on the top of the scalp, a swelling of the tissues of the right eye and an abrasion to the right side of this eye. There was a bruise of the

right upper lip and also below the left ear and multiple small bruises over the left chest. There were small abrasions of the skin of the right elbow, right knee and both lower legs. The right eye was in an almost closed condition. Interior examination disclosed some bruises in the muscle tissues under the area of the exterior skin bruises and eight ribs on the left side were fractured. There was a small amount of blood in the left chest cavity and a very extensive abdominal hemorrhage. There were about four quarts of blood in the abdomen, some of it partially liquified and there were some clots. The liver was quite enlarged and was below the margin of the rib on the right side. There were four lacerations of the liver, both on the right side and left side. One of these lacerations was four or five inches long, another about three inches long, another about two inches long, and one about one inch long. There was some hemorrhage around the right and left kidneys.

The laboratory report showed an alcohol level in the blood of 3.6 milligrams per c.c. The doctor testified that this would indicate intoxication and that the level at which death would generally ensue from intoxication would be 5 milligrams per c.c., or over. He further testified that the death of Meyer was due to a massive hemorrhage in the abdominal cavity due to traumatic laceration of the liver; that in his opinion the injury could possibly be by falling but that in this particular case the most reasonable explanation of the laceration of the liver would be a blow or multiple blows; that in his opinion Meyer lived a matter of hours after he received the lacerations to his liver, roughly between five and twenty-four hours.

The record shows that the defendant was arrested at about 11:30 p. m. on the night of July 17, 1953, charged with being drunk on the highway, and thereafter was in the custody of the officers. On July 19, 1953, at about 9:00 p. m. defendant was questioned by officers at the Oceanside jail. He was then wearing a woolen shirt, a pair of bluejeans and a wrist watch. He was not wearing glasses and complained of his right fist, stating that he had either broken or hurt his knuckles. He stated that he had met Meyer the evening of July 14, 1953, north of La Jolla Junction; that Meyer had a flat tire and defendant stopped his car and went over and assisted him; that they then went to Meyer's ranch and he stayed with Meyer; that on Friday evening, July 17th, Meyer was in the bedroom of the house and was shooting a rifle out of the window; that defendant asked Meyer for the gun and after obtaining it, placed it in the closet; that Meyer slapped defendant and that he, defendant, "wound up" like a baseball pitcher and "really hit" Meyer; that he gave Meyer "a pretty good beating"; that the trousers he was then wearing belonged to Meyer and that the wallet was in them when he borrowed them; that the wrist watch which he was wearing had fallen off Meyer's wrist at the time of the fight and that he had picked it up.

At the request of the officers the defendant wrote out a statement of his activities from the time he met Meyer, stating therein, among other things, that he met Meyer on highway 101, north of La Jolla Junction and stopped to help him change a tire; that Meyer invited him to go to his ranch; that he stayed at the ranch until the night of his arrest; that on this night, after dark, Meyer "dropped to sleep in a drunken stupor"; that about two hours later Meyer got up and shot a rifle out of a window to scare coyotes; that he obtained the gun from Meyer and put it out of his reach in the closet; that Meyer slapped him hard on the face and that he, defendant, lost his temper and proceeded to "beat Meyer up"; that he revived Meyer with cold water, covered him with a bed cover and demanded that he lay on the floor; that he loaded his spare clothes and blanket, took the rifle and left in his car; that his car stalled just north of Lucadia and while he was trying to flag a ride, he was questioned by a highway patrol officer; that he was arrested by the officer and taken to the Oceanside jail at about 12:00 p. m.

On July 20th defendant was again questioned by the officers. He again related the substance of his previous statements

and further stated that he injured his right fist quite severely when he struck Meyer; that the first time he struck Meyer he went only part way down, recovered his balance and struck the defendant a couple of times; that he struck Meyer "probably five or six times and he went down and stayed down"; that he "stomped" on Meyer's foot once when he endeavored to get up; that he then went to the kitchen, got a bucket of cold water and "flushed" it on Meyer's head; that when Meyer revived it seemed to defendant that Meyer mumbled "he had enough" and defendant answered "If you haven't got enough, I can sure as hell give you some more"; that defendant did not stay in the house more than ten minutes after the fight; that he picked up Meyer's wrist watch and put it on and also took a case of power tools which were in the kitchen; that the pair of glasses which were found on the deepfreeze had fallen off defendant's face during the fight; that he assumed they had been broken, that he could not find them.

At the trial defendant testified concerning the fight with Meyer that he struck Meyer in the face only; that while in the bedroom of the house he struck Meyer "possibly three or four times"; that he then followed Meyer into the living room and there exchanged blows with him and that Meyer was finally knocked down; that he started to get up and defendant stepped on his foot and told him to stay where he was on the floor; that he, defendant, acted in self-defense; that he took the rifle with him when he left for self-protection; that he did not intend to steal any of Meyer's personal property and intended to return the tools and the rifle; that after he told Meyer to remain on the floor, he covered him with a bed pad and that he did not stomp on his body in any way; that when he left the place Meyer was alive and conscious.

An autopsy surgeon testified for the defense and stated that while he had not had an opportunity to examine the body of Meyer, he had read the testimony of Dr. Lloyd; that he was of the opinion that external violence could have caused the liver injury and that it could have been caused by a severe fall; that he did not think Mr. Meyer died of intoxication and that he agreed that death was due from hemorrhage resulting from laceration of the liver; that it would be unusual to repeatedly fall on the same injured left side to sustain the injury found in this case.

Appellant's principal contention is that the evidence, without his extrajudicial statements, does not show that the decedent came to his death as the result of a criminal agency. This contention is not supported by the record.

In People v. Cullen, 37 Cal.2d 614, 624, 234 P.2d 1, 7, the rule is stated as follows:

> "It is the settled rule, however, that the corpus delicti must be established independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof *aliunde* of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing that the alleged victims met death by a criminal agency is all that is required. The defendant's extra-judicial statements are then admissible, the order of proof being discretionary, and together with the prima facie showing must satisfy the jury beyond a reasonable doubt."

The court also held that the *corpus delicti* (in a prosecution for murder) consists of two elements, the death of the alleged victim and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially; that it is the function of the jury to draw the proper inferences from the proof of the circumstances and it is not the province of the reviewing court to overturn the jury's verdict when it is supported by substantial evidence, including the reasonable inferences to be drawn therefrom.

In People v. Ives, 17 Cal.2d 459, 110 P.2d 408, in a prosecution for murder, the body of the deceased, Robert Sherrard, was recovered as the result of dragging a portion of the Sacramento River. The

body was found clad only in bathing trunks and no mark was found on it except a scratch on the head. Deceased's clothing was found nearby on the same side of the river. An autopsy surgeon testified that the deceased "Came to his death by asphyxiation by drowning"; that the condition of the heart and lungs showed a lack of oxygen or some obstruction in breathing; that Sherrard was partially or more probably totally unconscious when his body entered the water. This conclusion was based upon the condition of the lungs and heart and also an analysis of the stomach which showed traces of chloral hydrate, a substance used "as a hypnotic" to produce sleep. The court said, 17 Cal.2d at pages 463–464, 110 P.2d at page 411:

> "The *corpus delicti* may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a *prima facie* case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. People v. King, 213 Cal. 89, 1 P.2d 15; People v. Selby, 198 Cal. 426, 245 P. 426; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Bonilla, 114 Cal.App. 219, 299 P. 784; People v. Wagner, 21 Cal.App.2d 92, 68 P.2d 277.
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> "To prove a *prima facie* case of *corpus delicti*, all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of the death of Sherrard. However, in this case, each defendant appeared as a witness in his own behalf and admitted certain participation in the offense. With both these elements present here, evidence of the *corpus delicti* was amply sufficient to submit to the jury. People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849; People v. Kelly, 70 Cal.App. 519, 234 P. 110; People v. Kinsley, 118 Cal. App. 593, 5 P.2d 938." See also People v. Black, 103 Cal.App.2d 69, 229 P.2d 61.

In the instant case the opinion of pathologist Dr. Lloyd that the death of Mr. Meyer was due to a massive hemorrhage in the abdominal cavity due to traumatic laceration of the liver and that the most reasonable explanation of the laceration of the liver would be a blow or multiple blows is amply supported by the evidence. The severe injuries found on the body of the deceased such as the several extensive lacerations of the liver, black eye, the eight broken ribs, the bruise on the right upper lip, the bruise below the left ear, the multiple bruises on the left chest, the abrasions of the skin of the right elbow, right knee and both lower legs, coupled with the absence of any evidence that any furniture was overturned or that anything was broken in the Meyer home, together with the evidence that the blood had been cleaned up in the vicinity of the body and that the defendant's blood spattered glasses were found at the scene, were sufficient to prove a *prima facie* case of *corpus delicti* and to show a reasonable probability that a criminal act of another was a direct cause of the death of Mr. Meyer. The circumstances in evidence established a *prima facie* showing of the *corpus delicti* sufficient to allow the case, with the defendant's admissions, to go to the jury. The defendant admitted that he "wound up" like a baseball pitcher and "really hit" Meyer; that he gave Meyer "a pretty good beating"; that he lost his temper and proceeded "to beat Meyer up"; that he struck Meyer "probably five or six times" and when he went down and stayed down, it seemed to him that he told Meyer "if you haven't got enough, I can sure as hell give you some more." These admissions, together with the other circumstances shown by the record, amply support the verdict of the jury and the judgment as well as the order of the court in denying appellant's motions for an advised verdict and a new trial.

The judgment and order denying a new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

GENERAL ELECTRIC COMPANY, Petitioner,

v.

The SUPERIOR COURT of the State of California, In and for the COUNTY OF ALAMEDA, Respondent,

Affiliated Government Employees Distributing Co., Inc., et al., Real Party in Interest.

No. 16622.

District Court of Appeal, First District, Division 1, California.

April 22, 1955.

Rehearing Denied May 20, 1955.

Hearing Granted June 16, 1955.*

Proceeding by manufacturer to obtain writ of prohibition or other appropriate writ to prevent enforcement of order of the Superior Court, County of Alameda, requiring manufacturer, in action by manufacturer to restrain defendant from selling manufacturer's fair traded appliances below fair trade prices established by manufacturer under California Fair Trade Act, to produce certain of its books and records for inspection by defendant. The District Court of Appeal, Bray, J., held that question of manufacturer's profits could not be an issue, and, therefore, Superior Court did not have power, in such proceeding, to issue order requiring manufacturer to produce its records to show its profits.

Writ issued.

1. Discovery ⇐85, 89

Code of Civil Procedure provision pertaining to discovery vests discretion in trial court, but, if documentary evidence for which discovery is sought could not be admitted at trial, trial court will not have power to order its production. West's Ann. Code Civ.Proc. § 1000.

2. Trade-Marks and Trade-Names and Unfair Competition ⇐94

Question of manufacturer's profits could not be an issue in proceeding brought by it to enforce prices fixed by it under the Fair Trade Act, and, therefore, Superior Court did not have power, in such proceeding, to issue order requiring manufacturer to produce its records to show its profits. West's Ann.Code Civ.Proc. § 1000; West's Ann.Bus. & Prof.Code, §§ 16900–16905.

3. Equity ⇐65(2)

Manufacturer, which, in proceeding to enforce prices fixed by and under the Fair Trade Act, was asking Court of Equity to restrain defendant from charging less than fair trade price, would not be held to have come into court with unclean hands because of alleged unreasonably high prices fixed, in view of facts that such charge was not supported by any allegations of fact from which court could determine what the claimed net profits were, and that legislature had refused to make amount of producer's profit an element in fixing of fair trade prices. West's Ann.Bus. & Prof.Code, §§ 16900–16905.

4. Trade-Marks and Trade-Names and Unfair Competition ⇐94

To require manufacturer to produce costs of doing business, and thereby open to his competitors a closely guarded secret, upon general charge that his profits are arbitrary or unreasonable would completely emasculate the Fair Trade Act. West's Ann.Bus. & Prof.Code, §§ 16900–16905.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for petitioner.

Butterworth & Smith, Los Angeles, for Real Parties in Interest.

BRAY, Justice.

Petitioner seeks a writ of prohibition (or other appropriate writ) to prevent enforce-

 * Opinion vacated 291 P.2d 945.

ment of the superior court's order requiring petitioner to produce certain of its books and records for the inspection of the real party in interest, defendant Affiliated Government Employees Distributing Co., Inc.

Question Presented.

The propriety of the inspection order depends upon whether in an action by a manufacturer against a retailer to enjoin the sale of the former's products below the fair trade prices established by the manufacturer, the question of the latter's profits is material.

Record.

[1] Petitioner is plaintiff in an action for injunction under the California Fair Trade Act, Business and Professions Code, sections 16900–16905, brought against defendant to restrain defendant from selling petitioner's fair traded electrical appliances below the fair trade prices established by petitioner pursuant to said act. Defendant answered, setting up a number of alleged defenses to the action. In this proceeding we are concerned only with the fifth affirmative defense, as it is conceded that the order, the enforcement of which is here sought to be prevented, is based upon that alleged defense.[1] In that defense it is alleged, upon information and belief, that plaintiff "has arbitrarily and capriciously fixed the Fair Trade prices of its commodities far in excess of the cost of manufacturing and distributing the commodities and has unlawfully and inequitably used the Fair Trade Act to provide an arbitrary and unreasonable margin of profit on the sale to the public of its Fair Traded articles * * * [B]y virtue of the aforesaid conduct, plaintiff has used the Fair Trade Act in a manner detrimental and injurious to the public good and welfare, and has engaged in inequitable conduct which precludes it from seeking relief from a court of equity."

It will be observed that the entire defense contains no statement of facts, no estimate of profits, and no statement of the difference between the costs of manufacture and the fair trade price established.[2] The allegations of the entire defense are bald conclusions on information and belief. Upon that defense and the affidavit of defendant's attorney in which he stated that at the trial defendant would attempt to prove that petitioner had arbitrarily and unreasonably fixed the fair trade prices of its commodities far in excess of the cost of manufacturing and distribution, and therefore it was necessary for defendant to inspect petitioner's books and records insofar as they reveal said cost of manufacture and distribution, defendant moved under section 1000, Code of Civil Procedure, for an order requiring defendant to produce its cost accounting records necessary to compute the unit cost of manufacturing each of its products as to which it had listed Fair Trade Minimum Retail Prices, including certain specified records. The superior court made an "Order Allowing Defendant to Inspect Certain Documents and Records of Plaintiff" which requires plaintiff to produce for defendant's inspection the requested books and records dealing with the cost of certain specified electrical products.

Is the Manufacturer's Profit Material?

[2] Petitioner attacks the order on many grounds. However, as our decision of the above mentioned question is determinative of this proceeding, we deem it unnecessary to discuss the other grounds. If the manufacturer's profits cannot be an issue in a proceeding brought by it to enforce the prices fixed by it under the Fair Trade Act, obviously the court had no power to issue the order requiring it to produce its records to show its profits.

1. While section 1000, Code of Civil Procedure, the discovery section, vests a discretion in the trial court, Milton Kauffman, Inc. v. Superior Court, 94 Cal.App.2d 8, 16, 210 P.2d 88, it is obvious that if the evidence for which discovery is sought could not be admitted at the trial, the trial court would have no power to order its production.

2. It should be noted, too, that the fair trade price is not the price the manufacturer receives for its product, but the price the retailer receives. In that price the profit of the distributor and the retailer is included.

There is nothing in the California Fair Trade Act which in any wise limits the price the producer under the act may fix for his product, nor is his profit limited in any way.[3]

A case directly in point is Sunbeam Corp. v. Central Housekeeping Mart, 1954, 2 Ill. App.2d 543, 120 N.E.2d 362, 369. There in an action brought to restrain a retailer from selling the plaintiff's products under the fair trade prices fixed by plaintiff under the Illinois Fair Trade Act, S.H.A. ch. 121½, § 188 et seq., the defendant, as did defendant here, pleaded the defense of "arbitrarily and unreasonably high prices", alleging that the plaintiff's margin of profit between manufacturer's cost and the retail price was "'more than 200%.'" In holding that the Illinois Fair Trade Act did not provide for an inquiry into prices, the court stated, 120 N.E.2d at page 369: "Here we have a general defensive averment relied upon as a base from which to force an inquiry into a large national manufacturing concern, its cost of doing business, its cost accounting records, and supporting data. We think it unreasonable to make an inquiry of this scope upon such a general charge.

"We need not decide whether there is no case in which equity could not inquire in the public interest whether an excessive margin of profit had resulted in an extortionate retail price to the consumer. It is enough to say that this charge does not here make an issue which would justify such an inquiry. The charge is not supported by any allegations of fact from which the chancellor could determine what even the net profit was."

[3] Defendant contends in effect that it alleged that petitioner in asking the aid of a court of equity to restrain the defendant from charging less than the fair trade price, was coming into court with "unclean hands" because of the alleged unreasonably high prices fixed and that under general principles of equity such an allegation, if proved, would constitute a defense to the action. There are two answers to this: First, as stated in effect in Sunbeam Corp. v. Central Housekeeping Mart, supra, 2 Ill.App.2d 543, 120 N.E.2d 362,—upon such a general charge as appears in the answer, unsupported as it is by any allegation of fact from which the court could determine what the claimed net profits were, it would be unreasonable for the court to assume that plaintiff's profit was arbitrary or unreasonable or that plaintiff's hands were unclean in this action. Secondly, where the Legislature has refused to make the amount of the producer's profit an element in the fixing of fair trade prices, the courts should not attempt to do so by the device of applying the unclean hands doctrine to the question of profits.

No case is cited holding that an investigation into the producer's profits may be made in an action under the Fair Trade Acts. The defendant refers to Julius Schmid v. McKay, dba Public Drug Co. (Okla.Dist.Ct.1949; 1948–1949 Trade Cases, paragraph 62,509), which denied an injunction to restrain a retailer from selling below the fair trade price, although the court found that the price fixed provided for "an arbitrary and unreasonable margin of profit to the *retail dealer*." (Emphasis added.) That question is not before us. On appeal to the Oklahoma Supreme Court, 203 Okl. 502, 223 P.2d 529, the defendant filed no brief and the Supreme Court ordered the injunction to issue without consideration of the merits of the case, but solely because of the defendant's failure to file a brief. Obviously, the decision of that Supreme Court in no wise supports defendant's position here.

Defendant also refers to the statement in Sunbeam Corp. v. Marcus, D.C., 1952, 105 F.Supp. 39, giving as one of the matters to be established by a manufacturer to obtain relief under the New York Fair Trade Laws, 105 F.Supp. at page 41: "(4) Under equitable principles the plaintiff has

3. See Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177, for a discussion of the act, its validity, its purposes, including the statement that the act is not solely a price fixing statute but is also to protect the good will in connection with the products themselves, and the property and contract rights of the producer.

not indulged in practices offensive to the conscience of the Court—that he comes into equity with clean hands." This statement, however, is not sufficient to support defendant's contentions here. It refers to such matters as are required by all Fair Trade Acts including ours—that the particular commodity be in "fair and open competition with commodities of the same general class produced by others * * *", Bus. and Prof.Code, § 16902, and that the manufacturer treat all retailers alike. In addition to the above requirement numbered (4), the Marcus case lists the three other requirements of such an action, 105 F.Supp. at page 41: "[1] The proof is convincing that the enforcement has been prompt, vigorous and impartial and that all reasonable steps have been taken to secure compliance. [2] The manufacturer is entitled to relief under the New York Fair Trade Law when he establishes: (1) That there is a genuine fair trade price structure; (2) That there is reasonable and diligent enforcement—that plaintiff has not by act or conduct waived the violation or abandoned its policy through all effective means; (3) That the relief sought against the violator is for the sole purpose of enforcement and not for any ulterior purpose; * * *." It will be noted that nowhere is reasonableness of price made a requirement of right to relief.

[4] It should be pointed out that to require a manufacturer to produce his costs of doing business (thereby opening to his competitors one of the closest guarded secrets of a manufacturer) upon a general charge that his profits are arbitrary and unreasonable would completely emasculate the Fair Trade Act. In every case involving that act brought by a manufacturer he would be forced by such a procedure to choose between disclosing an important trade secret and enforcing the prices fixed under an act which the state has declared is in the public interest.

Let the peremptory writ of prohibition issue.

PETERS, P. J., and PATTERSON, J. pro tem.

132 Cal.App.2d 709

Louise ROBINSON, Plaintiff and Appellant,

v.

NATIONAL AUTOMOBILE AND CASUALTY INSURANCE COMPANY, a corporation, Defendant and Respondent.

Civ. 20850.

District Court of Appeal, Second District, Division 1, California.

May 4, 1955.

Insured's action against insurer on residence and outside theft policy in which insured had declared that she had sustained one loss and no policy cancellations during last five years. The Superior Court, Los Angeles County, Clarence M. Hanson, J., granted nonsuit and rendered judgment thereon in favor of defendant, and insured appealed. The District Court of Appeal, White, P. J., held that evidence established that prior to issuance of policy insured had sustained insurance losses and policy cancellations of which she failed to inform insurer, and that insured's refusal to answer material questions, at examination under oath as provided for in policy, was failure to give insurer that degree of cooperation required by provisions of policy, and was violation of agreement of insured to submit to such examination under oath.

Judgment affirmed.

1. Insurance ⇐264(1)

Insured, by accepting theft policy containing usual provisions that it was issued in reliance upon statements contained in declarations of insured, made the warranties therein contained.

2. Insurance ⇐268

Breach of warranty in its inception prevents policy from attaching to risk.

3. Insurance ⇐392(1)

Fact that insurer cancelled theft policy and retained portion of premium after asserted theft and filing of proof of loss in connection therewith, did not create waiver of insurer's right to deny the liability, or estoppel.

4. Insurance ⇐665(3)

In insured's action against insurer on residence and outside theft policy in which insured had declared that she had sustained one loss and no policy cancellations during last five years, evidence established that prior to issuance of policy, insured had sustained insurance losses and policy cancellations of which she failed to inform insurer. Insurance Code, §§ 330, 331, 332, 334.

5. Insurance ⇐301

Prior insurance history of an insured is material element in acceptance or rejection of risk.

6. Insurance ⇐548

Insured's refusal to answer material questions at examination under oath as provided for in policy, was failure to give insurer that degree of cooperation required by provisions of policy, and was violation of agreement of insured to submit to such examination under oath.

Jacob W. Silverman, Los Angeles, for appellant.

Thomas P. Menzies, James O. White, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from a non-suit granted and judgment rendered thereon in favor of defendant in an action brought for payment on account of an alleged theft of personal property, under a "residence and outside theft policy" of insurance issued by defendant.

By her complaint, plaintiff alleged the issuance of the policy of insurance on or about April 2, 1953, for the period beginning March 31, 1953, to March 31, 1954. That by the policy plaintiff was insured against loss by theft of her jewelry and other personal and household effects at her residence in Beverly Hills, California, in an amount not exceeding $5,000. It was then alleged in the complaint that about May 12, 1953, plaintiff's premises were burglarized by person or persons unknown to her and various items of said insured property were stolen, all to her loss in a sum exceeding the policy limits of $5,000. The complaint then set forth that about June 1, 1953, plaintiff filed with defendant insurer written proof of loss and asked payment of the sum of $5,000, but the defendant rejected said claim and refused to pay the sum demanded or any part thereof.

By its answer defendant admitted issuance of the policy, filing of a claim of loss and rejection thereof, but denied any liability to plaintiff under the terms of said policy. Defendant also set forth five separate and affirmative defenses, as follows: (1) refusal of plaintiff to file a proof of loss in the form and manner required by defendant; (2) refusal of plaintiff to cooperate with defendant as required by terms of the policy, refusing to answer questions asked of her by defendant's representative and wilfully making incorrect statements respecting her claim; (3) false and fraudulent statements made by plaintiff in her application to defendant for issuance of the policy, as to whether plaintiff had theretofore, during the preceding five years, sustained or received indemnity for loss or damage by burglary, robbery, theft or larceny; (4) that the proof of loss furnished to defendant by plaintiff was false, fraudulent and untrue in its entirety; and (5) that plaintiff falsely and fraudulently declared and represented to defendant that during the five years preceding the issuance of the policy, no insurer had cancelled any burglary, robbery, theft or larceny insurance issued to her, or declined to issue such insurance.

At the trial plaintiff testified as to the issuance of the policy, her loss through a burglary, filing of her proof of loss and cancellation of the policy of defendant on July 29, 1953, to take effect as of August 5, 1953. She testified that of the total premium amounting to $34.50 previously paid to defendant, the latter, on August 5, 1953, refunded to her $22.49, at the time of cancellation of the policy. Plaintiff also testified that on the day she received the policy she contacted Mrs. Elizabeth Thatcher, an insurance clerk in the office of defendant's underwriting agents, through whom the policy was issued, and directed Mrs. Thatcher's attention to incorrect statements

contained in the policy with regard to previous cancellations of policies and losses, and that she acquainted Mrs. Thatcher with all of plaintiff's prior losses and cancellations. Plaintiff further testified that prior to the issuance of the policy she had advised Mrs. Thatcher of all prior losses and cancellations. However, Mrs. Thatcher testified that plaintiff told her she "only had one previous cancellation", but did not disclose two cancellations by other insurance companies. There was also testimony as set forth by defendant in its brief and substantiated by the record that, "On June 1, 1953, plaintiff filed a proof of loss [Ex. 2], listing a white mink stole, pearl wrist watch and various items of jewelry allegedly stolen from plaintiff's apartment * * * on May 12, 1953 * * * Pursuant to its right to do so under the policy of insurance [Ex. 1, Par. 3 of Conditions], defendant, through its attorney, took an examination under oath of the plaintiff [Ex. B], during the course of which examination plaintiff refused to answer questons respecting the following: Acquisition of a safe deposit box * * *; acquisition of cash for the re-acquisition of jewelry in August of 1952 * * *; listing of any jewelry in bankruptcy proceeding * * *; reporting of sale of jewelry in bankruptcy proceeding * * *; and respecting disclosure in bankruptcy of all of her assets * * *.

"On May 26, 1952, plaintiff filed in bankruptcy * * * The debtor's petition, signed and verified by the plaintiff [Ex. A], shows that her reported assets on that date consisted of 'household goods and furniture, household stores, wearing apparel and ornaments of the person in the value of $500.00,' and that the total value of the personal property consisted of $500.00. * * * Under the 'Summary of Debts and Assets' of the debtor, the total of household goods was listed at $500.00, the total for automobiles and other vehicles as $150.00 and 'other personal property, None' * * * Under Schedule B–5 of Exhibit A the plaintiff claimed as exempt the entire amount of $500.00 on the household goods and the sum of $150.00, being her equity in the automobile.

"Respecting the issuance of the policy of insurance, it is shown by Exhibit 1 (the policy) that plaintiff stated that she had had one prior loss and no prior cancellations. Plaintiff, at trial, admitted that she had actually had a total of five losses * * * and a total of three cancellations * * * The evidence most favorable to plaintiff [which, parenthetically, was stricken— * * *] is plaintiff's testimony that she told a Mrs. Thatcher, an employee of defendant's underwriting agent, 'they had cancelled' * * *, that Evanston & Company cancelled one of her policies * *, and when asked whether or not the cancellation from Evanston was the only one she had told about, her answer was 'I told her that Evanston & Company have' * * *"

From the foregoing, it is manifest that the main and decisive question presented on this appeal is whether a non-suit was properly granted upon the uncontradicted and unexplained refusal of an insured to answer material questions in an examination under oath, provided for in the policy, and the manifest and unrefuted testimony that the insured failed to inform the insurer of prior losses and cancellations which unquestionably induced issuance of the policy.

The policy of insurance involved in this action contains under paragraph 3 of "Conditions," the following:

"* * * Upon the company's request, *the insured and every claimant hereunder shall submit to examination by the company,* subscribe the same, under oath if required, and produce for the company's examination all pertinent records, all at such reasonable times and places as the company shall designate, and shall cooperate with the company in all matters pertaining to loss or claims with respect thereto." (Emphasis added.)

Condition No. 6 of the insurance policy provides:

"No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the policy."

Pursuant to the foregoing "examination" provision of the policy plaintiff, the insured, was examined under oath July 9, 1953, (this statement made under oath was admitted in evidence) at which time plaintiff was asked various questions which she refused to answer. The policy of insurance herein was issued by defendant April 2, 1953. The record shows that many of the items which plaintiff claimed were stolen had been acquired prior to May, 1952. On May 26, 1952, plaintiff signed and verified a debtor's petition in bankruptcy. This petition shows that plaintiff listed her total assets as consisting of "household goods and furniture, household stores, wearing apparel and ornaments of the person $500.-00," and that her entire assets consisted of said household goods and an automobile in which her interest was $150.

Possessed of the knowledge that the petition in bankruptcy was filed in May of 1952, listing no jewelry whatsoever and no effects of value in excess of $500, and that a proof of loss was filed on the policy herein on June 1, 1953, slightly more than one year after the bankruptcy petition was filed and in which proof of loss there was claimed a loss of personal property in excess of the policy limit of $5,000, and that plaintiff's proof of loss showed acquisition of considerable jewelry claimed to have been stolen prior to the date of her filing in bankruptcy, she was interrogated at the trial as follows:

"Q. Then did you list in your schedule of assets any of the jewelry that you had?"

Upon advice of her counsel plaintiff replied, "I refuse to answer".

In the same examination plaintiff refused to answer questions as to when, if at all, she acquired a safe deposit box. With reference to her claim that about the month of March, 1953, she had sold some jewelry to one Harold Frank and that about August she repaid Mr. Frank $800 and that the jewelry was returned to her, plaintiff was asked, "Where did you get the cash?" (which she paid to Mr. Frank). Upon advice of counsel she again refused to answer. Finally, plaintiff was asked, "Did you fully, fairly and truthfully, disclose in your bankruptcy proceedings all of your assets?" Again, on advice of counsel an answer was refused.

In view of the foregoing it can hardly be said that plaintiff complied with the "co-operation" clause of her contract. On the contrary, it is evident that by her conduct the insured deprived the insurer of its right to a full disclosure of the true facts, in disregard of the plain provisions of her contract. Hickman v. London Assurance Corp., 184 Cal. 524, 527 to 534, 195 P. 45, 18 A.L.R. 742; Bergeron v. Employers' Fire Ins. Co., 115 Cal.App. 672, 675, 2 P.2d 453; Erreca v. Western States Life Ins. Co., 19 Cal.2d 388, 400, 121 P.2d 689, 141 A.L.R. 68.

The contract of insurance with which we are here concerned contained the usual provision that the policy was issued in reliance upon the statements contained in the declarations of the insured. In the policy here in question we find the following declarations:

"Item No. 5.

"During the last five years the insured has not sustained or received indemnity for loss or damage by burglary, robbery, theft or larceny, except as herein stated: Loss in December 1952 of fur-ranch mink coat $5500—taken from home (fur floater)."

And Item No. 6 reads:

"During the last five years no insurer has cancelled any burglary, robbery, theft or larceny insurance issued to the insured, or declined to issue such insurance, except as herein stated: No exceptions."

[1, 2] The record herein contains ample evidence that plaintiff mis-stated facts both as to prior insurance losses and as to prior cancellations. She admitted she actually sustained a total of five losses and three cancellations. Plaintiff insists that the record "* * * fails to disclose that any of the alleged losses and cancellations were incurred by Plaintiff during the last five years prior to the issuance of the policy". This claim is not borne out by the record which discloses admissions by plaintiff that one cancellation occurred December 11, 1952, another about October 26,

1951, and that in August, 1952, she sustained a loss of insured jewelry for which she was paid $1,100. In accepting the policy plaintiff made the warranties therein contained and a breach of warranty, where it is broken in its inception, prevents the policy from attaching to the risk. Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 669, 67 P.2d 1046.

Plaintiff's contention that defendant had knowledge of the aforesaid matters contained in the declarations but nevertheless, continued the policy in effect until after the loss, thereby lulling plaintiff into a sense of security, and that defendant did not rely upon the truth of the representations made in the declaration is not sustained by the record. It would challenge credulity and do violence to reason to say that either the testimony of Mrs. Thatcher or the admissions of plaintiff at the trial justify as reasonable, the assumption that plaintiff made a full, fair and truthful disclosure in her declarations Nos. 5 and 6 contained in the policy.

[3] Plaintiff next contends that the retention of the premium covering the date of loss and failure to return same when the policy was cancelled resulted in an estoppel. The California law is to the contrary. At all times, defendant denied liability under the policy. The rights of the parties were fixed at the time of the loss. Obviously, no estoppel could have arisen after the alleged theft of the property. At no time did defendant lead plaintiff to believe that it would not take advantage of the claimed falsities in her declarations contained in the contract of insurance. On the contrary, defendant persistently asserted its reliance upon such declarations as relieving it from liability under the contract. Furthermore, the cancellation of the policy and retention of a portion of the premium occurred after the asserted theft and filing of proof of loss in connection therewith, and did not create a waiver of the insurance company's right to deny liability, or an estoppel. Gilmore v. Eureka Casualty Co., 123 Cal.App. 20, 28, 10 P.2d 810; Hargett v. Gulf Ins. Co., 12 Cal.App.2d 449, 456, 457, 55 P.2d 1258; Strauss v. Dubuque F. & M. Ins. Co. 132 Cal.App. 283, 294, 22 P.2d 582.

Plaintiff's claim that she acquainted Mrs. Thatcher, a clerk for the underwriting agency, with all of the former's prior losses and cancellations does not aid her because that testimony was stricken as being in violation of the parol evidence rule, and Mrs. Thatcher, as heretofore indicated, testified that she knew of but one other loss and cancellation prior to issuance of the policy here in question.

[4–6] Viewed in the light of well known and established rules governing the court in the consideration of motions for a nonsuit, we are satisfied that the testimony in the case at bar shows without conflict that plaintiff's sustained losses and cancellations prior to the issuance of the policy of which she failed to acquaint defendant or communicate to it, Insurance Code, §§ 330, 331, 332, 334. It is well established in our law that prior insurance history of an insured is a material element in the acceptance or rejection of a risk. Gates v. General Casualty Co. of America, 9 Cir., 120 F.2d 925, 927. Neither can it be questioned that the refusal of the insured to answer material questions at an examination under oath (provided for in the policy), shows a failure to give to the insurer that degree of cooperation required by the provisions of the policy here under consideration, and is a violation of the agreement of the insured to submit to such examination under oath.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

132 Cal.App.2d 732

In the Matter of the ESTATE of Coralie M. REED, deceased.

Loren B. REED, Petitioner and Respondent, Marjorie HAMILTON, Executrix and Respondent,

v.

Marjorie HAMILTON, Contestant and Appellant.

Civ. 20773.

District Court of Appeal, Second District, Division 3, California.

May 4, 1955.

In the matter of a decedent's estate. From judgments of the Superior Court of Los Angeles County, Caryl M. Sheldon, J., determining that one petitioning for partial distribution of the estate to him as decedent's sole heir, construction of decedent's will and determination of heirship, was decedent's son and only heir, entitled to all of estate after payment of debts and administration expenses, and ordering partial distribution to him, the executrix who contested the petitions, appealed. The District Court of Appeal, Ashburn, J. pro tem., held that testimony of petitioner and seven long-standing acquaintances of petitioner that he was decedent's son was not inherently improbable and that a trier of facts is not required to accept a handwriting expert's indirect evidence in preference to direct evidence of witnesses having personal knowledge on issue of a person's identity.

Judgments affirmed.

1. Appeal and Error ⇐989

An appellate court cannot reweigh substantially conflicting evidence introduced in trial court.

2. Descent and Distribution ⇐71(6)

In proceedings for partial distribution of decedent's estate to petitioner as decedent's alleged sole heir, construction of decedent's will, and determination of heirship, testimony of petitioner and seven long-standing acquaintances of petitioner that he was decedent's son was not inherently improbable.

3. Appeal and Error ⇐996

A reviewing court will not hold trial court's findings unsupported by evidence merely because reviewing court might reasonably draw different inferences from evidence than those reasonably drawn by trial court.

4. Appeal and Error ⇐994(3)

A reviewing court cannot reject a witness' testimony, believed by trier of facts, unless it is physically impossible for such testimony to be true or its falsity is apparent without resorting to inferences or deductions.

5. Evidence ⇐588

For testimony to be held inherently improbable, it must appear that what witnesses related or described could not have occurred, and testimony merely disclosing unusual circumstances is not inherently improbable.

6. Appeal and Error ⇐994(3)

Testimony subject to justifiable suspicion does not justify reversal of judgment by appellate court.

7. Evidence ⇐588

The trier of facts may believe and accept part of a witness' testimony and disbelieve or have reasonable doubt as to effect of remainder thereof.

8. Appeal and Error ⇐931(1)

On appeal, part of testimony supporting judgment appealed from must be accepted, not part which would defeat or tend to defeat judgment.

9. Appeal and Error ⇐995

A finding of trier of facts cannot be set aside on appeal, unless it clearly appears that there is no substantial evidence to support finding on any hypothesis

10. Evidence ⇐574

The trier of facts is not required to accept handwriting expert's indirect evidence in preference to direct evidence of witnesses having personal knowledge on issue of a person's identity.

11. Evidence ⇐570

Expert testimony must be given weight to which it appears to be justly entitled in each case.

12. Evidence ⇐570

The law makes no distinction between expert testimony and evidence of other character.

13. Evidence ⇐574

Though law encourages demonstration of truth of issues before court by any means generally accepted as tending to prove facts in dispute, jury or trial court must determine relative weight of conflicting scientific testimony and testimony as to facts.

Ralph B. Herzog, Beverly Hills, for appellant.

Francis R. McKenna, La Canada, for respondent.

ASHBURN, Justice pro tem.

[1] There is no merit in this appeal. It is an effort to induce an appellate court to reweigh substantially conflicting evidence, a thing which every California lawyer knows or should know we cannot do. "The appellate court's function begins and ends with a determination as to whether or not there is any substantial evidence which will support the findings of the trier of fact." In re Guardianship of Kentera, 41 Cal.2d 639, 645, 262 P.2d 317, 320.

Coralie M. Reed died leaving no will except a holographic document reading as follows: "April 21, 1951 To Whom It May Concern: This is to certify that it is my desire that in case of my inability to function—or in case of my demise, I hereby turn the keys of this house 3101 Manitou Ave. over to Mrs. Marge Hamilton. She has knowledge and understanding of my desires and wishes and will take charge." Respondent Loren B. Reed filed a petition for partial distribution to him as son and sole heir of decedent; also a petition "to construe will and to determine heirship." The latter petition prayed for a determination that respondent is sole heir of decedent and that Marjorie Hamilton (who had been appointed executrix) has no interest in the estate except her fees as executrix. Both petitions were contested by her upon the grounds that petitioner is not the son of decedent and she, the contestant, is entitled to distribution of the entire estate under the will. The trial judge found petitioner to be the son and only heir of decedent and entitled as such to all of the estate after payment of debts and expenses of administration; that the will disposed of no property or interest therein; and partial distribution to petitioner was ordered as prayed. Marjorie Hamilton appeals.

Appellant's brief says: "The sole issue presented to the trial court was whether or not the petitioner and respondent was the same person known in prior years to be the son of the decedent, Coralie M. Reed, and therefore her sole surviving heir." Respondent's counsel agrees with this. Then appellant's counsel discloses the entire absence of merit in his appeal by saying: "The respondent produced seven witnesses who testified that the petitioner was the son of said decedent and the person referred to in said Will. The appellant produced eight witnesses who testified that the petitioner was not the son of said decedent."

Counsel argues nevertheless that the testimony of respondent's witnesses was inherently improbable. It consisted of statements by respondent that he was decedent's son and testimony of long-standing acquaintances that he was the son of Mrs. Coralie M. Reed. Appellant relies primarily upon the testimony of a handwriting expert to the effect that certain handwriting of petitioner was not the same as some conceded exemplars of the writing of the person whom all witnesses knew years ago to be Loren B. Reed.

[2–9] There is no basis for the claim of inherent improbability in the testimony of petitioner's witnesses who identified him as the son of decedent. "A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. In order to say that testimony is

inherently improbable, it must appear that what was related or described could not have occurred. Testimony which merely discloses unusual circumstances is not inherently improbable. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal." Murphy v. Ablow, 123 Cal.App.2d 853, 858, 268 P.2d 80, 83.

[10–13] Appellant further complains that "The court impliedly found that the testimony of the handwriting expert, though uncontradicted, was not true or worthy of consideration." It is an odd conceit that the trier of fact must accept indirect evidence given by a handwriting expert in preference to the direct evidence of witnesses having personal knowledge upon an issue of identity of a person. In Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163, the court was considering the effect of a blood test to determine paternity. The case was quoted as follows in Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 33 Cal.2d 89, 94, 199 P.2d 302, 306: "'Whatever claims the medical profession may make for the test, in California "no evidence is by law made conclusive or unanswerable unless so declared by this code." Section 1978, Code Civ.Proc. Expert testimony "is to be given the weight to which it appears in each case to be justly entitled." State Compensation Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 231 P. 996, 1000. The law makes no distinction whatever between expert testimony and evidence of other character. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25. Although it encourages the demonstration of the truth of the issues before a court by any means which are generally accepted as tending to prove the facts in dispute, "when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court, must determine the relative weight of the evidence." Rolland v. Porterfield, 183 Cal. 466, 191 P. 913, 914.

"'These are fundamental rules which are firmly embedded in the law of evidence.'"

The decree for partial distribution and the decree determining heirship, from which appeals have been taken, are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 739

PACIFIC ENGINE & MACHINE WORKS, a California corporation, Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF DEL NORTE, and Honorable Samuel F. Finley, a Judge thereof, Respondents.

Civ. 8817.

District Court of Appeal, Third District, California.

May 4, 1955.

Hearing Denied June 29, 1955.

Proceedings on petition for a writ of mandate to compel the Superior Court, Del Norte County, Samuel F. Finley, J., to proceed with trial of action commenced by petitioner in that court. The District Court of Appeal, Schottky, J., held that where action against two Oregonians and one Californian, on alleged cause of action arising in California, had been filed in California court, and subsequently action against Oregonians alone, based upon same cause of action, had been filed in federal district court in Oregon, but thereafter (it having been judicially determined in interim that joinder of Californian as defendant in California action had not been fraudulent) Oregonians had appeared and answered in California action and Oregon action had,

on motion of plaintiff, been abated, pending final determination of California action, it was an abuse of discretion for California Court to subsequently order action therein stayed until final disposition of Oregon action.

Writ issued.

1. Equity ⇐51(1)

Equity abhors a multiplicity of actions.

2. Action ⇐69(3)

Where action against two Oregonians and one Californian on alleged cause of action arising in California had been filed in California court, and subsequently action against Oregonians alone, based upon same cause of action, had been filed in federal district court in Oregon, but thereafter (it having been judicially determined in interim that joinder of Californian as defendant in California action had not been fraudulent) Oregonians had appeared and answered in California action and Oregon action had, on motion of plaintiff, been abated, pending final determination of California action, it was an abuse of discretion for California court to subsequently order action therein stayed until final disposition of Oregon action. Fed.Rules Civ. Proc. rule 41(a), 28 U.S.C.A.

3. Mandamus ⇐28

Mandamus lies to control judicial discretion which has been abused. West's Ann.Code Civ.Proc. § 963.

Barr & Hammond, Yreka, Hugh B. Collins, Medford, Or., for petitioner.

Tebbe & Correia, Yreka, for respondent.

SHOTTKY, Justice.

Petitioner above named filed in this court a petition for a writ of mandate to compel the Superior Court of Del Norte County to proceed with the trial of an action commenced by petitioner in said court. We issued an alternative writ and a return thereto was filed by John C. Rogers and Ruth V. Rogers on behalf of themselves as the real parties in interest and of the respondent Superior Court.

The facts which appear from the petition and the return, and which are not in substantial dispute, are as follows:

Petitioner commenced an action in the Superior Court of Del Norte County on December 10, 1953, against John C. Rogers, Ruth V. Rogers, and one Joe Gentry (sued as Doe defendant), to recover damages alleged to have resulted from a fire in Crescent City caused by the negligence of defendants.

Defendants Rogers are citizens and residents of the State of Oregon, and defendant Gentry is a citizen and resident of the State of California. Personal service was made on defendant Gentry and he appeared in the action. Certain real property alleged to belong to defendants Rogers was attached but no service of summons was made on said defendants in California, a copy of the complaint and summons being delivered to them in the State of Oregon. Thereafter defendants Rogers appeared specially and moved to have the action transferred to the United States District Court for the Northern District of California on the grounds that they were citizens of the State of Oregon and that defendant Gentry had been fraudulently joined as a party defendant in order to prevent removal to the United States District Court, and said action was removed to said United States District Court. On August 11, 1954, plaintiff and petitioner commenced an action in the District Court of the United States for the District of Oregon against defendants Rogers only, based upon the same cause of action as the action theretofore filed in the respondent court against defendants Rogers and Gentry, and defendants Rogers were served in said action. On August 12, 1954, the United States District Court for the Northern District of California, determined that the joinder of defendant Joe Gentry was not fraudulent and remanded said action to the respondent superior court. Petitioner then filed notice of motion to enter the default of defendants Rogers in respondent court, but before October 8, 1954, the time set for the hearing of said motion, said defendants Rogers appeared in said action by filing an answer. On October 11, 1954, petitioner

moved the United States District Court in Oregon for leave to dismiss the action filed in the United States District Court, which motion was opposed by defendants Rogers and denied by the court. On October 8, 1954, the respondent Superior Court set said action for trial commencing June 6, 1955, and thereafter defendants Rogers filed notice of motion to stay proceedings in the superior court or to dismiss. Thereafter petitioner moved the United States District Court for the District of Oregon to enter an order abating all further proceedings in the Oregon action pending final determination of the action pending in respondent court, and said United States District Court of Oregon, on February 21, 1955, ordered that said Oregon action and all proceedings therein be abated pending final determination of the action pending in the respondent court. On February 24, 1955, the Judge of respondent court filed a memorandum of opinion stating that the action pending in respondent court should be abated until the final determination of the action pending in the United States District Court for the District of Oregon, and thereafter, although advised that the United States District Court of Oregon had abated the action pending there, caused to be entered an order abating the action pending in the respondent court until final disposition of the action filed in the United States District Court.

Respondent court in its memorandum opinion and counsel for real parties in interest, defendants Rogers, appear to rely heavily on Simmons v. Superior Court, 96 Cal.App.2d 119, 214 P.2d 844, 19 A.L.R.2d 288, in support of the order abating the action in the superior court of Del Norte County. In the Simmons case the wife filed an action for divorce in Texas on February 10, 1949, and the husband filed an action for divorce in California on February 15, 1949. The wife appeared in the California action by filing an answer on March 26, 1949, and the husband appeared in the Texas action by filing a plea in abatement and an answer on May 2, 1949. On July 26, 1949, the wife made a motion to remove the California action to the United States District Court, but on September 23, 1949, the United States District Court remanded the action to the Superior Court on the ground that both husband and wife were residents of Texas. On October 17th the wife moved the California superior court for an order staying proceedings in the California action until the final determination of the Texas action. The superior court denied the motion and the wife then filed in the District Court of Appeal a petition to restrain the superior court from taking any further proceedings in the case. The District Court of Appeal determined that a writ should issue ordering the Superior Court to stay proceedings until the final determination of the Texas action.

In the course of its opinion the court said, 96 Cal.App.2d at pages 122–125, 214 P.2d at page 848:

> "It is settled California law that the pendency of a prior action in a court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes good ground for abatement of a later action within the same jurisdiction either in the same court or in another court having the jurisdiction, 1 Cal.Jur., sec. 4, [p. 23]; and it is held that the first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so. [Citing cases.]
>
> "* * * * * * *
>
> "The rule which forbids a later action in the same state between the same parties involving the same subject matter rests upon principles of wisdom and justice, to prevent vexation, oppression and harassment, to prevent unnecessary litigation, to prevent a multiplicity of suits,—in short, to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other. We think there is no distinction in reason or difference in principle between a case where a later action between the same parties involving the same subject matter is commenced in the same state and a case where a later action between

the same parties involving the same subject matter is commenced in another state. If proceedings should be stayed in the first case mentioned, it is in order to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts. Any and all of this may occur where the later action is commenced in another state, as well as where it is commenced in the same state. 14 Am. Jur. 436, sec. 243.

"* * * * * * *

"We think it manifest that respondent court abused its discretion in not staying, as a matter of comity, further proceedings in the California action until the final determination of the Texas action."

We do not believe that Simmons v. Superior Court is determinative of the instant proceeding as there is a distinct difference in the factual situation. Petitioner herein filed an action in the superior court of Del Norte County against defendants Rogers and Joe Gentry (sued as Doe defendant) to recover damages resulting from a fire in Crescent City. Personal service was obtained on Gentry and certain property alleged to belong to defendants Rogers was attached. Proceedings were commenced to obtain service on defendants Rogers by publication as they were citizens and residents of the state of Oregon and no personal service could be made on them outside of California. We have hereinbefore set out the various steps in the two cases and it appears that petitioner, failing to get personal service on defendants Rogers in California, filed an action against them only in the United States District Court in Oregon. Petitioner did not join Gentry as a defendant in the Oregon action, no doubt because Gentry being a resident of California personal service could not be obtained on him outside of Oregon. The record shows that defendants Rogers thereafter appeared and filed an answer in the California action, and filed a motion to stay proceedings in the California action. Petitioner, now having the defendants Rogers and defendant Gentry before the superior court of Del Norte County and subject to a judgment in personam, moved to dismiss the action filed by him in the United States District Court in Oregon. Under rule 41(a) of Federal Rules of Civil Procedure, 28 U.S.C.A., after answer filed, an action may be dismissed without prejudice only by filing a stipulation of dismissal signed by all parties who have appeared in the action or upon order of the court and upon such terms and conditions as the court deems proper. 35 C.J.S., Federal Courts, § 142, p. 1174. This motion was opposed by defendants Rogers and was denied by the court. Thereafter petitioner made a motion in the United States District Court in Oregon to abate the Oregon action, which motion was granted as hereinbefore set forth, and thereafter the respondent Superior Court granted the motion of the defendants Rogers staying proceedings in said action until final disposition of the action filed in the United States District Court in Oregon.

It thus appears that the only action in which the defendants John C. Rogers, Ruth V. Rogers and Joe Gentry are parties defendant is at issue in the superior court of Del Norte County and that the action filed by petitioner in the United States District Court in Oregon, in which only defendants Rogers are parties defendant, has been ordered stayed and abated pending the final determination of the action in the California superior court. It also appears that the action in the superior court is the action that was filed first and that the alleged cause of action arose in Del Norte County. It is obvious that petitioner filed the action in the United States District Court in Oregon because it could not obtain personal service on defendants Rogers in California, but when defendants Rogers appeared and answered in the California action, that action became the only action in which a complete determination of the issues between petitioner and John C. Rogers, Ruth V. Rogers and Joe Gentry could be had. If petitioner proceeded to trial against defendants Rogers in the United States District Court in Oregon, it would still have to proceed to trial in the superior court in California in order to ob-

tain a judgment against Gentry. Under such circumstances we think that neither reason nor authority can justify the order staying the trial of the California action.

[1] We are unable to agree with counsel for respondents that because petitioner filed the action against defendants Rogers in the United States District Court in Oregon after it had filed the action against the defendants Rogers and Joe Gentry in the superior court of Del Norte County, it must first proceed with the trial of the case in the Oregon court. Nor does the fact that the order staying proceedings in the Federal court in Oregon was made on motion of petitioner affect its right to have the California action tried. As stated in Simmons v. Superior Court, supra, 96 Cal.App.2d at page 130, 214 P.2d at page 852: "Equity abhors a multiplicity of actions. 'It is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties.' Rilcoff v. Superior Court, 50 Cal.App.2d 503, 506, 123 P.2d 540, 542."

[2] Under all of the facts and circumstances of the instant proceeding, as shown by the record, we are convinced that it was an abuse of discretion for the respondent Superior Court to order proceedings in the action on file in the superior court of Del Norte County stayed until the final disposition of the action filed in the United States District Court in Oregon.

[3] The order granting the stay is nonappealable, Code Civ.Proc. § 963, and therefore petitioner has no speedy or adequate remedy by appeal. To quote again from Simmons v. Superior Court, supra, 96 Cal.App.2d at page 132, 214 P.2d at page 853:

"Mandate lies to control judicial discretion when that discretion has been abused. [Citing cases.] In the Hays case the court stated [Hays v. Superior Court], 16 Cal.2d 260, 265, at page 266, 105 P.2d 975, at page 979: '" An abuse of discretion, however, is not the exercise of discretion, but is action beyond the limits of discretion, and it is settled that the writ [mandate] will issue to correct such abuse if the facts otherwise justify its issuance."'"

Let a peremptory writ of mandate issue commanding respondent court to proceed with the trial of said action No. 4919 pending in respondent court.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 649

GENERAL ELECTRIC COMPANY,
Plaintiff and Respondent,

v.

FEDERAL EMPLOYEES' DISTRIBUTING COMPANY, a corporation, Federal Employees' Distributing Company, a corporation, doing business as FEDCO, et al., Defendants.

Federal Employees' Distributing Company, a corporation, Appellant.

Civ. 20552.

District Court of Appeal, Second District, Division 1, California.

May 2, 1955.

Action to obtain injunction forbidding defendant from selling plaintiff's products for less than fair trade prices established by plaintiff. The Superior Court, Los Angeles County, Frank G. Swain, J., granted preliminary injunction, and defendant appealed. The District Court of Appeal, Drapeau, J., held that grant, pending appeal and new trial and final determination of action, of preliminary injunction forbidding defendants from selling plaintiff's products for less than fair trade prices established by plaintiff did not constitute an abuse of Superior Court's discretion.

Order affirmed.

1. Appeal and Error ⇐447

Issuance of preliminary injunction pending appeal is not matter raised in the

judgment, and an appeal from a judgment does not deprive the Superior Court of jurisdiction and of power to preserve the subject of litigation until final determination of the appeal.

2. Appeal and Error ⇨447

Grant, pending appeal and new trial and final determination of action, of preliminary injunction forbidding defendants from selling plaintiff's products for less than fair trade prices established by plaintiff did not constitute an abuse of Superior Court's discretion.

Butterworth & Smith; Edward L. Butterworth and Leonard S. Wolf, Los Angeles, for appellant.

Meserve, Mumper & Hughes, E. Avery, Crary, Robert A. Stewart, Jr., and Cromwell Warner, Jr., Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff, General Electric Company, brought this action against defendant, Federal Employees' Distributing Company, a corporation, for an injunction forbidding defendant to sell plaintiff's products for less than fair trade prices established by plaintiff and its distributors and retail dealers in California.

In order to readily understand the contentions on this appeal it will be helpful to set forth, chronologically, pertinent filings, judgment, and orders. All but the last one are dated in 1953.

February 10th, complaint filed.

April 10th, preliminary injunction issued.

July 20th, judgment of nonsuit entered, dissolving preliminary injunction.

August 25th, notice of intention to move for new trial filed by plaintiff.

September 8th, appeal from judgment of nonsuit, filed by plaintiff.

October 6th, order for new trial granted.

October 8th, notice of motion for preliminary injunction pending new trial and final determination of action filed by plaintiff.

October 20th, appeal from order granting new trial, filed by defendant.

October 30th, cross appeal from judgment of nonsuit filed by plaintiff.

November 20th, preliminary injunction pending new trial and final determination of the action granted.

January 22, 1954, notice of appeal by defendant from the preliminary injunction pending new trial and final determination of the action.

This appeal presents but one question: Did the Superior Court have jurisdiction to grant the preliminary injunction last stated, notwithstanding the fact that notices of appeal from the judgment of nonsuit and from the order granting a new trial had been filed prior thereto?

Appeals from the judgment of nonsuit and from the order granting a new trial have been consolidated, General Electric Co. v. Federal Employees' Dist. Co., 122 Cal.App.2d 509, 265 P.2d 19, briefed and argued together, and will be decided and the opinion will be filed immediately after this decision. 282 P.2d 943.

The case of Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617, appears to answer the question stated. That case holds that the issuance of a preliminary injunction pending appeal is not a matter embraced in the judgment, and that an appeal from the judgment does not deprive the Superior Court of jurisdiction and power to preserve the subject of the litigation until the final determination of the appeal.

Defendant relies upon Danley v. Superior Court, 64 Cal.App. 594, 222 P. 362, and contends that that case holds to the contrary. Hearing by the Supreme Court in the Danley case was denied about six months before the Eisenberg case was decided.

[1] This Court is of the opinion that the law stated in the Eisenberg case is determinative of this case.

[2] There is no merit in defendant's suggestion that the Superior Court abused its discretion in making the order granting

the preliminary injunction pending final disposition of the case.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

GENERAL ELECTRIC COMPANY, a corporation, Plaintiff, Appellant and Respondent,

v.

FEDERAL EMPLOYEES' DISTRIBUTING COMPANY, a corporation, Federal Employees' Distributing Company, a corporation, doing business as FEDCO, et al., Defendants,

Federal Employees' Distributing Company, a corporation, Respondent and Appellant.

Civ. 20067.

District Court of Appeal, Second District, Division 1, California.

May 2, 1955.

Rehearing Denied May 31, 1955.

Hearing Granted June 29, 1955.*

Action to enjoin defendant from selling plaintiff's products for less than fair trade prices established by plaintiff and its distributors and retail dealers in California. The Superior Court, Los Angeles County, Dudley G. McGregor, J., entered judgment of nonsuit and Frank G. Swain, J., entered order granting new trial, and plaintiff appealed from judgment of nonsuit. Defendant cross-appealed from judgment of nonsuit and appealed from order granting new trial. The District Court of Appeal, Drapeau, J., held that plaintiff, which had failed to enforce uniformly its minimum fair trade prices, had inequitably discriminated in favor of large classes of consumers, and had not subjected such classes to its fair trade price restrictions, was not entitled to invoke power of equity to have fair trade contract enforced by an injunction.

Judgment affirmed and order reversed.

1. Trade-Marks and Trade-Names and Unfair Competition ⇐97

Fair Trade Act provision that sales contrary to minimum contract prices are actionable at suit of any person damaged thereby contemplates application of equitable remedy of injunction regardless whether such sales are made by parties to the contract or not. West's Ann.Bus. & Prof.Code, § 16904.

2. Constitutional Law ⇐60

Legislative discretion may not be delegated.

3. Statutes ⇐77(1)

Statute, which confers particular privileges on class arbitrarily selected from large number of persons, all of whom stand in same relation to privileges granted, and between whom reasonable distinction for such selection cannot be found, if discriminatory, constitutes a "special law" and is discriminatory and unconstitutional. West's Ann.Const. art. 1, § 11.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Law".

4. Trade-Marks and Trade-Names and Unfair Competition ⇐68(2.18)

In enacting the Fair Trade Act, Legislature did not intend to authorize producers of commodities to divide their customers into classes and to provide by contract that one or more favored classes could buy such commodities at cut-rate prices and that others would have to pay the minimum prices stipulated in the contract. West's Ann.Bus. & Prof.Code, §§ 16900 et seq., 16902; West's Ann.Const. art. 1, § 11.

5. Trade-Marks and Trade-Names and Unfair Competition ⇐84

Plaintiff, which had failed to enforce uniformly its minimum fair trade prices, had inequitably discriminated in favor of large classes of consumers, and had not subjected such classes to its fair trade price restrictions, was not entitled to invoke power of equity to have such fair trade contract enforced by an injunction. West's Ann.Bus. & Prof.Code, §§ 16900 et seq., 16902; West's Ann.Const. art. 1, § 11.

6. Appeal and Error ⇐854(6)

Order granting new trial should be affirmed if there is any ground upon which

* Opinion vacated 291 P.2d 942.

it might properly have been made, but, if neither pleadings nor proof will, as matter of law, support a case, reviewing court has duty to reverse order granting new trial and to put an end to the litigation.

7. New Trial ⇐27

Wide discretion allowed to the Superior Court on motions for new trial will not justify grant of such motion if, in its findings and judgment, the court reached only conclusion that could have been reached on the record.

Meserve, Mumper & Hughes, E. Avery Crary, Robert A. Stewart, Jr., and Cromwell Warner, Jr., Los Angeles, for General Electric Co.

Butterworth & Smith, Edward L. Butterworth and F. Walton Brown, Los Angeles, for Federal Employees' Distributing Co.

DRAPEAU, Justice.

As stated in the preceding opinion, Cal. App., 282 P.2d 941, plaintiff, General Electric Company, brought this action against defendant, Federal Employees' Distributing Company, a corporation, for an injunction forbidding it to sell plaintiff's products for less than the fair trade prices established by plaintiff and its distributors and retail dealers in California.

Plaintiff appeals from a judgment of nonsuit that followed the presentation of its case in the Superior Court.

Defendant cross-appeals from the judgment of nonsuit, and appeals from an order granting a new trial made subsequently to the judgment.

The appeals from the judgment and the order granting a new trial have been consolidated for briefing, argument, and decision in this Court. General Electric Co. v. Federal Employees' Dist. Co., 122 Cal.App.2d 509, 265 P.2d 19.

The substantive law governing this appeal is to be found in sections 16900 et seq. of California's Business and Professions Code, referred to as "The Fair Trade Act."

The Fair Trade Act was first held constitutional in Max Factor & Co. v. Kunsman, 1936, 5 Cal.2d 446, 55 P.2d 177, affirmed in 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122. The latest case involving the act, decided by our Supreme Court, is Cal-Dak Co. v. Sav-on Drugs, 1953, 40 Cal.2d 492, 254 P.2d 497.

Many matters have been argued and briefed on these appeals, among them being: the purposes of the Fair Trade Act, the measure and method of proof of damages for a breach of the law, whether or not there was proof of irreparable injury in this case, the scope and purposes of injunctive relief, asserted errors in ruling upon evidentiary matters at the trial, what are retail sales, and whether or not defendant, by reason of its cooperative character, comes or does not come within the purview of the act.

However, this Court has come to the conclusion that there is one feature in this case that, at the threshold of its consideration, compels affirmance of the judgment and reversal of the order granting a new trial. Having come to that conclusion it would serve no useful purpose to comment in this opinion upon the many other matters urged in support of, or for reversal of the judgment and the order.

Section 16902 of the Code permits agreements by producers with buyers that such producers' commodities will not be sold at retail for prices less than stipulated by the producer. Only three exceptions to such fixed sales prices are permitted: (1) In closing out an owner's stock; (2) In selling damaged goods, or goods deteriorated in quality; and, (3) in selling by any officer acting under the order of a court.

[1] Section 16904 provides that sales contrary to such minimum contract prices are "actionable at the suit of any person damaged thereby." That phrase contemplates application of the equitable remedy of injunction. Cal-Dak Co. v. Sav-on Drugs, supra, 40 Cal.2d 492, 254 P.2d 497. And it matters not whether such sales are made by parties to the contract or not. Cal-Dak Co. v. Sav-on Drugs, supra.

But in this case the contract upon which plaintiff rests its whole case contains the following exceptions: "The indicated retail prices do not apply to sales made to employees of the General Electric Company

or to sales by distributors or dealers of these products to their own employees, or to sales to governmental agencies or to commercial or institutional establishments buying for their own use and not for resale."

Carried to their logical conclusion these exceptions nullify the purpose and intent of the Fair Trade Act.

[2, 3] All laws of a general nature shall have a uniform operation. Const. Art. I, Sec. 11. Legislative discretion may not be delegated. State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29. A statute is discriminatory if it confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to privileges granted and between whom and those not favored no reasonable distinction can be found. Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000. A law is a "special law" and unconstitutional if it confers particular privileges in the exercise of a common right upon a group arbitrarily selected. Communist Party of United States v. Peek, 20 Cal.2d 536, 127 P.2d 889.

[4, 5] So, bearing in mind the constitutional limitation of legislative power, it becomes evident that it was not the intention of the Legislature in enacting the Fair Trade Act to authorize producers of commodities to divide their customers into classes and to provide by contract that one or more favored classes may buy such commodities at cut-rate prices and that others must pay the minimum prices stipulated in the contract. And the powers of equity may not be invoked to enforce such contracts.

Therefore, that part of the judgment of the Superior Court reading as follows is supported by the undisputed facts in this case:

"that plaintiff's evidence disclosed that plaintiff was not entitled to the discretionary remedy of injunction by reason of the fact that such evidence showed that plaintiff had failed to enforce uniformly its minimum fair trade prices and had inequitably discriminated in favor of large classes of consumers and had not subjected them to its fair trade price restrictions,"

[6, 7] While an order granting a new trial should be affirmed if there is any ground upon which it might properly have been made, yet when neither pleadings nor proof as a matter of law will support a case it becomes the duty of a court of review to reverse the order and put an end to the litigation. The wide discretion allowed to the Superior Court on motions for a new trial will not justify the granting of such motions where in its findings and judgment the court reached the only conclusion that could properly have been reached on the record. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1037; Mazzotta v. Los Angeles Ry Corp., 25 Cal.2d 165, 153 P.2d 338.

The judgment is affirmed, and the order granting a new trial is reversed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 588

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence Edward KENT, Defendant and Appellant.

Cr. 5301.

District Court of Appeal, Second District. Division 2, California.

April 28, 1955.

Defendant was convicted of manslaughter. From judgment of the Superior Court of Los Angeles County, Burdette J. Daniels, J., entered on the verdict and order denying a new trial, the defendant appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to sustain the conviction.

Judgment and order denying motion for new trial affirmed.

1. Homicide ⇐250

Evidence was sufficient to sustain conviction for manslaughter. Pen.Code, § 192, subd. 1.

2. Criminal Law ⇐829(1)

Where subject matter of requested instruction was substantially incorporated in instruction given by court, it was not error to refuse to give requested instruction.

Edmund G. Brown, Atty. Gen., Delbert E. Wong, Deputy Atty. Gen., for respondent.

Sam Houston Allen, Van Nuys, for appellant.

McCOMB, Justice.

From a judgment of guilty of manslaughter after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] *Questions:* First: Was there substantial evidence to sustain a judgment of guilty of the crime of manslaughter?

Yes. Manslaughter is the unlawful killing of a human being without malice, if done upon a sudden quarrel or heat of passion. (Penal Code, sec. 192, subd. 1.)

The record discloses the following:

Herbert Singhofen and defendant had been close personal friends for approximately 20 years. Defendant, who was an alcoholic, had for a long time been a drinking partner of Mr. Singhofen. For several days prior to June 17, 1954, Mr. Singhofen had been drinking at his home, and during this time defendant had called upon him on several occasions. On one of these occasions, Mr. Singhofen had given defendant his passbook on a nearby savings bank and defendant had withdrawn $100 therefrom, which he had divided with Mr. Singhofen.

Thereafter defendant returned to his hotel room which was located several blocks from his friend's residence. During the next several days defendant went to the race track where he won considerable money. On the evening of Thursday, June 17, he had approximately $160 on his person at which time he went to Mr. Singhofen's residence and found him in bad shape due to his drinking and failure to eat. Defendant brought Mr. Singhofen to his [defendant's] hotel where he was registered as a guest. At the time Mr. Singhofen was under the influence of liquor and shaking so badly he could not write his name. He had dark circles under his eyes, but there were no cuts, bruises or abrasions on his face.

In the same hotel was a man named Clark, with whom defendant had been drinking periodically for several days.

The following night Mr. Clark, accompanied by defendant, carried Mr. Singhofen from the hotel at which time there were bruises and scratches on Mr. Singhofen's back. Defendant and Mr. Clark called a taxicab and drove to deceased's home where they left him on his bed. Before leaving the taxicab defendant gave the driver a $20 bill. Returning to the taxicab, the driver was instructed to drive to Beverly and Western. During the ride Mr. Clark and defendant had a conversation. When they left the cab Mr. Clark asked the driver if he had overheard. Upon receiving a negative reply, Mr. Clark said, "You had better not recall what you heard or seen, or heard what we were talking about." The fare was a little over $2.00, but when the driver offered defendant change for the $20 bill previously given him, defendant said "forget it" or "I don't want any change" or some such expression.

At about 9:30 Saturday evening defendant called Mr. Jackson, whose business is the relief and rehabilitation of alcoholics, and told him there had been a "big fight over here", and that Herb, referring to Mr. Singhofen, had been hurt. Defendant sought Mr. Jackson's assistance. Mr. Jackson went to the home of Mr. Singhofen, which was a shack on the rear of 617 Coronado Street, and found his dead body. He thereupon called the police. Deceased's body was terribly battered and beaten.

Upon examination of defendant's hotel room, blood was found on the wall and

blood on a pillow slip. Defendant testified relative to the events of June 18, 1954, that he left decedent in his room at about 6:00 p.m. "I went out and ate and saw some guys and I felt better. I left him on the floor. When I came back, I picked up this boy Clark to help me lift him up and put him on the bed. He was laying on his back with blood streaming from his mouth. His shirt was full of blood. We took his shirt off. I think we threw it in the waste-basket and layed him on the bed. Then we cleaned his face and shaved him. This was about 9:30 or 10. * * *

"As soon as we shaved him and cleaned his face Clark looked at him and said, 'this man is dead'. He stopped breathing—he had no pulse. Clark seemed to know something about it—he is about 6' 4"—about respiration so he tried to revive him with artificial respiration—slapped his face—nothing—we couldn't get any life in him. Then Clark got the idea—let's get him out of the hotel. I am drunk—it seemed like a decent idea at the time—don't know why. We took him out. He carried him out, I couldn't carry him. We took him out to this trailer house and left him draped over the bed. I didn't know, I opened the door and said put him in the bed and we went back."

He denied striking the decedent at any time and when questioned about the blood on the wall, defendant explained that it was the result of a bloody nose after being struck by the deceased about a week before. When later questioned about the blood on the wall and when asked whether or not he would object to a blood type test, defendant admitted that the blood was that of deceased, and that about 10 days before he had struck deceased on the nose after being struck by him.

From the foregoing evidence the jury were justified in finding that defendant took deceased to his room; both parties had been drinking; they had engaged in a fight and that deceased had been severely beaten with the result that he died. Under such facts it is evident the jury was justified in inferring that decedent was killed by defendant upon a sudden quarrel, and that he was thus guilty of manslaughter.

The evidence disclosed that defendant had admitted there had been a fight in his conversation with Mr. Jackson; also that he gave conflicting stories as to the source of the blood on the wall in his room.

In view of the fact that we cannot say that " 'upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt' " (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779), we must conclude that the foregoing evidence was sufficient to support the verdict of guilty.

[2] Second: Did the trial court err in refusing to give the following instruction requested by defendant?

"You are instructed that as a matter of law the evidence in this case does not justify and would not support a conviction of murder; therefore, it will be your duty to confine your consideration to the question of the defendant's guilt or innocence on the included offense of manslaughter and that offense is defined elsewhere in my instructions. As to the latter offense, the court has not and does not by giving of this instruction intend to express any opinion on the question of guilt or innocence of the defendant."

No. The trial court in lieu thereof instructed the jury as follows:

"By the Constitution of California, a judge of this court, presiding in the trial of an action, is authorized, within proper bounds, to comment to the jury on the credibility of any witness and on any other phase of evidence.

"[In accord with that authority, and with a view to aiding you in determining the facts, I propose to make certain statements concerning the evidence in this case, but before doing so,]

"I would caution you that it is your right and duty to exercise the same independence of judgment in weighing the judge's comment on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict.

"I advise you from the evidence in this case you are not warranted in finding the defendant guilty of murder in the first or second degrees."

In both instructions the court advised the jury that a conviction of murder was not justified by the evidence. The instruction requested by defendant contained a statement that the court did not intend to express an opinion on the question of guilt or innocence of defendant. The instruction given contained a statement that it was the right and duty of the jury to exercise the same independence of judgment in weighing a judge's comment on the evidence as it was entitled to exercise in weighing the testimony of the witnesses and the argument of counsel, and that the jury was the exclusive judge of all questions of fact, and "Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or compel a verdict."

It thus appears that the instruction given by the court was substantially the same as the instruction requested by defendant. It is not error for a court to refuse to give a requested instruction where the subject matter thereof is substantially incorporated in the instruction given. (People v. Barber, 62 Cal.App.2d 206, 213[6]), 144 P.2d 371.

Therefore the court's action was without error. An examination of the record discloses that defendant had a full and fair trial.

The judgment and the order denying the motion for new trial are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 746

Jack B. LINDSEY and Henriette L. Lindsey, Plaintiffs,

v.

Helen Farish CAMPBELL, Defendant-Appellant,

Jack B. Lindsey, Respondent.

Civ. 20770.

District Court of Appeal, Second District, Division 3, California.

May 5, 1955.

Hearing Denied June 29, 1955.

Action for treble damages for usury. From a judgment of the Superior Court, Los Angeles County, Philbrick McCoy, J., in favor of the plaintiffs, defendant appealed. The District Court of Appeal, Shinn, P. J., held that an agreed statement of facts which had been adopted as findings by the trial court compelled the conclusion that a transaction whereby the defendant had been promised a return of $14,000 for her "supplying $6,400 in a real estate sub-division" was an investment and not a loan and was consequently not usurious.

Judgment reversed with instructions to vacate conclusions of law, to make new conclusions in accordance with opinion and to enter judgment for defendant.

1. Usury ⇐142(3)

In action for treble damages for usury, wherein defense of estoppel was pleaded, question of waiver of defense was one of intention, and defendant's statement in trial brief to effect that, in view of other defense, it would seem unnecessary to urge defense of estoppel, did not constitute waiver and trial court should have considered that issue.

2. Usury ⇐16

Where parties in fact intend loan of money, any attempt to disguise nature of loan by characterizing it as something else will be disregarded and court will look through form to substance of transaction.

3. Usury ⇐113

Burden of showing usury is upon him who claims it.

4. Usury ⇐72

Though courts will tolerate no subterfuge designed to evade Usury Law and will always admit evidence to show that contract fair on its face is nevertheless disguise for usurious transaction, it is equally true that, if contract is subject to two constructions, one of which will render it usurious and one which will render it lawful, courts, in absence of other evidence requiring contract to be construed as usurious, will give it such construction as will render it lawful.

5. Usury ⇐11

In usurious transaction, there must be a loan of money, which is to be repaid to lender, with compensation for its use in amount constituting charge in excess of highest permissible rate, and as necessary concomitant there must exist corrupt intent to exact illegal charge for use of money lent.

6. Usury ⇐142(5)

Agreed statement of facts which were adopted as findings by trial court in action for treble damages for usury compelled conclusion that transaction whereby defendant had been promised return of $14,000 for her "supplying $6,400 in a real estate sub-division" was an investment and not a loan and was consequently not usurious

Rafter & Fredricks, Eric Rafter, Hermosa Beach, for appellant.

Matt D. Cooney, Sherman Oaks, for respondent.

SHINN, Presiding Justice.

Jack B. Lindsey and Henriette L. Lindsey brought this action against Helen Farish Campbell alleging that plaintiff (sic) borrowed $6,300 from defendant, evidenced by 7 promissory notes of $2,000 each, payable in 9 months after date, with interest at 6 per cent per annum, and secured the same by trust deeds on 7 separate parcels of real property in the City of Los Angeles. It was alleged that within one year prior to the institution of the action plaintiff paid defendant $6,300 plus $7,700, plus interest at 6 per cent per annum upon $14,000, alleged to have been "borrowed by plaintiff from defendant." Treble damages were sought in the sum of $23,940 on the theory that the loans were usurious. Judgment was rendered in favor of plaintiff Jack B. Lindsey for that amount and costs and in favor of defendant for costs against Henriette L. Lindsey. Defendant appeals from the judgment.

[1] The case was tried on an agreed statement of facts which is set out in the margin.[1] The statement was adopted as

1. "That during the year 1951, Plaintiff Jack B. Lindsey was associated in business with Robert Osborne, a real estate broker, licensed by the State of California. Also associated in this business were Leo Wheeler and William Wishart, licensed real estate brokers. The Lindsey business consisted of obtaining tracts of real property, sub-dividing same, constructing homes thereon and selling the individual homes at a profit. Jack B. Lindsey being a licensed contractor was in charge of constructing the homes and Robert Osborne handled the selling portion of the business on a commission basis.

"During the months of September, October and November, 1951, Lindsey owned a tract of real property in the State of California consisting of Lots 1 through 14 of Tract 15307, said tract had been sub-divided and plans submitted to the City for the dedication of portions of the tract for streets and sewers. During the months of September and October, however, Lindsey did not have sufficient monies to post the cash bond required by the City to insure performance of the construction work agreed to by them to be performed by them in their sub-dividing plan.

"That on several occasions during said months, Lindsey met with Osborne and his associate brokers, Wheeler and Wishart and requested them to make efforts to obtain additional monies for investment in said sub-division plan so that their sub-division could be completed and construction of the proposed homes commenced.

"During the month of October, 1951 and pursuant to said request of Lindsey and Osborne, Leo Wheeler approached Mrs. Campbell, the defendant, and asked her if she was interested in supplying $6,400.00 in a real estate sub-division and stated to her that should she sup-

the findings of the court and there was a conclusion of law that the transaction was a usurious loan of money for which plaintiff was entitled to recover treble the amount paid by plaintiff. The answer of the defendant alleged as one of the defenses that plaintiffs were estopped from urging the contention that the transaction constituted a loan of money. The court declined to entertain the defense of estoppel not because the court was of the opinion that the facts furnished no basis for an estoppel but upon the ground that defendant had abandoned that defense. The only basis for this position of the court was that in the defendant's trial brief was found the statement "in view of the foregoing cases, it would not seem necessary to urge defendant's second defense of estoppel." And the court stated "I didn't even consider it." It is apparent that the court was mistaken as to the defendant's having waived this defense. It had been pleaded and if the defendant was so confident that another defense had been so well established as to render it unnecessary to press the defense of estoppel that defense should not have been deemed waived. There is nothing else in the record which remotely suggests an intention to waive the defense and, of course, the intention is controlling on the question of waiver. The court should have considered the defense of estoppel but this is not the decisive question on the appeal.

We do not find in the stipulated facts any basis for the conclusion that the transaction was a loan of money. Every pertinent fact is consistent only with the conclusion that defendant merely made an investment in plaintiff's project. In order to construe the transaction as a loan it would be necessary to ignore every stipu-

ply said monies, it would return $14,000.00 within one year.

"That at all times mentioned herein Helen Farish Campbell was a widow, completely unfamiliar with business and financial transactions and totally dependent for her support on income from certain trust funds which had been established by her. Mrs. Campbell relied throughout for the handling of all transactions in connection with said subdivision upon the advice of Wheeler, who had been a personal friend of hers for several years.

"Mrs. Campbell expressed interest in supplying the money outlined by Wheeler and requested Wheeler to inform Mr. Osborne of her interest. Within a few days Osborne called Mrs. Campbell and requested her to come to his real estate office in Van Nuys for a conference. Mrs. Campbell, accompanied by Mr. Wheeler, went to Mrs. Osborne's office where such conference was held between Mrs. Campbell, Lindsay, Osborne, Wishart and Wheeler. At this meeting Mr. Lindsey and Mr. Osborne outlined the details of their sub-division plan and informed Mrs. Campbell of their desire for funds to proceed with the completion of said sub-division and for the construction of the projected homes. Mrs. Campbell stated at this meeting that she would supply $6,300.00 but that she would have to instruct her broker to sell certain stocks owned by her.

"Thereafter in a period of approximately ten days, Mrs. Campbell obtained the $6,300.00 and returned to Mr. Osborne's office where she handed the check for $6,300.00 to Mr. Lindsey. At this meeting Mr. Wheeler requested that Mrs. Campbell have some evidence of the agreement and requested that she be given second trust deeds in the amount of $14,000.00, said trust deeds being in the amount of $2,000.00 each on lots 1 through 7 of said tract. Lots 1 through 7 had a fair market value at this time of $2,800.00.

"Mrs. Campbell and Lindsey went to Southland Escrow Company in Glendale and arranged for the issuance of said trust deeds and notes which were thereafter signed by Lindsey and delivered to Mrs. Campbell. No written agreement as to the division of the sales price was made and no books of account or other records were kept as between Mrs. Campbell and Lindsey.

"During the year 1952, construction loans were obtained and homes erected on said lots 1 through 7 and said homes were sold by Osborne. Mrs. Campbell made demand for payment of her notes but payment was not made and she thereupon during the month of August, 1952, instructed the trustee of the deeds of trust to commence foreclosure proceedings. Thereafter, and prior to the filing of the Complaint in this action all seven of said notes were paid, at various times, each in the amount of $2,000.00 plus $80.00 interest. That after paying Mrs. Campbell as aforesaid and paying of all commissions to Osborne, Lindsey lost on the venture."

lated fact which tends to identify it as an investment and to supply others of import to the exact contrary of those stricken.

Plaintiff says that the case of Martin v. Ajax Construction Co., 124 Cal.App.2d 425, 269 P.2d 132, furnishes a complete answer to defendant's contention that she made an investment and not a loan. The case does not bear out that contention. The agreement under which plaintiffs Martin furnished money to Ajax provided that the Martins were "willing to loan" Ajax money and "hereby loan the first party the sum of $5,000." They were given a note of $10,000 and a written guarantee of individual stockholders. The court held that the mere testimony of Martin that he thought the transaction was an investment was wholly insufficient to prove that it was not a loan or that he engaged in a joint venture with Ajax; there was no evidence whatever of a joint venture.

[2, 3] It is true, of course, that where the parties in fact intend a loan of money any attempt to disguise the nature of the loan by characterizing it as something else will be disregarded; the court will look through the form to the substance of the transaction. Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621. But the courts do not find usury without evidence that usury has been committed. Of course the burden of showing usury is upon him who claims it. Harris v. Pollack, 101 Cal.App.2d 26, 224 P.2d 824.

[4, 5] The rule which is controlling here is stated in Coley v. Wolcott, 103 Cal. App. 140, 284 P. 241, 244, as follows: "While courts will tolerate no subterfuge designed to evade the Usury Law, and will always admit evidence to show that a contract fair on its face is nevertheless a disguise for a usurious transaction, it is equally true that, if a contract is subject to two constructions, one of which will render it usurious and therefore unlawful and one which will render it lawful, the courts, in the absence of other evidence requiring the contract to be construed as usurious, will give it such a construction as will render it lawful. Shelley v. Byers, [supra,] 73 Cal.App. 44, 238 P. 177; Cobb v. Hartenstein, 47 Utah, 174, 152 P. 424, 427; Ohio Inv. Co. v. Brown, 89 Kan. 66, 130 P. 665; Lusk v. Smith, 71 Kan. 550, 81 P. 173; German Savings Bank & Loan Ass'n v. Leavens, 89 Wash. 78, 153 P. 1092; Martin v. Oklahoma State Bank, 86 Okl. 113, 206 P. 824; Forman v. Needles, 78 Okl. 105, 188 P. 1087." The foregoing statement was quoted in part in Moore v. Dealy, 117 Cal.App.2d 89, at page 94, 254 P.2d 888, at page 892, where it was said: "The test is whether there was an attempt to evade the law. As was said in Rose v. Wheeler, 140 Cal.App. 217, 219, 220, 35 P.2d 220, 221: '"In a usurious transaction, there must be a loan of money, which is to be repaid to the lender, with compensation for its use in an amount constituting a charge in excess of the highest permissible rate. And as a necessary concomitant there must exist the corrupt intent to exact the illegal charge for the use of the money lent. Lamb v. Herndon, 97 Cal.App. 193, 197, 275 P. 503. The presumptions of law are in favor of legality; and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness. Coley v. Wolcott, 103 Cal.App. 140, 284 P. 241; Shelley v. Byers, 73 Cal.App. 44, 57, 238 P. 177."'" 12 Am.Jur. pp. 793–794 says: "An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous. Such interpretation is preferred to one which renders it invalid. It will not be interpreted so as to be invalid unless such interpretation is required by the terms of the agreement in the light of the surrounding circumstances. * * *" The same rule is stated in 17 C.J.S., Contracts, §§ 318, 586, pp. 735–736, 1227.

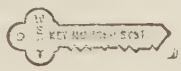
[6] According to the statement of facts the project was to subdivide the property, construct homes and sell the individual homes "at a profit." The money contributed by Mrs. Campbell was for a bond "to insure performance of the construction work agreed to by them to be performed by them in their sub-dividing plans." The

persons designated as "them" were plaintiff Jack B. Lindsey, Robert Osborne, Leo Wheeler and William Wishart. It was the joint project of all these gentlemen, and plaintiff was approached by Wheeler pursuant to the agreed purpose of the associates "to make efforts to obtain additional monies for investment in said subdivision plan so that their sub-division could be completed and construction of proposed homes commenced." Mrs. Campbell was not asked for a loan of money; the word loan was not used in presenting the proposition to her. She was asked "if she was interested in supplying $6,400.00 in a real estate sub-division." She "relied throughout for the handling of all transactions in connection with said sub-division upon the advice of Wheeler, who had been a personal friend of hers for several years." Plaintiff and Osborne explained to her their subdivision and construction plan and she agreed to supply $6,300.00 for it. She sold securities and furnished the money to Mr. Lindsey. There was then no suggestion of a loan of money. Mrs. Campbell had nothing to show that she would receive $14,000 from the venture and it was only after she had agreed to furnish capital and turned over the money that Mr. Wheeler hit upon the plan for her to be given the notes and trust deeds upon 7 of the lots. Construction loans were obtained on the remaining 7; houses were built; and the places were sold. Plaintiff lost money on the venture. We do not see how the trial court could have inferred from the facts stated that any of the parties to the transaction understood that it involved a loan of money. It affirmatively appeared that the proposition made to plaintiff was as found in the statement of facts "to obtain additional monies for investment in said subdivision plan." It was never proposed to her that she should loan $2,000 on each of 7 of the lots. The promise of the return of $14,000 was for her "supplying $6,400.00 in a real estate subdivision." The notes and trust deeds were an afterthought. And if it was the intention of the associates to merely borrow $6,300.00 from Mrs. Campbell, there would have been no purpose in outlining to her the entire plan of subdivision and improvement. No books of account or other records were kept between Mrs. Campbell and plaintiff for the obvious reason that the associates guaranteed to return Mrs. Campbell $14,000 for an investment. The agreed facts expressly state that the purpose of the associates was "to obtain additional monies for investment in said sub-division" and Mrs. Campbell was asked "if she was interested in supplying $6,400.00 in a real estate sub-division" and that "it would return $14,000.00 within one year." Obviously the "it" was the investment. Until the notes and trust deeds were suggested after the parties had fully arrived at their agreement it was not intimated to Mrs. Campbell that plaintiff any more than the other associates would be personally liable for the payment to her of the amount they agreed she should receive. We repeat that every pertinent fact of the statement of facts indicates that it was not only the representation to Mrs. Campbell but that it was her understanding and the understanding of plaintiff and his associates that the notes and trust deeds were given to secure Mrs. Campbell her share of the profits which it was understood the venture would produce. There was nothing unreasonable in the agreement to give Mrs. Campbell some $7,000 of profit for the investment of her money. The subdividers would not have agreed to give her $14,000 as her share had they not expected to make substantial profits. There were 14 lots to be built on. Mrs. Campbell would receive a profit of about $500 from the sale of each house. The plans of the promoters were too optimistic. The profits were not realized, and the charge of usury was obviously an afterthought. We are of the opinion that in the absence of extrinsic evidence the facts stipulated do not justify a conclusion that the transaction constituted a loan of money. It is unnecessary to determine whether the error of refusing to consider the defense of estoppel furnishes an independent ground for reversal.

The judgment is reversed with instructions to vacate the conclusions of law,

to make new conclusions in accordance with the views herein expressed and to enter judgment for the defendant.

WOOD and VALLÉE, JJ., concur.



132 Cal.App.2d 635

Elmer R. LEWIS, Ian W. Hoeffler and Sigred Dagmar Hoeffler, Plaintiffs-Respondents,

v.

Margaret R. JOHNSON, Defendant-Appellant.

Civ. 8518.

District Court of Appeal, Third District, California.

April 29, 1955.

Rehearing Denied May 23, 1955.

Hearing Denied June 23, 1955.

Action to quiet title to mining claims which plaintiffs had located subsequent to defendants' location. The Superior Court, Plumas County, Wm. M. MacMillan, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to sustain finding that plaintiffs had performed requisite assessment and discovery work.

Judgment affirmed.

1. Trial ⇐66

In action to quiet title to unpatented mining claims, reopening cause upon plaintiffs' motion to supply missing proof of discovery work was not abuse of discretion. 30 U.S.C.A. § 26; Public Resources Code, §§ 2304, 2307.

2. Trial ⇐66

Generally, in an absence of affirmative showing of prejudice, it is within discretion of trial court to reopen a cause at any time before trial has been concluded and its decision rendered.

3. Mines and Minerals ⇐23(2)

A court will not substitute its own judgment as to wisdom and efficacy of method employed in developing a mine in place of judgment of owner of claim.

4. Appeal and Error ⇐979(4), 1011(1)

Where evidence in action to quiet title to mining claims was so sharply conflicting that trial court was necessarily compelled to weigh credibility of various witnesses in determining truth, reviewing court could not hold that findings were not amply supported by evidence or that trial court had abused its discretion in refusing new trial.

5. Affidavits ⇐18

Affidavits that requirements requisite to valid location of mining claims had been faithfully performed, when filed with and duly certified by county recorder, constituted prima facie evidence of performance of labor in making of improvements as recited therein.

6. Mines and Minerals ⇐38(20)

In action to quiet title to unpatented mining claims, evidence was sufficient to sustain finding that plaintiffs had performed requisite assessment and discovery work. 30 U.S.C.A. § 26; Public Resources Code, §§ 2304, 2307.

7. Appeal and Error ⇐1056(2)

In action to quiet title to unpatented mining claims which plaintiffs had relocated after defendants' location, wherein witness who had done work for defendants testified, evidence that this witness did work because he was expecting a lease from defendants was immaterial and its exclusion was not prejudicial error.

8. Appeal and Error ⇐205

Where no offer of proof was made, reviewing court could not ascertain whether error or prejudice resulted from exclusion of evidence.

9. Appeal and Error ⇐1056(5)

In action to quiet title to mining claims which plaintiffs had located after defendants' location, wherein witness who had done work for defendants testified, exclusion of evidence concerning agreement between this witness and a defendant concerning terms on which work would be done was not prejudicial, in view of fact that work would count as annual assessment

work whether performed under lease, option or as an employee.

10. Mines and Minerals ⇐23(2)

Work performed on mining claim counts as annual assessment work, whether performed under lease, option or merely as an employee.

11. Mines and Minerals ⇐23(2)

Required labor or improvement ordinarily must be performed or made by owner of claim, but it is not necessary that he perform work personally, and work performed or improvement made by anyone in privity with him inures to his benefit and may be sufficient to preserve claim.

John C. Harris, Sacramento, for appellant.

S. C. Young, Quincy, Edw. R. Solinsky, San Francisco, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment quieting respondents' title to four unpatented mining claims as against the appellant's adverse claims thereto. It stands without challenge that at one time prior to October 1, 1950, the appellant was the owner of rights to the subject mining claims which were originally acquired pursuant to 30 U.S.C.A. § 26, which provides that locators of mining locations on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns, have the exclusive right of possession and enjoyment of the surface of such locations and of various lodes and ledges therein so long as such locators or their heirs or assigns comply with the laws of the United States and of this State governing their possessory title. The trial court found that appellant had lost all right to said mining claims by failure to perform "the annual assessment work" required by governing statutes and that after such loss respondents had exercised their right to acquire possessory title to said claims by relocation in their own right. Respondents, as plaintiffs, made certain preliminary proof, and having rested their cause appellant moved for a nonsuit, which motion was denied. Appellant then presented her defense, based on evidence of a chain of title deraigned from the original notices of location and the performance of the annual assessment work. Her proof as to the doing of the assessment work was challenged and a number of witnesses were called, the burden of whose testimony was that appellant had not, in fact, done the amount of work called for by the statutes. The case was ordered submitted upon briefs, and appellant's reply brief pointed out the lack of any proof in the record that within 90 days after the date of location respondents had performed discovery work as required by Section 2304 of the Public Resources Code. This section requires that within that period the locators either sink a discovery shaft upon a claim to a depth of at least 10 feet from the lowest part of the rim of the shaft at the surface, or drive a tunnel or open cut upon the claim to at least 10 feet below the surface, or excavate an open cut upon the claim, removing therefrom not less than 7 cubic yards of material. Section 2307 of the Public Resources Code provides that failure or neglect of a locator to comply with the requirements of Section 2304 renders the location null and void. Upon this lack of proof being so pointed out, respondents moved the trial court for leave to reopen to supply the needed proof, which motion was opposed by appellant, but granted by the trial court. Thereafter evidence material to that issue was taken. At the close of that evidence the entire cause was submitted to the court for decision. The trial court announced its decision in favor of respondents and thereafter signed and filed findings of fact and conclusions of law, and entered judgment quieting respondents' title as against the claims of appellant.

[1, 2] For reversal appellant first contends that the reopening of the cause upon motion of plaintiffs to supply the missing proof of discovery work was an abuse of the court's judicial discretion. This contention cannot be sustained. Speaking generally and unless prejudice be affirmatively shown, it is within the discretion of a trial court to reopen a cause at any time before a trial has been concluded and its

decision has been rendered. Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 612, 296 P. 616.

[3, 4] Appellant next contends that the court's denial of defendant's motion for a new trial on the ground of insufficiency of the evidence, and error at law occurring at the trial, was erroneous. Appellant also assigns error in that she claims the evidence is insufficient to justify the findings. We shall treat these two assignments of error together. It appears that from the assessment year of 1942–1943 to the beginning of the assessment year 1949–1950 Congress had granted a moratorium as to the requirements for annual assessment work; and that as to the assessment year 1949–1950 the time for doing the assessment work was extended to October 1, 1950. During the moratorium period appellant had done no work upon the claims. She was not required to do any. She had, as required by statute, filed of record each year a notice of her desire to continue to hold the claims. As to assessment work done during the assessment year 1949–1950 there was much testimony on behalf of appellant by a number of witnesses which, if accepted by the trial court, would have supported a finding that the assessment work had been done. On the other hand there was much testimony by an even greater number of witnesses that sufficient work had not, in fact, been done and that such meager work as was done was not assessment work but was nothing more than renewing coverings over existing shafts in the interest of safety, and repairing or partially reconstructing a small cabin for general purposes. While a court will not substitute its own judgment as to the wisdom and efficacy of the method employed in developing a mine in place of that of the owner of the claim, nevertheless this testimony went to the question of whether or not any assessment work had been done and, if so, as to whether or not that work furnished the necessary quantum to hold the claims. The evidence was so sharply conflicting that the trial court was necessarily compelled to weigh the credibility of the various witnesses in determining the truth. Under such circumstances we cannot hold on appeal either that the findings were not amply supported by the evidence or that the court abused its discretion in refusing a new trial. Typical of evidence supporting the claims of appellant is the following: There had been filed on her behalf an affidavit or proof of annual labor sufficient on its face to show the performance of the required amount of assessment work within the time limited. Mrs. Gosselin, a daughter of appellant, testified that she and her husband had done labor and made improvements on the claims in excess of $100 for each claim; that this included timbering and boarding two existing shafts, cleaning up brush, making a trail wide enough to haul logs over, and clearing the access road into and within the boundaries of the claims. She testified to the expenditure of money furnished by her mother in the amount of $300, all of which she said was spent for lumber, supplies and hired labor, and that she and her husband added funds of their own to meet the costs. A Mr. Roth testified for appellant that he worked on the claims during the month of July, 1950, and then commencing in late September, worked continuously until beyond the limited time for completing the assessment work. Mr. Erickson worked with him and so testified. They said they built a cabin, commenced tunneling on one of the claims, going into the hillside a distance of 50 feet, and timbering some 25 feet underground. Roth's testimony was that the cost of the house would be as much as $400 and the value of the tunnel work as much as $1,000. As opposed to all this, Elmer Lewis, one of the plaintiffs, testified that during the assessment years 1949–1950 and 1950–1951 he lived on one of the claims all of the time and inspected the properties every week and sometimes oftener; that he saw no brush cut, not even a twig; that the only lumber used upon the claims by appellant was old lumber picked up on the property and nailed around the timbers of a shaft to keep stock and people from falling in; that nothing was done to support any ground work; that no timbering was done inside any shaft; that he never saw anyone working on these claims until Roth came there in September of 1950. There were other witnesses who

testified generally to the same effect as to the lack of any substantial work being done.

[5, 6] Appellant challenges the sufficiency of the evidence to sustain a finding that respondents have done such discovery work as was necessary to perfect their locations of the claims. But there was testimony, that we must assume the court accepted as true, tending to show that the locators had discovered mineral veins bearing ore in place; that they had panned and assayed for values, finding the rock to be gold and silver bearing, the quantities shown by the assays running from a few dollars a ton to more than $100 a ton; that within the required 90 days after location, discovery shafts, open cuts and other excavations were sunk to the required depths and specifications and that in general all of the requirements of the law requisite to valid location of the claims had been faithfully performed. It is, of course, true that the affidavits that these things were done, when filed with and duly certified by the county recorder, constituted prima facie evidence of the performance of labor in the making of improvements as recited therein. For this reason we cannot sustain appellant's contention relating to the making and perfection of the locations. This same statutory rule of presumption of the truth of recitals in the recorded affidavits was sufficient answer to appellant's motion for nonsuit. No error can be ascribed to the denial of that motion.

[7–10] Appellant claims prejudicial error in two rulings of the trial court concerning the admission and exclusion of evidence. It appeared that Mr. Roth had for a long time had a good deal to do with caring for appellant's interest in the claims, having done work on them over a long period of years. He also seems to have been mainly in charge of the assessment work done during the vital assessment year 1949–1950. On cross-examination it was developed that, although testifying at length as to the nature, the quantum and the value of assessment work done during that year as extended, he had nevertheless promptly upon the expiration of the period for doing the assessment work relocated the claims in his own name, an action which of course, if unexplained, tended to prejudicially affect the testimony he had given, favorable to appellant's cause. He, also, when asked if he had personally filed any proof of the labor he testified had been done on behalf of appellant, replied that he had never intended to do so, a statement which again tended to challenge his good faith. On redirect examination counsel for appellant sought to clarify the situation created by the effect of his testimony on cross-examination, and the following occurred. By counsel for the appellant:

"Q. Mr. Roth, you stated just immediately preceding our recess here that you didn't ever intend to file a proof of labor after you did this work on this tunnel, this 40 foot tunnel. What did you mean by that? A. I didn't intend to do it for the reason that I felt I was already paid for the reason I had a lease being executed a year or two prior to this—I'll say back almost a year before I came up here.

"Q. Is that the lease of these six claims that the defendant claims she owns? A. That is right.

"Q. And is that still in process of being executed and delivered to you? A. Yes."

At this point counsel for the respondent moved to strike out the last question and answer upon the ground, it seems, that it was inadmissible because the lease referred to had not been executed and delivered and was, therefore, not a lease. Counsel for the appellant stated that the testimony was for the purpose of showing Roth's purpose in doing the work on the claims. The court struck out the testimony. We are unable to find anything material in this episode and certainly we could not ascribe prejudicial error to the court's order. Counsel for the appellant then asked Mr. Roth this question: "Q. Did you ever during 1950, intend to file a location on any of these six claims belonging to Margaret Johnson?" Roth had testified that he had posted location notices and had also said he had never intended to file proof of labor. He had said nothing about intention to record notice of location. At this point counsel for respondents objected that whether or not Roth intended to file for record, a location notice was immaterial and this objec-

tion was sustained. It is difficult to say that any right of appellant was injured thereby, but in any event no offer of proof was made and we do not know what the witness would have said if he had been permitted to answer the question. Under the familiar rule, therefore, we cannot ascertain whether there was any error or prejudice. He was then asked why he had never filed for record a notice of location after posting the ground. Objection was sustained and the question went unanswered. Again there was no offer to prove what the fact was to which he might have testified. A Mr. Erickson had spent considerable time on the claims with Mr. Roth during the period that Roth, according to appellant's evidence, was engaged in doing assessment work, and Erickson had testified that he had done a good deal of that work himself. On cross-examination he was asked who employed him to go on the claims and do the work, and he said that there was a verbal understanding or agreement that he and Roth were to be partners in the claims; that Roth also had a verbal agreement with appellant. Counsel for the appellant moved that so much of the testimony as was hearsay with regard to what Roth had told him concerning any understanding with Mrs. Johnson be stricken. The motion was denied. We think that since the matter had been developed on cross-examination and since it cast a doubt upon the appellant's position that the work had been done for her she was entitled to go into the matter on redirect and establish what the situation was. However, the matter is of little moment, for it made no difference whether Roth and Erickson were working under a lease, an option or were merely employed by appellant, for in any event the work they did would count as annual assessment work. Whitwell v. Goodsell, 37 Ariz. 451, 295 P. 318, 319—work done by optionee under oral option.

[11] "The labor or improvement required by the statute ordinarily must be performed or made by the owner of the claim, but it is not necessary that the owner should personally perform the work or make the improvement, since work performed or improvement made by anyone in privity with him inures to his benefit and may be sufficient to preserve the claim. The required work or improvement may be done or made by an owner's authorized agent, or by his legal representative. It is sufficient to preserve the claim, if the required labor or improvement is performed or made, on behalf of the claim, by anyone who has a legal or equitable interest or title therein, such as by one in possession under an option, by a coöwner, by a member of a mining association or a stockholder of a corporation which owns the claim, * * *." 58 C.J.S., Mines and Minerals, § 70; see also Lindley on Mines, 3rd ed., vol. 2, Sec. 407.

For the reasons given the judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

132 Cal.App.2d 582

IDEAL PACKING CO., a Wisconsin corporation, Plaintiff, Cross-Defendant, Appellant,

v.

Lucille G. BRICE, James B. Brice, Doe I, Doe II, Doe III, Doe IV and Doe V, Defendants, Cross-Complainants and Respondents,

Sol Belinky, Cross-Defendant and Appellant.

Civ. 20503.

District Court of Appeal, Second District, Division 2, California.

April 28, 1955.

Rehearing Denied May 26, 1955.

Hearing Denied June 23, 1955.

Action for accounting by lessee of ranch against lessors, who were employed to operate ranch for monthly salary plus 40% of net profits as determined by accounting which was to be taken as soon as practicable at end of lease period. From adverse judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., the lessee appealed. The District Court of

Appeal, Moore, P. J., held that evidence was sufficient to sustain finding that net profits for first year were $5,330.50 and that lessors were entitled to $2,132.20 as their share of profits.

Judgment affirmed.

1. Master and Servant ⇐81

In action for accounting by lessee of ranch against lessors, who were employed to operate ranch for monthly salary plus 40 per cent of net profits as determined by an accounting which was to be taken as soon as practicable at end of lease period, evidence sustained finding that net profits for first-year operations totaled $5,330.50 and that lessors were entitled to $2,132.20.

2. Appeal and Error ⇐994(3)

Where trial court accepts proof adduced by one expert and rejects that presented by another with reference to issues of same controversy, court's consideration of contention involves an inquiry into credibility of witnesses and weight to be accorded their testimony which no reviewing court will indulge.

3. Appeal and Error ⇐1073(1)

In action for accounting by lessee of ranch against lessors, who were employed to operate ranch for monthly salary plus 40 per cent of net profits as determined by accounting which was to be taken as soon as practicable at end of lease period, which was extended for one year, lessee was not prejudiced by court's dividing accounting when one of lessee's exhibits divided lease into separate periods and there was testimony that parties had agreed to furnish an accounting for each separate period.

4. Master and Servant ⇐81

In action for accounting by lessee of ranch against lessors, who were employed to operate for monthly salary plus 40 per cent of net profits, court was at liberty to accept such substantial evidence as appeared most probable and was not required to give special value to testimony of lessee's accountant.

5. Master and Servant ⇐81

In action for accounting by lessee of ranch against lessors, who were employed to operate ranch for monthly salary plus 40 per cent of net profits, finding was not required on each of certain credits to which lessee claimed it was entitled but only as to whether a profit had been realized, and if so amount thereof and lessors' share.

6. Accounting ⇐22
Appeal and Error ⇐1071(6)

An account is not required to be in any particular form, and if controversy and disposition thereof can be intelligently ascertained from record, findings, decree or bill of exceptions, reviewing court will uphold findings.

Minter & Feder, Hollywood, Rosenthal & Norton, Jerome B. Rosenthal and Lawrence William Steinberg, Beverly Hills, for appellants.

Mason & Howard, Los Angeles, for respondents. Paul P. Selvin, Los Angeles, of counsel.

MOORE, Presiding Justice.

Appeal by plaintiffs from a judgment in an action for accounting wherein defendants prevailed on their cross complaint. Reversal is demanded on (1) inadequacy of the findings; (2) error in dividing the accounting period; (3) court's failure to employ the profit determining method required by the contract; (4) insufficiency of the evidence; (5) failure to find upon substantial credits and to award same to plaintiff.

On June 19, 1950, respondents were owners of the J Bar L Ranch, (140 acres) and its equipment. On that day they effected a transaction with plaintiff as follows: (1) respondents leased the ranch to appellants for the period to terminate September 13, 1951, to be used for feeding cattle and growing crops; (2) respondents were employed to operate the ranch for which they should receive $200 per month, have their home on the ranch and receive a bonus of 40 per cent of the net profits gained from the operations, payable 30 days after the completion of a statement of the accounting, but in no event later than 75 days after September 13, 1951; (3) an accounting was to be taken for the purpose of computing the bonus as

soon as practicable after the September date; (4) Belinky (officer of and assignor to Ideal Packing Co.) loaned to respondents $24,000 evidenced by their note and secured by a trust deed on the J Bar L Ranch; (5) they orally agreed to commence operations under the contract June 19, 1950. At the expiration of the specified year, the parties orally agreed to extend the lease for an additional year, terminating September 12, 1952, on its identical terms and conditions. But prior to the arrival of the day designated for the expiration of the extended period, they agreed further not to extend the term. By November 24, 1952, appellants had removed their bovine herd from the leased land.[1]

At the end of the first year of operations, respondents demanded a computation of the profits and payment of their bonus. But neither calculation was done nor payment made. On the contrary, appellants attempted to prevent respondents from refinancing the loan when the note matured in order that appellants might acquire the J Bar L Ranch at a foreclosure sale. Such efforts on the part of appellants consisted of (1) their failure to keep correct accounts and to render an accounting to respondents of the profits earned by their operations; (2) their instituting this unfounded suit and their levy of a writ of attachment on the J Bar L Ranch[2], thereby encumbering its title and rendering a refinancing difficult.

[1, 2] Appellants contend that the findings are inadequate in that they do not clearly show the basis of the court's judgment; that there is no means of telling how the court derived the amount found to be due respondents; that the report of a referee or a master is required to enable the reviewing court properly to adjudicate this appeal. However, no authority is cited to support such contention. The court found specifically "that an accounting of the operations of J-L Ranch was had in open Court; that said accounting showed a net profit for the first year period, June 19, 1950 to September 12, 1951, in the sum of $5,330.-50." An accounting made in open court fulfills any requirement for a referee's report. Respondents' Exhibit O gives in detail the figures of the accounting as made to the court. It shows the total net income for the first year to have been $5,263.64. The court computed that it was $5,330.50, $66.86 more than reported by respondents' accountant. The latter included an inventory of the cattle but not of the supplies for the first year. The court added $2,100, the value of grain or hay, to the inventoried value of the cattle, making the total $7,363.-64. Deducting therefrom the items of overpayment, taxes, salary and a harrow, totaling $2,033.14, leaves the sum of $5,330.-50, the total net profit for the first year. Forty per cent of that total is $2,132.20—which is the sum due respondents for the first year. The testimony of respondents and their accountant is substantial evidence to support such findings. There is no halo about the head of the accountant of appellants that shines all the way to this court. To us he was just a witness of the human

1. Finding XII
"That prior to September 12, 1952, Ideal and the Brices orally agreed that said lease and employment contract should not be renewed for a third year, but that the operations of feeding, including pasturage of the cattle then remaining on the premises, should thereafter be completed in accordance with the terms of said contract, and that such operations continued until November 24, 1952, when Ideal removed all of their cattle from the ranch and abandoned and terminated said contract."

2. Finding XIX
"That plaintiff and cross-defendants wrongfully engaged in a course of conduct intended to make it impossible for cross-complainants to pay the obligations secured by the deed of trust upon their property when the same became due, in order that cross-defendants might acquire the same under foreclosure proceedings, which wrongful conduct consisted of cross-defendants' failure to keep proper accounts and to render an accounting to cross-complainants of the profits of the business, as required by the terms of the employment contract, and the institution of an unfounded suit, as represented by the present action, accompanied by the imposition of a cloud upon defendants' title by virtue of the attachment issued therein with the intent thereby to prevent cross-complainants from refinancing their property by borrowing from others."

variety whom the trial court was especially authorized to evaluate. That court having studied and appraised all evidence introduced, its findings are the ultimate of the truth of the issues investigated. Where a trial court accepts the proof adduced by one expert and rejects that presented by another with reference to the issues of the same controversy, its consideration of the contention involves an inquiry into the credibility of the witnesses and the weight to be accorded their testimony which no appellate court will indulge. Hurley v. Behnke, 212 Cal. 761, 762, 300 P. 820; Berkowitz v. Kiener Co., 37 Cal.App.2d 419, 425, 99 P.2d 578. In the Berkowitz case, the appellant made claims similar to those presented here: (1) The evidence is insufficient to support the accounting made by the court; (2) the court arbitrarily divided the accounting period; (3) the court did not refer the issue to a qualified accountant. The appellate court adhered to the fundamental law that it should not be burdened with the task of reviewing the evidence where there is a substantial conflict, but must accept as true all evidence tending to establish the correctness of the reasonable inference. Under the doctrine announced by the cited authorities, it is vain for an appellant to contend that the trial court "did not give consideration" to his evidence, or that the testimony of Kahn, respondents' accountant, "is not entitled to any substantial evidentiary effect" or that in taking the accounting in open court, the trial judge gave no "special credence or weight to the net profit statement of Schwartz, the certified public accountant of the employer." That Kahn's statement was "exaggerated and distorted" was an argument to be addressed to the trial court. Kruckow v. Lesser, 111 Cal. App.2d 198, 200, 244 P.2d 19; Hoffman v. Gurnsey, 44 Cal.App. 98, 185 P. 993.

[3] Appellants contend that they were prejudiced by the court's dividing the accounting period; that if the full term from June 19, 1950 to September 13, 1952 had been used, the accounting would have disclosed a loss; that as respondents did not seek a separate accounting for the first three months following June 19, 1950 or for the two distinct years that followed, by such behavior they fixed the term into one period. The court evidently followed the suggestion of appellants' exhibit 5 which divided the lease-contract term into separate periods. Nevertheless, they now contend that there was one continuous lease for a three-year period and therefore there should be but one accounting period. But on the testimony of Mrs. Brice and the admissions of appellants that they had agreed to furnish an accounting for each separate period, the court adopted respondents' contention. Indeed, appellants' own exhibit 5 entitled "Tentative Funds Advanced to Brice" is divided into separate periods. While there is some basis for appellants' insistence upon an agreement for a single term of the contract's subsistence, the court accepted the version espoused by respondents, and that settles it "so far as this court is concerned." Hoffman v. Gurnsey, supra.

[4] Appellants insist that special value should have been accorded to the testimony of their accountant. Such a contention would be a novelty when applied to any person in any group of witnesses after the trial court has already evaluated the witnesses who had appeared before it. But this accountant himself said that his own audit was "tentative" to which he could not unqualifiedly certify. The court was at liberty to accept such substantial evidence as appeared most probable, Berkowitz v. Kiener, supra, 37 Cal.App.2d at page 423, 99 P.2d 578, and in so doing conformed with established practice. Besides the testimony of the expert accountants, there was ample evidence to substantiate the findings as to the accuracy and competency of the accounting adopted by the court. The court did not derive its findings solely from the testimony of respondents' accountant, but considered and weighed all the evidence adduced. Because the testimony of such accountant did not fully cover every item, it should not, for that reason, be wholly swept aside as void or meaningless. But it was nevertheless to be considered as a factor for the solution of the issues. From the ultimate facts found, it is obvious that the court did not base its findings on the testimony of either accountant but upon all the

proof adduced. The contention that certain proof was disregarded is disproved by the adequate attempts of the court to cover the entire field and by its final figures.

[5] Appellants contend that the court failed to find upon certain credits to which they are entitled, e. g.: a loan to Brice; overpayment for cattle purchased; canvases purchased by appellant but retained by Brice; excess payment for cattle and credit due for hay left on the ranch. Appellants contend that the total value of all such items is $3,358.25 and that by reason of the court's failure to find on such items, the judgment should be reversed. A finding on each of such items was not necessary. The ultimate fact to be found by the court was, first, whether any profit had been earned during the first year; second, the amount of such profit, and third, respondents' share. Those facts were determined as follows: total profit, $5,330.50; respondents' share (40 per cent), $2,132.20 Adding to the latter sum the amount due for maintenance and repairs: $954.95, makes $3,087.15 the judgment awarded to respondents. Findings upon each of the several items of an account would be calculated unduly to extend the area to be included in findings. The court heard all the witnesses and reached the determination as to the correctness of the claims of each party and the result was that the net earnings for the first period was $5,330.50. To make findings on the several credits to which appellants deem themselves entitled would be a finding of the evidence.

[6] In addition to their criticisms of the lack of findings, appellants dislike the method by which respondents prove their account. An account is not required to be in any particular form. The requirement of any litigant is that he present the evidence of his claims in an orderly fashion. The question presented is a practical one: whether from the entire record, a miscarriage of justice appears? If it can be intelligently ascertained from the record, the findings, the decree or even a bill of exceptions showing the controversy and the disposition thereof, the appellate court will uphold findings in accounting cases. Whann v. Doell, 192 Cal. 680, 684, 221 P. 899.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

132 Cal.App.2d 736

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward Lee LOGGINS and Lindy Edelman, Defendants.

Lindy Edelman, Appellant.

Cr. 5309.

District Court of Appeal, Second District. Division 3, California.

May 4, 1955.

Prosecution for burglary in the first degree. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered judgment of conviction. One defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⇐575

Where information charging accused with burglary was filed on June 15 and trial commenced on July 30, trial was timely. Pen.Code, §§ 460, 1382.

2. Criminal Law ⇐1144(3)

In prosecution for burglary, amendment in open court of information, after defendants had plead, to include one defendant's prior conviction in another state was presumed to have been filed pursuant to leave of court, although minutes of court did not so state, and was proper. Pen.Code, §§ 460, 969a, 1008.

3. Criminal Law ⇐995(6)

Where nothing in record in prosecution for burglary in first degree showed

sentence for prior conviction in another state had not been served by accused, sentence on present conviction was not required to run concurrently with sentence on previous conviction in another state. Pen.Code, § 460.

4. Burglary ⇐6

A dwelling-house is "inhabited" within the meaning of the burglary statute although the residents or inhabitants are temporarily absent from the premises. Pen. Code, § 460.

See publication Words and Phrases, for other judicial constructions and definitions of "Inhabited".

5. Burglary ⇐41(1)

Evidence was sufficient to sustain conviction for burglary in the first degree. Pen.Code, § 460.

6. Burglary ⇐45

In prosecution for burglary in the first degree, the intent of the accused in entering house was a question of fact. Pen.Code, § 460.

7. Criminal Law ⇐1159(5)

Where circumstances and conduct of an accused charged with burglary reasonably indicated his purpose in entering a house was to commit a larceny or any felony, a verdict of guilty of burglary will not be disturbed on appeal. Pen.Code, § 460.

8. Burglary ⇐29

In prosecution for burglary in the first degree, intent by accused to commit theft in house entered could reasonably be inferred from the forcible and unlawful entry of the house. Pen.Code, § 460.

Lindy Edelman, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Lindy Edelman appeals from a conviction by a jury of first degree burglary. An information charging appellant Edelman and one Loggins with burglary of the home of Truman Shaffer was filed June 15th. They were arraigned June 17th and pleaded not guilty. July 15th, the information was amended to include a prior conviction of appellant, and both defendants were rearraigned. Trial was commenced July 30th.

Truman Shaffer was away from home for the evening and when he returned about 2:00 a. m. he encountered defendant and Loggins in front of his house. Appellant was carrying four suits of Shaffer's, a pink shirt and other items of clothing valued at $500. The pink shirt and a cleaner's check were subsequently discovered in Edelman's home, and a gray suit was obtained with the check. Shaffer identified the suit and shirt as his. After an argument in front of the house, appellant and Loggins fled with the clothing. A rear window of Shaffer's home had been broken and the house had been ransacked and was in disorder. Shaffer had not given appellant or Loggins permission to enter.

In defense appellant testified that he thought the clothes belonged to Loggins since Loggins had lived with Shaffer for two weeks the previous March, that Loggins was merely returning to get his clothes, and that he, appellant, merely stood outside the house and received the clothes as Loggins handed them out.

[1] Appellant assigns as his first ground of error that he was denied a trial within 60 days after the filing of the information as required by section 1382 of the Penal Code. In this the appellant is mistaken, since the record shows that the information was filed June 15th and the trial commenced on July 30th.

[2] Defendant next asserts that the amendment of the information to include his prior conviction in Oklahoma was improper and deprived him of his constitutional rights. The amendment was made pursuant to Penal Code section 969a which allows amendment of the information if it has not charged all prior felonies of which the defendant has been convicted in this state or elsewhere. This section was held constitutional in People v. Wilson, 101 Cal. App. 376, 281 P. 700. Penal Code section 1008 also allows amendment of the information at any time before defendant pleads,

without leave of court, and, thereafter, with leave of court. The amended information here was filed in open court and is presumed to have been filed pursuant to leave of court, although the minutes of the court do not so state.

[3] Appellant next contends that his prior conviction in Oklahoma and his present conviction must run concurrently since the later conviction was not ordered to run consecutively. There is nothing in the record to show that the prior sentence had not been served.

[4] Appellant urges he was improperly convicted of first degree burglary; that the evidence was only sufficient to sustain a conviction of burglary in the second degree. Penal Code section 460 reads: "Every burglary of an inhabited dwelling-house or building committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed with a deadly weapon * * * is burglary of the first degree.

"2. All other kinds of burglary are of the second degree. * * *" The burglary in question here falls within the definition of first degree burglary since it was the entry of an inhabited dwelling in the nighttime. A dwelling house is inhabited within the meaning of this section although the residents or inhabitants are temporarily absent from the premises. People v. Allard, 99 Cal.App. 591, 592, 279 P. 182; People v. Stewart, 113 Cal.App.2d 687, 691, 248 P.2d 768.

[5] The evidence was sufficient to sustain the conviction. See People v. Stewart, supra.

[6-8] The intent of the accused in entering a house was a question of fact, and where the circumstances and conduct of the accused reasonably indicate his purpose in doing so is to commit a larceny or any felony, a verdict of guilty of burglary will not be disturbed on appeal. People v. Kittrelle, 102 Cal.App.2d 149, 156, 227 P.2d 38. The intent to commit theft could reasonably be inferred from the forcible and unlawful entry. People v. Fitch, 73 Cal.App. 2d 825, 827, 167 P.2d 211; People v. Davis, 24 Cal.App.2d 408, 410, 75 P.2d 80.

Other grounds of appeal are unsubstantiated by the record.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 720

In re ESTATE of Charlotte DE MONT, Deceased.

James W. BUDDELL and Bank of America National Trust and Savings Association, Petitioners and Respondents, James W. Buddell, Edna L. Mitchell, Legatees and Respondents,

v.

Lorenzo RENZONI, Contestant and Appellant.

Civ. 20851.

District Court of Appeal, Second District, Division 2, California.

May 4, 1955.

Will contest. The Superior Court, Los Angeles County, Philbrick McCoy, J., gave judgment for proponents. Contestant appealed. The District Court of Appeal, Moore, P. J., held that although testatrix' second will named her nurse and one coguardian of her person as beneficiaries of her estate, evidence supported finding that there was no undue influence exerted upon testatrix, and that she was mentally sound at time of making will.

Judgment affirmed.

1. Wills ⇐55(1), 166(2)

In will contest, although testatrix' second will named her nurse and one co-guardian of her person as beneficiaries of her estate, evidence supported finding that there was no undue influence upon testatrix, and that she was of sound mind at time of making will. West's Ann.Code Civ.Proc. § 1963; West's Ann.Civ.Code, § 2235.

2. Wills ⇐155(1)

"Undue influence" is that kind of influence or supremacy of one mind over another by which the latter is prevented from acting according to his own wish or judgment. West's Ann.Civ.Code, § 2235.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

3. Wills ⇐400

Where evidence as to undue influence exerted upon testatrix was in sharp conflict, District Court of Appeal presumed that trial court adopted evidence offered by proponents of will in finding no undue influence. West's Ann.Code Civ.Proc., § 1963.

4. Wills ⇐400

Even if a confidential relationship existed between testatrix and her nurse, who was named as beneficiary in will, and statute providing that all transactions between a trustee and beneficiary during the existence of the trust are presumed to be entered into by the latter without sufficient consideration and under undue influence was applicable, rule that where evidence is in conflict, it is presumed that trial court adopted evidence offered in support of its verdict, prevailed. West's Ann.Code Civ.Proc. § 1963; West's Ann.Civ.Code, § 2235.

5. Appeal and Error ⇐931(1), 994(3)

When the trial court has witnesses before it and listens to the evidence from both sides, findings based upon that evidence should not be disturbed notwithstanding question of burden of proof, and it must be assumed that the burden of proof was sustained, otherwise trial court would not have made the finding. West's Ann.Code Civ. Proc. § 1963.

6. Wills ⇐400

In will contest, the trial court is the final arbiter of facts, of the credibility of witnesses, and of the weight to be given their testimony.

7. Appeal and Error ⇐1010(1)

A reviewing court has no power to interfere with the findings where there is any substantial evidence to support them.

8. Wills ⇐52(1)

In will contest, proponents are not required to prove or disprove contestant's allegations, and are not required to offer any proof at all unless and until contestant has offered proof which standing alone would warrant a finding that testatrix was mentally incapable of executing a will at the time the will was executed.

9. Wills ⇐300

In will contest, a contestant cannot prevail through the weakness of proponent's case even if the testimony of proponent and his witnesses may have been subject to suspicion or otherwise was unsatisfactory, but affirmative proof must be produced by the contestant.

10. Wills ⇐334

In will contest, where trial court heard testimony of objector's witnesses, and made specific findings on the issues, trial court did not act arbitrarily in finding that there was no undue influence in making of will.

11. Wills ⇐166(7)

Mere proof of opportunity to influence a testator does not sustain a finding of undue influence, in the absence of proof of pressure directed to the testamentary act.

12. Wills ⇐155(1)

"Undue influence" implies the exercise of such coercion as is calculated to hamper the free agency and will of another.

13. Wills ⇐55(1)

To set aside a will for mental unsoundness, the abnormalities of mind must have had a direct bearing on the testamentary act, and the proof must show that the property of the testator was devised in a manner which occurred solely by reason of the alleged infirmities.

14. Wills ⇐166(4)

Fact that guradian of person of testatrix called in an attorney unknown to testatrix to assist her in preparation of her will, did not show that guardian participated in preparation of will and its execution.

A. W. Brunton, Los Angeles, for appellant.

Van Lee Hood, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the evidence justified the findings that decedent was of sound mind at the time of executing her will and that its execution was not procured by fraud and undue influence.

Decedent was a physician and surgeon and practiced her profession until December 6, 1949, when her arm was broken. On the 19th of the same month, she executed a will by which she gave Lorenzo Renzoni one half of the residue of her estate; the other half to Demetrio Serge, with special bequests to her relatives, her friends and to the church of her faith. She became ill and weak toward the end of 1949 and in January 1950 Mr. James W. Buddell and the Bank of America were appointed coguardians of her estate and Mr. Buddell was appointed guardian of her person. On December 20, 1951, she executed a new will, prepared by attorney Cohen and witnessed by Bernard B. Cohen and Charles J. Pflueger. The will was in due form and the attesting witnesses affirmed the competency of the testatrix. She remembered her natural heirs and her church, but the residue of the lady's estate was bequeathed to Edna L. Mitchell and James W. Buddell. On its being offered for probate, Demetrio Serge filed a contest. The bequest named for him was only $250. He dismissed his contest but Lorenzo Renzoni intervened by adopting the "First Amended Opposition" of Demetrio. The issues of competency and fraud and undue influence were tried with the resultant findings against the claims of Lorenzo who has appealed.

Appellant contends that a confidential relationship existed between the deceased and her nurse, Edna L. Mitchell; that Mitchell was employed by James Buddell; that both parties exerted undue influence over the deceased; and he maintains that because of this confidential relationship between the nurse, Mitchell, and the deceased, the burden of proof was on the legatees to show that there was no undue influence, coercion or fraud involved in the execution of the will.

Appellant's contention is fully answered in the case of Bolander v. Thompson, 57 Cal.App.2d 444, 446, 134 P.2d 924. The facts there adjudicated were similar to those of the instant case. Certain gifts had been made to the attending nurse. Upon the death of the testator, the heirs at law brought an action to set aside the legacies, alleging that the will had been made by the deceased while under the undue influence of the attending nurse. The contestants contended that the nurse was in a confidential relationship to the deceased, thus shifting the burden of proof to the proponent to show that there was no undue influence. The court's appropriate reply to such contention was that there are no decisions which hold that a confidential relationship arises in *all* cases between a patient and a nurse. "The accepted rule is that such a relationship may exist upon showing of special circumstances of the particular case." Ibid., 57 Cal.App.2d at page 447, 134 P.2d at page 926.

[1–7] The court below found that no undue influence had been exerted and that decedent was of sound mind at the time the will was executed. Undue influence has been defined to be that kind of influence or supremacy of one mind over another by which the latter is prevented from acting according to his own wish or judgment. (6 Cal.Jur., p. 70.) Appellant undertook with intelligent effort to establish undue influence. But the evidence was in sharp conflict. It is, therefore, presumed that the trial court adopted the evidence offered by respondents. Even though a confidential relationship had existed and section 2235 * of the Civil Code had come into play, the rule with respect to the conflict of evidence, section 1963, Code of Civil

* Civil Code, section 2235.
"All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

Procedure, is applicable, and therefore prevails. In the Bolander case, the court held that "the question of the burden of proof, or of the shifting of the burden, is not material. The material issue is the fact of undue influence, as distinguished from the suspicions and conjectures which may arise from the conduct of the party." When the trial court has the witness before it and listens to the evidence from both sides, "the findings based upon that evidence should not be disturbed notwithstanding the question of the burden of proof." It must be assumed that the burden of proof was sustained; otherwise, the trial court would not have made the finding. Bolander v. Thompson, supra, 57 Cal.App.2d 449, 134 P.2d 924. The trial court is the final arbiter of facts, of the credibility of witnesses, and of the weight to be given their testimony. A reviewing court has no power to interfere with the findings where there is any substantial evidence to support them. In re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384.

Appellant contends (1) that the evidence offered by respondents did not establish that decedent was capable of making a will; (2) that she did not know the attorney who prepared the will, prior to his drafting the instrument; therefore, (3) since they were responsible for employing the attorney, respondents participated in the preparation of the will and its execution.

[8, 9] Respondents were not required to prove or disprove appellant's allegations. They were not called upon to offer any proof at all unless and until contestant had offered proof which standing alone would have warranted a finding that decedent was mentally incapable of executing a will at the time the will was executed, seventeen months before her decease. Appellant cannot prevail through the weakness of proponents' case even if the testimony of proponents and their witnesses may have been subject to suspicion or otherwise unsatisfactory. Affirmative proof must be produced by the contestant. In re Estate of Stone, 59 Cal.App.2d 263, 268, 138 P.2d 710.

In Re Estate of Johnson, 200 Cal. 299, 305, 252 P. 1049, 1052, it was held that merely because the deceased was adjudged incompetent in the guardianship proceedings was not evidence of incapacity at the time she executed her will "and that the burden of proving that the decedent was of unsound mind at the time of the execution of the alleged will rested at all times upon the contestant." In re Estate of Worrall, 53 Cal.App.2d 243, 247, 127 P.2d 593.

[10] There is no indication that the trial court acted arbitrarily. On the contrary, the court heard the testimony of appellant's witnesses *in extenso* and they proved some suspicious circumstances. But on the issues, the court made specific findings that decedent did not come under the influence of her residuary legatees; did not execute her will at the fraudulent importunity of such legatees; was never overpowered by them, but that she signed the instrument voluntarily, free of duress, undue influence or restraint.

[11, 12] Mere proof of opportunity to influence a testatrix does not sustain a finding of undue influence, in the absence of proof of pressure directed to the testamentary act. In re Estate of Graves, 202 Cal. 258, 262, 259 P. 935. Undue influence implies the exercise of such coercion as is calculated to hamper the free agency and will of another. Goldman v. Goldman, 116 Cal.App.2d 227, 235, 253 P.2d 474. See In re Estate of Keizur, 64 Cal.App.2d 117, 122, 148 P.2d 116; In re Estate of Higgins, 156 Cal. 257, 261, 104 P. 6.

[13] On the issue of incompetency, the judgment is fortified by numerous decisions. It is the law that to set aside a will for mental unsoundness, the abnormalities of mind must have had a direct bearing on the testamentary act. The proof must have shown that the property of the testator was devised in a manner which occurred solely by reason of the alleged infirmities. In re Estate of Leonard, 92 Cal.App.2d 420, 427, 207 P.2d 66. See In re Estate of White, 128 Cal.App.2d 659, 666, 276 P.2d 11; In re Estate of Johanson, 62 Cal.App.2d 41, 50, 144 P.2d 72; In re Estate of Johnson, supra.

[14] The appellant cites no authority to uphold his contention that the guardian

cannot call an attorney unknown to the testatrix to assist her in the preparation of her will; in fact, it would be the normal thing for a person of good mental capacity to rely upon the judgment of her guardian and friend, an officer of an institution that has a special department to answer her needs.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

Nick VANGEL and Ernest Vangel, Plaintiffs and Respondents,

v.

Charles VANGEL, Defendant and Appellant.

Civ. 20534.

District Court of Appeal, Second District, Division 2, California.

April 28, 1955.

Rehearing Denied May 17, 1955.

Hearing Granted June 23, 1955.*

Action for dissolution of partnership and for an accounting. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgment following an accounting, and defendant appealed from judgment and from a post-judgment order fixing bond on appeal. The District Court of Appeal, McComb, J., held, inter alia, that Superior Court properly construed reviewing court's opinion on previous appeal as requiring that defendant receive, as his share of profits of partnership earned since dissolution date, a sum other than sum equal to one-third of total and that defendant be denied compensation for services rendered to partnership from dissolution date until judgment.

Judgment and order affirmed.

1. Appeal and Error ⇐1203(6)

In action for dissolution of partnership and for an accounting, trial court properly construed reviewing court's opinion on previous appeal as requiring that defendant receive, as his share of profits of partnership earned since dissolution date, a sum other than sum equal to one-third of total and that defendant be denied compensation for services rendered to partnership from dissolution date until judgment.

2. Appeal and Error ⇐757(3)

One who contends that a finding is not supported by evidence must set forth in brief a summary of evidence on questioned issue, and, unless this is done, error assigned is deemed waived.

3. Appeal and Error ⇐901, 931(1)

Appellant has burden of showing error and where burden is not met it is presumed that there was substantial evidence to support each and every questioned finding.

4. Appeal and Error ⇐757(3), 931(1)

Where appellant failed to summarize evidence in brief and failed to sustain burden of showing error, reviewing court presumed that there was sufficient evidence to sustain each and every questioned finding.

5. Partnership ⇐346

Partner who, on appeal in partnership dissolution case, obtained a new and different accounting, was properly required to pay his proportionate cost of audit and accounting.

6. Appeal and Error ⇐843(2)

Where bond on appeal was never posted and appeal was prosecuted without it, question whether trial court erred in fixing amount of bond was moot and would not be considered.

7. Appeal and Error ⇐843(1)

A reviewing court will not review questions which are moot and of only academic importance, and will not undertake to determine abstract questions of law at request of a party who shows that no substantial rights can be affected by decision either way.

Pacht, Tannenbaum & Ross; Isaac Pacht, Rudolph Pacht, Jerry Pacht, Los Angeles, for appellant.

* Opinion vacated 291 P.2d 25.

J. Howard Sullivan and Joseph T. Enright, Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by defendant from a judgment following an accounting of partnership assets which was rendered pursuant to the decision on an appeal from a judgment decreeing a partnership dissolution involving the same parties. (See Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919.) There is also consolidated with the foregoing appeal a separate appeal from a post-judgment order fixing a bond on appeal in the sum of $20,000.

For a detailed statement of the facts involving the present litigation, see Vangel v. Vangel, supra, 116 Cal.App.2d 618, et seq., 254 P.2d 919.

So far as the present appeal is concerned these are the only questions involved:

[1] First: *Did the trial court in taking the accounting err in (a) awarding defendant as his share of the profits of the partnership earned since the dissolution date any sum other than a sum equal to 33⅓% of the total; and (b) denying defendant compensation for his services rendered to the partnership from June 15, 1950 (the date of the dissolution of the partnership) until the date of the present judgment from which an appeal is taken?*

This question must be answered in the negative. In an opinion of this court prepared by Mr. Justice Fox (Vangel v. Vangel, supra, 116 Cal.App.2d 633, 254 P.2d 930) it was said:

"A retrial of the issues is unnecessary, but an accounting must be had and a new judgment entered. The first phase of the accounting is for the purpose of determining the value of the respective interests of the partners as of the date of dissolution, viz., June 15, 1950. In arriving at that figure the valuation of $235,000 placed on the property by the trial court is definitive of that question. However, in determining the respective financial interests in the partnership business as of that date consideration must be given to the $25,000 which plaintiffs advanced for defendant, and to the $42,000 which plaintiffs improperly withheld and distributed, together with interest on said sums to the date of dissolution. All other assets and liabilities of the partnership, together with any claims of the parties *inter se*, must be included in the ascertainment of the respective interests of the plaintiffs and the defendant.

"The second phase of the accounting covers the period from June 15, 1950, to the filing of the remittitur herein. This should establish the net profits of the partnership for that period and defendant's share therein should be allocated to him in proportion to his interest in the business on June 15, 1950. The judgment should contain an appropriate provision permitting plaintiffs the privilege of purchasing defendant's interest in the partnership enterprise pursuant to the provisions of section 15038(2) (b) Corporations Code, and providing that in the event plaintiffs elect to make such purchase they shall pay defendant interest at the rate of 7 per cent per annum on the amount found to be due him as of the date of the remittitur until paid. The judgment should also contain an appropriate provision for the indemnification of defendant in the event plaintiffs purchase his interest. Section 15038(2) (b). The judgment should further provide for defendant's participation, on a pro rata basis, in the proceeds of the sale after deducting picking and other marketing expense of such, if any, of the citrus crop as may be substantially matured upon the filing of the remittitur. This provision should require plaintiffs to assign to defendant his share of the proceeds from such maturing crop so that they may be paid directly to defendant by the marketing organization, and thus not delay the accounting or rendition of a final judgment * * *."

"The judgment is reversed with directions to take the accounting and

enter a judgment in accordance with the views herein."

When the case was retried by the superior court before Judge Vickers, two contentions were made by defendant's attorney: (1) that defendant was entitled to 33⅓% of the profits of the partnership earned after its dissolution, regardless of the facts; and (2) that he was entitled to compensation for services rendered to the partnership after its dissolution to the date of the accounting.

In construing the language used by this court in Vangel v. Vangel, supra, the learned trial judge said:

"The cases from which you have read, Judge Pacht, commencing with the Griggs case and ending with the Kirkpatrick case, are not cases which apply to a dissolution by order of court because of the fault of one of the parties. Your attempt to apply the rules laid down by reason of the interpretation of a contract by reason of the acts of the parties cannot apply to this case.

"Such rules generally apply to two situations: (1) Where the parties have made a contract which is uncertain by its terms, and for the purpose of analyzation and determination of what the parties intended to do at the time they executed the contract, we look into their subsequent conduct. That is not our case, because the actions upon which you rely, except for the deed back in 1948, were acts subsequent to the judgment, one or more of the judgments in this case. You cannot enter into their acts or conduct and determine what was in their minds at the time the contract was made for them by the court. We have to look to what was in the court's mind, and that you can determine only from what the court says.

"Now the second application of conduct of the parties is sometimes looked to for the making of a new contract; that is, such conduct on their part which might create respective obligations, and from which it can be said that they implied a promise to do certain things in return for certain other things to be done by the opposite parties. We don't have such facts here.

"It is quite apparent that these parties have been unable to make a new contract for themselves from the time, or almost from the time, that they entered into the original partnership agreement. A very important element of that was that the one who managed the place was to be paid a certain sum of money for his services, determined by the mutual agreement of the parties. And yet, as the lower court and as the District Court found, they were never able to agree to that. On a factual basis, there is nothing before me which would justify me in finding the parties had made a new contract for themselves at any time, either before or after the Superior Court judge provided a change in their agreement from that which was created by the original partnership agreement.

"Now, we are not here concerned with a matter of equity. As far as the action of this Court is concerned, its function is to apply the law of the case as laid down by Mr. Justice Fox. * * *

"The only interpretation that is possible, in my mind, to be placed upon the opinion of Justice Fox in relation to this matter, is, as he clearly has stated: 116 Cal.App.2d 615 [254 P.2d 919] that 'We shall first determine the pro rata share of the defendant as of June 15, 1950,' [sic] and since it was apparent to the District Court that the defendant did not wish to accomplish that which he could have accomplished, to wit, that pro rata share expressed in dollars with interest thereon from June 15, 1950, but to apply that pro rata share to the profits of the business from June 15, 1950, to the date of the coming down of the remittitur.

"Now, the only possible way to do it is as has been already done by the only possible method of doing that, and

that is as has already been done by the accountant, and that is to reflect the value of the business as determined by the trial court, and then to apply to it the $25,000 debt of the defendant, the $14,000 debt of the plaintiffs, one to the other, respectively, and such other claims *inter alia* that there may have been—and we have none produced here—and then having determined that pro rata interest, which in this case appears to be approximately 24 per cent, we then apply that percentage to the profits during the period in question.

"Justice Fox did not make merely a passing reference to Sections 15038(2b), 15041 and 15042 of the Corporations Code. He referred to them for a specific purpose in applying them to the issues that were before him in that case and that are before us in this case. It is inconceivable to me that Justice Fox would have written the opinion as he did write it if he had any thought in mind that the profits were to be divided one-third to each of the parties. Much of what he has said in regard to the distribution of profits would have no application. We would have to write an entirely different opinion for him in order to arrive at that conclusion.

* * * * * *

"After thoroughly weighing the matter, as he did this, he arrives at definite conclusions, and . . . there can be little, if any, doubt in the mind of the reader as to just what conclusions he did arrive at."

We are in accord with the views expressed by the trial judge; the language in the opinion is clear, unambiguous and can only be construed as was done by the trial judge in denying defendant's contentions.

Second: *Does the evidence support the findings?*

[2] *Yes.* Defendant several times in his brief contended that the evidence does not support the findings. However, there is an absence of reference to the transcript, and defendant had failed to comply with the rule that one who contends that a finding is not supported by the evidence must set forth in his brief a summary of the evidence on the questioned issue. Unless this is done the error assigned is deemed to be waived. (McCosker **v.** McCosker, 122 Cal.App.2d 498, 500 [1], 265 P.2d 21.)

[3] The appealing party has the burden of showing error and where, as in the instant case, this burden is not met it will be presumed that there was substantial evidence to support each and every questioned finding. (Richard **v.** Richard, 123 Cal.App.2d 900, 902 [4], 267 P.2d 867.)

[4] Applying the foregoing rules to the facts in the present case it is apparent that since defendant has failed to comply with them, this court will presume that there was sufficient evidence to sustain each and every questioned finding of the trial court.

Third: *Did the trial court err in requiring defendant to pay his proportion of the cost of the audit and accounting?*

[5] *No.* The new accounting to which defendant is objecting was ordered as a result of the appeal prosecuted by defendant in the case of Vangel v. Vangel, supra, which resulted in the order directing the taking of the present accounting. Clearly he is not in a position to complain because he has obtained that which he sought by his previous action, to wit, a new and different accounting.

Fourth: *Did the trial court err in fixing the bond on appeal in the sum of $20,000?*

[6] This question is moot in view of the fact that the bond was never posted and the appeal has been prosecuted without it. We therefore do not consider such question. The rule is accurately stated by Mr. Justice Griffin in Keefer **v.** Keefer, 31 Cal.App.2d 335, 337, 87 P.2d 856, 857, thus:

[7] "An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who

shows that no substantial rights can be affected by the decision either way."

The judgment and order are, and each is affirmed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 593

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Antonio Andrew SIMEONE, Defendant and Appellant.

Cr. 5315.

District Court of Appeal, Second District, Division 2, California.

April 28, 1955.

Hearing Denied May 25, 1955.

Defendant was convicted of assault with a deadly weapon and of assault by means of force likely to produce great bodily injury. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Assault and Battery ⇐92

In prosecution for assault with a deadly weapon, and for assault by means of force likely to produce great bodily harm, evidence was sufficient to sustain conviction. Pen.Code, § 245.

2. Criminal Law ⇐1119(3)

Alleged assignment of error relating to remarks of trial judge could not be considered, where there was no reference to transcript for such language. Rules on Appeal, rule 33(b).

3. Criminal Law ⇐1119(4)

Alleged error at trial in that prosecuting attorney allegedly asked defendant to plead guilty could not be considered, where no such request was to be found in record.

4. Criminal Law ⇐1166½(12)

Preliminary remarks of trial judge to jury on nature of crimes charged was not prejudicial to defendant, where such remarks were merely attempts to acquaint jury with law applicable to case and where such statements did not contain misstatement of law.

5. Criminal Law ⇐641(4)

Right of defendant in criminal prosecution to counsel does not include right to postpone trial of case indefinitely and to reject services of public defender while defendant, at his leisure, attempts to find counsel who will serve without charge.

6. Constitutional Law ⇐268

Fact that court appointed for defendant, counsel who was rejected by defendant, and fact that defendant was not able to select lawyer to represent him as private counsel, did not operate to deny defendant due process of law. West's Ann. Const. art. 1, § 13.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

Appellate in pro. per. Morris Lavine, Los Angeles, appointed by the court.

MOORE, Presiding Justice.

Having been convicted of assault with a deadly weapon and of assault by means of force likely to produce great bodily injury, Penal Code, § 245, appellant seeks a reversal on the grounds of errors in rulings, prejudicial remarks of the court and of the district attorney, and in denial of the right to counsel. No claim is made that the evidence was insufficient to support the judgment, although it is charged that the testimony of the prosecutrix was so "biased" that its admission is prejudicial error.

It appears that appellant and his wife had experienced some unhappiness and he had absented himself from home. When they met on the street, she refused his offer to escort her home, but when she arrived, there he was waiting. He tried to persuade her to permit him to return to the apart-

ment. When she firmly denied his offer, he said: "For the last time, and I want a straight answer from you, am I moving in or not." Her answer was: "You are not." To that he replied: "Then you give me no choice." He thereupon took a small knife from his suitcase and followed his frightened wife into her bedroom and said: "I am going to kill you." While their daughter, Christina, remonstrated, he raised his hand and approached the mother with the knife pointed towards her face. In the scuffle, the knife first cut her wrist and then cut his finger. The second interference of Christina enabled Mrs. Simeone to escape and run away. She returned with the police who took appellant to the station.

On the following afternoon, May 14, appellant returned to his wife's apartment and sat for two hours; told her that if he did not move in he would "fix her good." When he departed, he said: "I am going now, but I'm coming back; you had better think this thing over; if [you] don't—when I come back and you don't talk tough, I can't stay here, I am going to kill you; you're my wife * * * if I can't have you, nobody else will have you."

Appellant continued to visit his wife each night about nine o'clock and remained until the police came. On at least one occasion he beat her head and jaw and caused her to faint and her children to plead with him to leave. On the morning of May 24 he met her on the way to work and said: "Look, you can go to work but before you go I want you to remember one thing, I've thought this all over very carefully. I am going to give you four days to think this thing over. Either I move in within that time or I'm going to kill you." True to his threat, he returned on May 28. When she opened the door slightly, he pushed it open against her, and struck her face with a large package of ice cream. When she attempted to escape, he grabbed her and pulled her towards the balcony, forced her back over the railing and as she resisted, he kept repeating: "I'm going to kill you! I told you I was and this is it! I'm going to give it to you! I'm going to kill you!" The woman's screams brought her daughter and a Mr. Tate.

[1] Soon the police came and took both parties to the Wilshire station, where appellant talked freely to officer Jackson. He denied striking his wife on May 28; said she grabbed him and that thereupon he struck her with the half gallon of ice cream in defending himself; said on May 13 he brought a traveling bag to her home; that it contained knives which he removed while there but did not use them to cut his wife. When asked whether he had a knife in his hand May 13 and advanced toward her, he refused to answer "until he had an attorney." His testimony was substantially the same. As to his call on May 28th, he testified that he "threw the ice cream up in the air and it hit her"; that he "grabbed her around the waist and coming out of the door * * * I was dragged with her up against the bannister." The evidence above recited was sufficient to support the verdicts on both counts I and III.

The Judge Not Prejudiced

On June 22 the court appointed the public defender to represent Mr. Simeone, but on June 25 defendant relieved him as counsel, stating he wanted private counsel.

[2] Appellant says that at the time he appeared before the court on July 21, 1954, Judge Fricke said, "So you're the fellow who thinks he's smarter than the lawyer and the judges." There is no reference to the transcript for such language, and it has not been found to date. Such assignment cannot be considered in the absence of the words from the transcript. If the pronouncement was made, it was incumbent upon appellant to have it included in the record. Rule 33(b), Rules on Appeal. Even if the record contained it, no showing is made that appellant was prejudiced thereby.

He says at his request the court continued the trial to August 4. On that date he asked "for another postponement" so that he could subpoena witnesses and confer with counsel. The court continued the trial to August 16. Appellant says: "on the day of trial Defendant insisted that he could not defend himself properly, but Judge Fricke would not hear it. And De-

fendant was forced to proceed." The record shows no insistence or mention by defendant that he could not defend himself. It does disclose the court's continual assistance in observing the rules of correct procedure.

Appellant says that due to his incarceration he did not have the power or freedom properly to subpoena witnesses for his defense. His own statement shows that he had ample opportunity to have witnesses subpoenaed between June 25 and August 16. If he was in the county jail, he had nothing to do but give a list of his witnesses with addresses to the jailer and they would have been in court. The only power necessary to enable appellant to get his witnesses at court was to tell a clerk or a deputy sheriff. By the four witnesses he called and others he had available, he did not establish that one had witnessed the assaults of May 13 and 28, for which he was on trial.

[3] Appellant complains that the prosecuting attorney asked him to plead guilty, that he had the case won. Such request of the lawyer is not to be found in the record. Therefore, it cannot be considered.

[4] Appellant contends that the court prejudiced him by certain preliminary remarks to the jury on the nature of the crimes charged. Such remarks were merely an attempt to acquaint the jury with the law applicable to the case they were about to hear. There is nothing in them to cause prejudice; neither did they contain a misstatement of the law.

Appellant says he was denied due process of law. This claim arises out of the facts as recited by him: that he, an inexperienced, impecunious layman, asked the court to appoint counsel to defend him; that the public defender was appointed but was rejected by appellant. However, despite the fact that such rejection was not justifiable, he contends that out of five thousand lawyers in the County of Los Angeles available, there was no problem about selecting a lawyer to represent an indigent defendant as his private counsel. In his supplemental brief he cites many decisions of the federal Supreme Court holding that "a defendant should be afforded a fair opportunity to secure counsel of his own choice", Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158; "in criminal prosecutions in any court the party accused shall have the right to appear and defend in person and with counsel", In re Masching, 41 Cal.2d 530, 532, 261 P.2d 251, 252; the denial of a defendant's request for a continuance and ordering a trial to commence at once amounted to a denial of his constitutional right to counsel, Ibid., 41 Cal.2d at page 534, 261 P.2d at page 252; "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial", People v. Lanigan, 22 Cal.2d 569, 575, 140 P.2d 24, 28, 148 A.L.R. 176; a defendant in a criminal action is entitled to counsel, In re McCoy, 32 Cal.2d 73, 76, 194 P.2d 531; a convict "would be entitled to release on habeas corpus if he could show that deprivation of counsel resulted in an unfair trial or in substance in no trial at all", In re Egan, 24 Cal.2d 323, 337, 149 P.2d 693, 701; "the party accused shall have the right to * * * appear and defend, in person and with counsel." Calif.Const. Art. 1, § 13. Appellant says this right would be of little value if an accused could be forced to proceed without counsel *because he had a particular objection,* in a county where there are public defenders, *to have a public defender represent him.*

[5, 6] Now, in the first place, the substantive law announced in the cited decisions is well known and no one disputes it. Second, the facts of many of them are so alien to those at bar that they cannot support a rule that would entitle appellant to a reversal. Third, when the court assigned the Public Defender to represent appellant, the accused had at hand one of the best equipped law offices in the state to champion his cause. It has a corps of vigorous, learned, amiable gentlemen who present their causes with force and intelligence. "Of course defendant's right to counsel does not include the right to postpone the trial of a case indefinitely and reject the services of the public defender

while defendant, at his leisure, attempts to find counsel who will serve without charge * * *." People v. Adamson, 34 Cal.2d 320, 332, 210 P.2d 13, 19. The Public Defender of Los Angeles County and his staff are exceptionally well qualified in defending criminal cases. Ibid. Where a person accused of crime refuses to be represented by the Public Defender of Los Angeles County, and demands that some practicing lawyer leave his private practice in order to defend such accused, the latter prefers to have cause for a grouch rather that a chance to defeat his accusers. Because there are thousands of lawyers in Los Angeles County who would gladly suffer much inconvenience rather than see the constitutional right of an accused violated, is no reason why a defendant should be privileged to dawdle with the trial court, to neglect for four weeks to obtain counsel, and then have his conviction reversed because he did not choose to be represented by the Public Defender.

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

Pearl C. HOPKINS, Plaintiff and Appellant,

v.

Guy B. HOPKINS, Defendant and Respondent.

Civ. 20855.

District Court of Appeal, Second District, Division 2, California.

April 28, 1955.

Hearing Granted June 23, 1955.*

Action by divorced wife to recover accrued installments on Colorado divorce decree. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that in view of fact that Colorado court had continuing jurisdiction to modify divorce decree, where parties' children had reached majority, California court properly refused to renew Colorado decree which required that husband pay monthly sum, unsegregated as between alimony and support and maintenance.

Affirmed.

See also, 116 Cal.App. 174, 253 P.2d 723.

1. Divorce ⇐389, 403(1)

Where Colorado divorce decree required that husband pay a certain sum in lieu of all payments of alimony and support money and by way of support and maintenance of parties' children, determination of what amount should be paid wife after children reached majority was for court which rendered judgment, and California court had no power to adjudicate respective rights of mother and children to the monthly payments.

2. Divorce ⇐255

Under Colorado law, where predivorce separation was, with consent of parties, merged into decree, decree was thenceforth the vital document affecting rights of parties.

3. Divorce ⇐380

Colorado divorce decree would be given liberal and reasonable interpretation according to general intent as revealed by all its provisions, keeping in view situation and relation of parties.

4. Judgment ⇐822(1)

Full faith and credit clause of federal Constitution does not require that a court must accept any decree at its apparent face value and renew it without regard to substantial justice, but the clause states a rule of evidence requiring that foreign decree be received in evidence, weighed and considered. U.S.C.A.Const. art. 4, § 1.

5. Judgment ⇐823

Full faith and credit clause does not require that California courts issue an execution on a foreign judgment, and where judgment is of such nature as would entitle either party to modification, California

* Opinion vacated 294 P.2d 1.

court should refuse to renew it until court of origin has had an opportunity to revise it. U.S.C.A.Const. art. 4, § 1.

6. Divorce ⇐164

Colorado court has continuous jurisdiction to revise and modify divorce decree.

7. Divorce ⇐394(3), 403(6)

In view of fact that Colorado court had continuing jurisdiction to modify divorce decree, where parties' children had reached majority, California court properly refused to renew Colorado divorce decree which required that husband pay a monthly sum, unsegregated as between alimony and support and maintenance. U.S.C.A.Const. art. 4, § 1.

Courtney A. Teel, Pasadena, for appellant.

George B. Bush, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an action on a foreign judgment. Appellant sued her former husband for the sum of $26,760—the accrued installments on a judgment of divorce entered in the District Court of Colorado, May 9, 1927. She demands a reversal and insists that the basic authority relied upon by the trial court is "in hopeless conflict with sound established law."

Prior to October 18, 1926, the parties resided in the City of Denver with their three minor girls. On that date, they made a property settlement agreement with respect to the care of their children and the support of appellant. She was to have exclusive custody of each child until the latter should arrive at her majority. He agreed to pay appellant "by way of support and maintenance" the sum of $150 per month commencing November 1, 1926, on the first day of each and every month thereafter. Other sums were to be paid to appellant, but such covenants are not involved herein. By the same instrument, the payments therein provided "shall forever release him from any further payments" for alimony, attorney's fees or court costs. Thereafter, respondent sued appellant for divorce in Denver County and a decree of the District Court was duly entered May 9, 1927, dissolving the marriage ties and approving the property settlement of October 18, 1926. The further finding was that no payments have been made pursuant to such decree within the period of five years last past. The court concluded that the Colorado judgment is too uncertain and is not enforcible and adjudged that appellant take nothing by her action.

Appellant contends that (1) the evidence does not support the findings; (2) the findings do not support the judgment; (3) that by virtue of respondent's payments of the sums of $10 per month for the support of each of the minor children until they respectively became 18 years of age, he is estopped to contend that the judgment was too uncertain.

Appellant argues that the judgment is one for the payment of money; that it was not subject to modification as to accrued payments; that the attainment by the daughters of their majorities did not automatically release respondent from his obligations under the judgment, citing Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, and Tomkins v. Tomkins, 89 Cal.App.2d 243, 200 P.2d 821.

[1] While it is true that some language of the cited decisions and of Hall v. Hall, 105 Colo. 227, 97 P.2d 415, and Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583, appears to support the contentions of appellant, yet such support is far short of that which would operate to effect a just judgment. The three girls had become adults by August 28, 1940. No payments under the Colorado decree were paid after February 1932. The court at Denver was never requested to clarify its decree or to declare the amount of the monthly payments due appellant and the amount payable to each of the girls. The Colorado decree contains nothing from which a California court could conclude what portion of $150 monthly payment was due appellant. Her allegation that $120 per month was intended for her was gratuitous and was found to be untrue. The decree provides expressly for the specified payments to appellant of $150 per month "in lieu of all

payments of alimony and support money, and by way of support and maintenance" for appellant and the minor children. It was not drawn with a view to its enforcement in another jurisdiction twenty-five years after its entry. Appraising it according to its form and tenor, its author evidently contemplated that the mother and her infant daughters would all continue as a unit and that the girls would never attain their majorities. Otherwise, the Colorado court might have segregated the sums payable for each of the three children and their mother, and not have left respondent weighted with the support of three adult daughters, years after their support had ceased to be his legal obligation. To do justice now in such a situation requires the watchful care of the court which rendered the judgment. Luthe v. Luthe, 12 Colo. 421, 430, 21 P. 467, 470.

[2, 3] The court below had no power to adjudicate the respective rights of the mother and three daughters to the monthly payments. Ibid. It is true the gross amount to be paid appellant as "support and maintenance for the first party and their said minor children, the sum of One Hundred Fifty Dollars ($150.00) per month" was included in their property settlement before the divorce action was filed. But its contents with the consent of the authors were merged into the decree, Gavette v. Gavette, 104 Colo. 71, 75, 88 P.2d 964; Johnson v. Johnson, 119 Colo. 5[illegible], 600, 206 P.2d 597, which was thenceforth the vital document affecting the rights of the parties. The trial court could not, under any known authority, rewrite their contract or modify the Colorado judgment. It provides for the payment of a definite sum for the benefit of four specified persons and that cannot be changed by the courts of another state. The Colorado decree must be construed according to its meaning as derived from the document in its entirety. No single clause or phrase may be placed under a microscope and enlarged to distort the document. Its interpretation must be liberal and reasonable and according to the general intent as revealed by all its provisions, Miranda v. Miranda, 81 Cal. App.2d 61, 65, 183 P.2d 61; In re Estate of Nathan, 89 Cal.App.2d 789, 201 P.2d 865, keeping in view the situation and relation of the parties. A strained construction of such a decree would result in some injustice.

[4–7] Appellant contends that her action is one for debt accrued at the rate of $150 per month; that she is entitled to a new judgment for all accruals "as against which the statute of limitations has not run," citing Article IV, section 1, Federal Constitution. Of course, full faith and credit are given by the courts of this state to the judgments of sister states as section 1 requires. But that provision does not require that a court must accept just any decree at its apparent face value and renew it without regard to substantial justice. Section 1 of Article IV is a rule of evidence and not of jurisdiction. State of Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 292, 8 S.Ct. 1370, 32 L.Ed. 239. Giving full faith and credit to a decree originating in another state means merely that it must be received in evidence, weighed and considered. It does not mean that the courts of California must, in effect, issue an execution on the foreign judgment. If the judgment is of such nature as would entitle either party to a modification thereof, the California court should refuse to renew it until the court of its origin has had an opportunity to revise it. The jurisdiction of the latter to revise and modify its decrees in divorce actions is continuous. Diegel v. Diegel, 73 Colo. 330, 215 P. 143, 144; Cartier v. Cartier, 94 Colo. 157, 28 P.2d 1010, 1012. By reason of the law that the Colorado court still has jurisdiction to modify its decree, and of the fact that the infants of respondent have grown to womanhood and are no longer entitled to be supported by him, the trial court properly denied renewal of the Colorado judgment.

Such was our holding in Kahn v. Kahn, 123 Cal.App.2d 819, 268 P.2d 151, where substantially the same facts were litigated. After disposing of the claim on the part of the Kahn children who had attained maturity ten years prior to the filing of the action on the Ohio judgment, we under-

took to demonstrate that Mrs. Kahn's personal claim to a portion of the $300 monthly installments awarded her in Ohio could not be the basis of a judgment in California. The Ohio decree did not indicate the portion of the award that was intended by the court as alimony. "The judgment is, therefore, too uncertain to be enforceable * * *. If appellant is to realize upon the judgment, she must resubmit the matter to the Ohio court for clarification. * * * if a wife seeks to recover the unpaid installments on her decree from another court and the amount of her award is the combined sum of alimony and child support and her children have attained their majorities and the court is unable to determine the portion intended for alimony as distinguished from the part allowed for child support, then the entire award of such decree is illegal and nonenforceable." Ibid., 123 Cal.App.2d at page 824, 268 P.2d at page 154.

Under the doctrine of *stare decisis,* contrary to appellant's contention, the Kahn decision controls this appeal.

Affirmed.

McCOMB and FOX, JJ., concur.

132 Cal.App.2d 753

C. Compton BROWN, Plaintiff and Respondent,

v.

A. W. PEETZ, Marion C. Barnard, Cleo P. Barnard, James F. Barnard, Neva Barnard, Wayne Fenderson, et al., Defendants and Appellants.

Civ. 4924, 4925.

District Court of Appeal, Fourth District, California.

May 5, 1955.

Electrical contractor's actions, consolidated for trial, upon general wiring contract and for balance due on reasonable value of labor and material furnished in installing intercommunication system, and to foreclose mechanics' lien. The Superior Court, Kern County, Norman F. Main, J., rendered judgment in favor of plaintiff against both the general contractor and the owners of the premises, in each action and defendants appealed from both judgments. The District Court of Appeal, Barnard, P. J., held, with respect to the first action, that evidence sustained the trial court's finding that any delay in completion of the building was not due to wrongful work stoppages on the part of the electrical contractor and, with respect to the second action, that evidence sustained findings and judgment against both the general contractor and the owners.

Affirmed.

1. Damages ⇐189

In electrical contractor's action against general contractor and owners of premises upon wiring contract, evidence sustained trial court's findings that any delay in completion of building was not caused by wrongful work stoppages on part of electrical contractor and that general contractor was not damaged thereby.

2. Appeal and Error ⇐1071(1)

In electrical contractor's action against general contractor and owners of premises upon wiring contract and to foreclose mechanics' lien, inconsistency in trial court's findings, in that court found all allegations of one paragraph of complaint were true and that all allegations of one paragraph of cross-complaint were true and thereby found both that contract had been entered into between electrical contractor and general contractor and that it had been entered into between electrical contractor and owners, was not prejudicial.

3. Appeal and Error ⇐909(1)

In electrical contractor's action against general contractor and owners of premises, upon wiring contract and to foreclose mechanics' lien, where general contract was not made part of record on appeal reviewing court would presume that it would show that general contractor had authority to bind owners and that it thus supported trial court's finding that contract was entered

into between electrical contractor and owners.

4. Contracts ⇐354

In electrical contractor's action upon wiring contract, issue that item included in original wiring contract had been eliminated by agreement of parties was covered by trial court's finding that proper credit was given by court for various deductions as admitted and as shown by evidence.

5. Contracts ⇐322(4)

In electrical contractor's action on wiring contract, finding that he completed his contract was supported by evidence.

6. Contracts ⇐346(1), 350(1)

In electrical contractor's action upon wiring contract, evidence sustained trial court's allowance of $66.09 as extra cost of installing conduit underneath area which general contractor had paved before installation of conduit and, though such item was not specifically alleged in pleadings, it was covered by other allegations therein and was within issues raised by pleadings.

7. Pleading ⇐193(6)

In electrical contractor's action upon complaint which alleged contract and amount due for extras, wherein matter of work stoppages was raised by answer and cross-complaint, overruling of demurrer was proper notwithstanding contention that complaint did not state a cause of action and purported to state three causes of action that should have been separately stated whereby defendants were allegedly prejudiced.

8. Contracts ⇐350(2)

In electrical contractor's action for labor and material provided at request of general contractor and owners of premises, for construction of intercommunication system, evidence sustained trial court's findings that work was to be done on basis of reasonable value of labor and material furnished and that monthly payments of not less than 85 per cent of value of labor and materials previously furnished were to be made, and that binding contract at fixed price had not been made.

9. Contracts ⇐354

In electrical contractor's action against general contractor and owners of premises for balance due on reasonable value of labor and materials furnished in installing intercommunication system, finding that defendants agreed to pay cost of labor and materials, or for fair and reasonable value thereof, was not beyond scope of issues raised by pleadings.

10. Contracts ⇐350(1)

In electrical contractor's action against general contractor and owners of premises for balance due on reasonable value of labor and materials furnished in installing intercommunication system, evidence sustained findings and judgment against both general contractor and owners.

Marvin Osburn, Los Angeles, for appellants.

Siemon & Siemon, Bakersfield, for respondent.

BARNARD, Presiding Justice.

These appeals involve two actions which were consolidated for trial. The defendant Peetz, as a general contractor, contracted to erect a medical building for the other defendants. The plaintiff, as a subcontractor, did the general wiring job on this building. As a separate transaction he was also engaged in installing an intercommunication system in this building. In the first of these actions, plaintiff sought to collect the balance claimed to be due upon the contract for the general wiring system, and the value of certain extras furnished in that connection. The second action claimed a balance due on the reasonable value of labor and materials furnished in installing the intercommunication system. Judgments were entered in favor of the plaintiff for a balance of $1,911.41 in the first action, and for $1,764.21 in the second action. The defendants have appealed from both judgments.

In the first action it was alleged that the plaintiff entered into a contract with Peetz as the agent of the other defendants, whereby the plaintiff agreed to install the

general wiring in accordance with written plans and specifications for $6,750; that during the construction plaintiff furnished, at the request of the defendants, certain extras which were of the reasonable value of $1,298.71; that during construction the defendants paid $5,825.12 on account of said contract price and on account of said extra work, without any direction as to the application of the same; that said work was completed on April 12, 1951; that defendants had refused, after demand made, to pay the balance of $2,223.59; and that a claim for a mechanic's lien had been filed and recorded. The prayer was for a judgment for this balance and for the foreclosure of the mechanic's lien. By answer and cross-complaint the defendants denied the amount claimed to be due; alleged that the plaintiff had failed to install certain fixtures and had omitted to allow certain credits; alleged that the extras ordered were worth only $564.27; and claimed that the defendants had been damaged in the total amount of $2,950 by work stoppages caused by the plaintiff, which delayed completion of the building.

The court found that under the general building contract between Peetz and his codefendants Peetz was employed to superintend the construction of the building, and his codefendants agreed to pay the cost of the labor and materials and to pay Peetz a stated amount for his services; that the allegations of the complaint were true, with certain exceptions not material here; that certain deductions should be made; and that on April 12, 1951, there remained due to the plaintiff on account of the contract price and the reasonable value of the extra labor and materials furnished the sum of $1,911.41, no part of which has been paid. The court also found against the defendants on their cross-complaint. Judgment for $1,911.41 was entered in favor of the plaintiff, together with a judgment for the foreclosure of his lien.

Appellants' main contention on this part of the appeal is that the court's findings, to the effect that Brown's work stoppage did not delay the completion of the building, and that the defendants were not damaged thereby, are not supported by any evidence. It is argued that the evidence shows, without conflict, that these work stoppages caused a delay of 17 days in the completion of the building; that Peetz was damaged in the sum of $1,700 because he was required to remain on the job as general contractor for an extra period of 17 days, and his time was worth $100 per day; and that Peetz was further damaged in the sum of $250 for loss of time of his key workman as a result of the delay caused by the respondent.

[1] The evidence for the appellants shows that some work stoppages occurred but that evidence, as a whole, is far from satisfactory in showing that such stoppages were unnecessary, and in showing that the damages thus claimed were properly chargeable to the respondent. The written contract of August 4, 1950, under which this wiring was done, set forth no time limit for the completion of the work. There is no evidence that any such time limit was agreed upon in connection with the extra work ordered and done. The respondent testified to the effect that there was no delay on this building caused by work stoppages on the electrical work; that the electrical work was always ahead of the carpenters; and he fully explained why some of the electrical work had to be delayed until after other work was done. There was evidence that the plans were changed during construction and that at times the respondent had to wait until other parts of the work were done before he could proceed with his work, and there was much evidence showing that he was not to blame for these stoppages, including the main one which occurred because Peetz informed him that he would not be paid for his extra work. One of the appellant doctors testified that the stoppage was caused by a dispute over paying for the extras, and that a conference was held at which the appellants agreed to allow some of the claims for extras but disagreed as to others. There was a valid excuse for this delay, and the evidence as a whole indicates that the respondent was guilty of no unnecessary work stoppage. The evidence, while conflicting to some extent, amply sustains the court's findings to the

effect that wrongful work stoppages did not cause a delay in the completion of the building and that the appellant Peetz was not damaged thereby.

[2, 3] It is next contended that the judgment against Peetz' codefendants, the owners of the building, is not supported by the findings or evidence. It is argued that the contract of August 4, 1950, was entered into by the respondent and Peetz only, and the other appellants were not parties thereto; that the court did not find that Peetz had the authority to bind the other appellants; and that the findings are conflicting in that the court found that the contract of August 4, 1950, was entered into between Brown and Peetz and at another time found it was entered into between Brown and the defendants. This latter contention is based on the fact that the court found that all of the allegations of one paragraph of the complaint were true, and also found that all of the allegations of one paragraph of the cross-complaint were true. No possible prejudice appears. As to the other contentions the court found that under the original contract for this building Peetz was employed by the other appellants to superintend the construction, and his codefendants agreed to pay the cost of labor and materials and to pay Peetz a stated amount for his services. The original contract, while admitted in evidence, was not made a part of the record before us and it must be presumed that it supports this finding. Sufficient authority to bind the other appellants thus appears. It may be further observed that the matter is of no great importance, with respect to the action here in question, because of respondent's lien upon the premises covering the judgment in this action.

[4–6] It is next contended that the findings fail to support the judgment in that the court failed to find upon an issue that one item included in the original wiring contract was eliminated by agreement of the parties; in that the finding that the respondent completed his contract is not supported by the evidence; and in that the finding that the appellants were indebted to the respondent in the sum of $66.09 as to an underground conduit is beyond the scope of the issues. The first of these matters was amply covered by the findings showing that proper credit was given by the court for various deductions as admitted, and as shown by the evidence. The finding that the respondent completed his contract is amply supported by the evidence. The item of $66.09 was allowed as the extra cost to the respondent of installing a certain conduit underneath an area which the appellants had had paved before the conduit was installed, thus increasing the cost thereof. There was ample evidence that respondent could have done this work much cheaper had he been informed of the paving and allowed to do it before the paving was laid, and that he was thus damaged in that amount. While that item was not specifically alleged in the pleadings it was covered by other allegations therein, and it comes well within the issues raised by the complaint and the answer.

[7] The final contention as to this case is that the demurrer to the complaint therein was erroneously overruled. The demurrer was on the ground that the complaint did not state a cause of action, and that it purported to state three causes of action which should have been separately stated. It is argued that the appellants were prejudiced in that they had to go to trial on the theory that the respondent had completed his contract but were met with evidence that the respondent was justified in interrupting his work and in not completing his contract; and in that evidence was offered as to the reasonable value of items claimed as extra work which should have been included as properly chargeable under the express contract. The complaint sufficiently alleged the contract and the amount due for extras, the matter of the delay was raised by the answer and cross-complaint, and no error appears in connection with overruling the demurrer.

In the second action, the complaint alleged that Peetz was acting as the agent of the owners in erecting this building; that between November 10, 1950 and April 14, 1951, the plaintiff performed labor and furnished materials at the request of defendants which were used in the construction and installation of an intercommunica-

tion system in this building; that the fair and reasonable value of the materials furnished and provided was $3,477.30, and the reasonable value of the labor furnished and performed was $1,676.70; that the total reasonable value of both labor and materials was $5,122.92; that the defendants accepted and received said labor and materials, and received the benefit thereof; that the defendants had paid plaintiff $2,000 on account thereof; and that defendants have refused to pay the balance of $3,122.92. The answer denied that any labor or materials on the intercommunication system were furnished after March 23, 1951; denied that the labor or materials supplied were of any value in excess of $500; and alleged that the $2,000 was paid by Peetz as an advance payment on a contract whereby Brown agreed to install this intercommunication system for the agreed price of $4,350.00. As affirmative defenses it was alleged that while the things furnished were worth not more than $500, $2,000 had been paid on account and Peetz was entitled to the balance of $1,500; that plaintiff failed to do any work on this installation after March 23, 1951; that Peetz and Brown entered into an agreement on December 9, 1950, whereby Brown agreed to do this work for $4,350; that by reason of this contract Peetz was not obligated to pay Brown until after the intercommunication system had been completely installed; and that because Brown failed to complete the installation of this intercommunication system Peetz was also damaged in the sum of $700 because of seven days' time he lost, and in the further sum of $1,500 because he was required to employ others to do the work and supply the materials the plaintiff had agreed to furnish.

The court found that Peetz was employed by his codefendants to superintend the construction of this building; that his codefendants agreed to pay the cost of labor and materials and to pay Peetz a stated amount for his services; that from November 10, 1950 to April 14, 1951, plaintiffs performed labor and provided materials, at the request of the defendants, which were applied to and used in the construction of this intercommunication system; that plaintiff furnished materials of the reasonable value, after allowing for offsets and discounts, of the sum of $2,087.51 and labor of the reasonable value of $1,676.70, amounting to a total sum of $3,764.21; that the defendants paid thereon the sum of $2,000; and that there was a balance due the plaintiff from the defendants of $1,764.21. It was further found that it was not true that the plaintiff agreed to install this system for $4,350 or any other agreed sum; that the plaintiff agreed to do said work on the basis of cost of labor and materials or the fair and reasonable value thereof, and not otherwise; that the parties agreed that during the progress of the work the defendants would pay, on the first day of each month, 85% of the value of the labor and materials theretofore furnished; that on April 12, 1951, there was due to the plaintiff $1,764.21 under this arrangement; that on that day the plaintiff demanded a progress payment of $1,000; that the defendants refused to pay said sum at that time, or at any time thereafter; and that the plaintiff then ceased to furnish any work or materials in connection with the installation of this intercommunication system. It was further found that the plaintiff did not fail or refuse to continue the work except that he did so after and on account of the failure of the defendants to make the required progress payments; that Peetz requested the plaintiff to continue the work but did not pay or offer to pay to the plaintiff any sum whatever on account of the progress payments which were due; and that it is not true that Peetz was damaged to the extent of $1,500 or $400, or in any other sum whatever, by reason of any delay on the part of the plaintiff or by reason of the failure of the plaintiff to complete the work, or for any other reason.

[8] Appellants' main contention is that the evidence shows, without conflict, that Brown agreed to install this intercommunication system for $4,350 and that the court's findings to the contrary are unsupported by the evidence. Reliance is placed on a letter dated December 9, 1950, written by Brown to Peetz and the doctor appel-

lants. This letter, which was received as an exhibit and is now before this court, starts out "A proposal to install an intercommunicating system * * * for the sum of $4,350.00 was made." It then goes on to state "Owing to changes made" in the work required "additions will have to be made to the above figure." It then went on to describe some things which had been left out and other changes which were necessary. It then stated that certain work was not included; that prices for certain other fixtures "are not available at this time"; that certain other described things "will entail additional material and labor"; that the price of eight items listed at prices totaling about $1,300 might increase, in which event the increased price "will have to be added to the price of the job"; and that certain preparations for future installations are not included.

The evidence conclusively shows that this letter of December 9, 1950, was not a binding contract for a fixed price of $4,350. There was evidence that sometime in November the respondent had estimated that the intercommunication system, as shown on the plans, would cost $4,350; that changes were made and the system was not installed in accordance with the original plans; that these changes were recognized by all parties and further negotiations followed, including the writing of the letter of December 9, 1950; and that an oral agreement was then made without any fixed price. While the evidence is not without conflict, it fully supports the court's findings to the effect that the respondent was requested to do this work on the basis of the reasonable value of the labor and materials furnished, and that he proceeded with the work on that basis.

It is further argued that the findings that it was agreed that defendants would pay to the plaintiff monthly not less than 85% of the value of the labor and materials previously furnished, is beyond the scope of the issues as shown by the pleadings. The evidence sustains that finding which is an incidental part of the arrangement under which this work was performed, it is a normal and usual incident to such agreements, and it was sufficiently within the scope of the issues presented, both by the pleadings and the evidence. The evidence is that the defendant paid such monthly payments for several months, and then notified the respondent that further payments would not be made because they were relying on a flat contract for a price of $4,350.

It is further contended that the findings do not support the judgment because the court failed to find upon seven designated issues. Four of these are with respect to claimed issues relating to the effect "of the December 9, 1950 contract". The court found that there was no such contract, and there was no need for further findings in that regard. The other three matters were fully covered in the findings made, and no further findings were necessary in that connection.

[9] It is further contended that the finding that the defendants agreed to pay the cost of labor and materials, or the fair and reasonable value thereof, is beyond the scope of the issues raised by the pleadings. This contention is without merit.

A further contention is made that the findings are conflicting because the court found that Peetz did, and did not, have a contract with the other defendants to erect this building; that the court found that the plaintiff agreed to install the system for the cost of labor and materials, and also for the fair and reasonable value thereof; and that the court found that the plaintiff and defendant made an express contract and also an implied contract at the same time. A careful reading of the findings discloses that no such conflicts exist, and it would serve no useful purpose to analyze and answer these contentions. No error or prejudice appears, and nothing in these matters could conceivably affect the result.

[10] Finally, it is contended that the findings do not support the judgment as against the appellants, other than Peetz. It is argued that there is no evidence that these other appellants requested the respondent to install this intercommunication system, and that these other defendants are not bound by the acts of Peetz as to any contractual obligation between him

and Brown, as to this intercommunication system. The findings are to the contrary and the testimony of one of the doctors shows that an intercommunication system was being installed at the request of these other appellants, that they knew that the work was being done by Brown, and that they were siding with Peetz in the controversy that had arisen. This, with some of the other evidence received, sufficiently supports the finding and judgment. The judgment as to all of the appellants is supported by the evidence and the findings made.

The judgments appealed from, and each of them, are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

ALPHA BETA FOOD MARKETS, Inc., a corporation et al., Plaintiffs, Cross-Defendants and Appellants,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, an unincorporated voluntary association et al., Defendants, Respondents,

and

Joseph T. DeSilva, Individually and in a representative capacity for and on behalf of Retail Clerks Union, Local No. 770, its officers and members, Cross-Complainant,

and

Food Employers Council, Inc., et al., Cross-Defendants, Appellants.

Civ. 20715.

District Court of Appeal, Second District, Division 2, California.

April 28, 1955.

Rehearing Denied May 20, 1955.

Hearing Granted June 23, 1955.*

Proceeding by food markets against labor unions for judgment declaring rights of parties under collective bargaining agreement. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that where modified collective bargaining agreement provided for annual negotiation of straight time pay and in event of federal wage control, for negotiation of premium pay for night and holiday work, and control was imposed and board of arbitration granted premium pay which was twice disapproved by regional wage stabilization board, premium pay did not survive abolition of control while matter was pending before National Wage Stabilization Board.

Judgment reversed with directions.

* Opinion vacated 291 P.2d 433.

1. War and National Defense ⇐404

Where modified collective bargaining agreement provided for annual negotiation of straight time pay and in event of federal wage control, for negotiation of premium pay for night and holiday work, and control was imposed and board of arbitration granted premium pay which was twice disapproved by regional wage stabilization board, premium pay did not survive abolition of control while matter was pending before National Wage Stabilization Board. Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.Appendix, § 2061 et seq.

2. War and National Defense ⇐404

During period of wage stabilization controls, any contracts between labor and management must have approval of Wage Stabilization Board. Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A.Appendix, § 2061 et seq.

3. Contracts ⇐103

Validity of terms of contract must be determined by law in effect when contract is made.

4. War and National Defense ⇐404

Where food markets and union executed modification to collective bargaining agreement reciting that agreement could be opened annually but only for negotiating changes in straight time pay and that in event of federal wage control, negotiation could be had for premium pay for night and holiday work, and where pursuant to such agreement, parties entered into agreement submitting question of premium pay-

ments to board of arbitration, law in force at time of agreement was law that determined whether it was valid. Defense Production Act of 1950, § 1 et seq., 50 U.S.C.A. Appendix, § 2061 et seq.

5. War and National Defense ⇐404

Collective bargaining agreements made during period of wage controls contrary to Defense Production Act are void. Defense Production Act of 1950, § 1 et seq., 50 U.S. C.A.Appendix, § 2061 et seq.

Musick, Peeler & Garrett, Harold F. Collins, McLaughlin & Casey, James A. McLaughlin, Los Angeles, for appellants.

Bodle & Landye, George E. Bodle, Daniel Fogel, Leo Geffner, Los Angeles, for respondents and cross-appellant.

Gibson, Dunn & Crutcher, Los Angeles, William French Smith, Los Angeles, amicus curiae.

MOORE, Presiding Justice.

Appeal from a judgment of declaratory relief.

After a long history of collective bargaining, on January 1, 1950, the parties executed a "Retail Food Agreement." It was to be effective for 15 months but could be reopened prior to July 1, 1950 on the request of either party on 30 days' notice for the purpose of negotiating changes in hourly rates. As a result of the Union's notice, on September 22, 1950, the parties executed a "Modification Agreement," extending and modifying the Food Agreement. The terms of the new agreement extended the Retail Food Agreement to December 31, 1955, provided it might be opened annually for negotiating changes only in straight time hourly rates of pay. Before the Modification Agreement had been executed the Korean conflict began and to meet the emergencies that might arise, the Defense Production Act of 1950, 50 U.S. C.A.Appendix, § 2061 et seq., was enacted. It provided for the stabilization of wages. Thereupon the parties made provision in the Modification Agreement, section 8b, to the effect that *in the event wages should be controlled by the federal government and such controls should nullify the wage increase effective January 1, 1951, the parties will be entitled to reopen negotiations for premium payments.* In other words, there could be no negotiations for premium payments unless the national government should impose a system of wage controls and only for the period. But because no final agreement was ever made for an increase of wages, not permissible under wage controls, it is readily apparent that no increase was ever agreed upon to be effective upon the abolition of controls.

After wages had been stabilized pursuant to the Defense Production Act, the Union gave notice October 1, 1951, to appellants of its desire to negotiate modifications of their agreement with respect to changes of provisions for vacations, guarantee of call-in pay, overtime and sixth day, part time clerks, defining work week, apprenticeships, rates of pay for department heads, sick leave, wage increases, *increased premium pay for Sundays, night work* and *holidays.* Under date of January 1, 1952, an agreement was executed whereby certain changes and conditions were mutually made, no part of which is involved in this controversy. A second agreement provided for a submission to the board of arbitration created by the agreement of the following: (1) What, if any, change should be made in the Modification Agreement with respect to premium pay for (a) night work, (b) for work on Sundays, (c) for work on holidays. That contract was designated as the "submission agreement." On May 12, 1952, the board decided the issue of premium pay in favor of the Union and its members. The award of the arbitration board was submitted to the 12th Regional Wage Stabilization Board. *It did not approve premium pay for night and holiday work,* and on a rehearing, its decision was reaffirmed at Los Angeles on July 11, 1952. Thereafter, pursuant to the rules, the matter was automatically transferred to the Wage Stabilization Board at Washington, D. C. It was there pending at the time President Eisenhower on February 6, 1953, issued his order by which (1) all regulations and orders stabilizing wages were suspended; (2) but as a part

of such order it was provided that it should "not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability or offense possessed, incurred, or committed prior to this date."

In their complaint, appellants alleged that a dispute concerning the meaning of the submission agreement exists; that respondents contend that if and when the controls of wages are terminated, the premium pay for night and holiday work shall automatically become payable for all such work performed by appellants' retail food clerk employees immediately following the termination of such wage controls, regardless of whether or not the Wage Stabilization Board shall have approved or disallowed the award of such premium pay. The pleading alleges the contentions of appellants as follows: "Plaintiffs dispute the above-described contention of the defendants and *contend that there shall never be any duty on the part of plaintiffs to pay any such premium pay for night and holiday work unless and until such premium pay is specifically allowed and approved by the Wage Stabilization Board* in accordance with the statutes of the United States governing wages, and that under the terms of the Submission Agreement, approval of such premium pay by the Wage Stabilization Board is a condition precedent to any liability and duty on the part of plaintiffs to pay such night and holiday premium pay."

The court found on such allegations as follows: "The provisions of the Submission Agreement with respect to approval of the award by the Wage Stabilization Board did not create or constitute a condition precedent to the finality of the award with respect to the said premium pay. Such provisions expressed the legal requirment of federal government approval, only; that such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to said Executive Order 10434, such legal requirement was eliminated."

The conclusion of the court was: "The provisions of said Submission Agreement with respect to approval of the said arbitration award by the Wage Stabilization Board, did not create or constitute a condition precedent to the finality of said award with respect to the said premium pay; that such provisions expressed only the legal requirement of federal government approval." In accordance with such finding and conclusion, the court adjudged the defendants to be entitled to their premium pay for night and holiday work.

Appellants now demand a reversal of such judgment on the grounds that (1) Wage Board approval of any award of premium pay was a condition precedent to the accrual of any obligation to pay such premium rates; (2) the President's decontrol order was not equivalent to wage board approval. Other matters are urged but they are not pertinent to a decision.

Without section 8b[1] of the modification agreement, the respondents could not for five years have negotiated for anything but straight time hourly rates of pay. Section 8b anticipated wage control. By that section they broadened the scope of demands that might be made, but such demands could not

1. "(b) It is agreed that in the event any duly authorized and empowered government board or agency establishes controls over wages and/or working conditions as a result of a national emergency, and only in the event such controls nullify, invalidate, alter or in any way render inoperative or illegal the wage increase effective January 1, 1951, as provided herein, or subsequent wage reopenings in accordance with Paragraph 6(b) of this Agreement, or the employee medical and hospital benefits herein provided, the restrictions set forth in Paragraphs 6(b) and 8(a) limiting the reopening rights of each of the parties to negotiate changes only in the straight time hourly rates of pay, shall be declared inoperative and shall cease to be in effect during any period in which such board or agency exercises controls, provided, however, that neither party shall be obligated at any time during the term of this agreement to bargain collectively with respect to pensions or annuities."

exceed the increases permissible under wage stabilization regulations. The Defense Production Act of 1950 authorized wage freeze. Respondents were willing to limit their negotiations for five years to straight time hourly rates of pay. But if wage controls were imposed, they demanded the right to broaden their demands to include other matters. They demanded everything that was available under wage regulations. This they could do under the provisions of 8b if straight time pay were limited. That section contemplated a wage ceiling on straight time hourly pay and on fringe benefits as well. In all reason, the parties could not have intended straight time hourly pay and not have included also all other benefits. Both parties knew that whatever the result was, it would have to be authorized by law.

After their negotiations had been completed, the parties executed the agreement of January 1, 1952,[2] which provided that the wage scales attached to such agreement shall be paid to all employees "covered by the aforesaid agreements; provided" that certain amounts shall be withheld until it has been determined that such wage rates are permissible under Wage Stabilization regulations; such amounts so withheld to be paid retroactively to the first Monday of 1952, if it be determined by the Union and the Food Employers Council Inc.[3] that such amount is permissible under existing Wage Stabilization regulations. That contract was the first by these parties under

2. "1. Effective as of January 1, 1952, the wage scales attached hereto as Exhibit 'A', and incorporated herein, shall be paid to all employees covered by the aforesaid agreements. [Retail Food Agreement, January 1, 1950; Modification, January 1, 1951.]

"2. Effective as of July 1, 1952, a cost of living adjustment shall be made and paid to all employees coming under the provisions of this contract amounting to the percentage of increase in the Bureau of Labor Statistics Consumers Price Index, U. S. Average, (new series) for the latest date available over the same index as of October 15, 1951. Thereafter, each half year, the cost of living allowance shall be increased or decreased in proportion to the increase or decrease of the latest Bureau of Labor Statistics Consumers Price Index over the index for October 15, 1951. It is agreed and understood that at no time shall such cost of living adjustment result in any decrease of the base rates provided herein and attached hereto as Exhibit 'A', and as modified by the improvement factor in Section 3 hereof.

"3. On January 1, 1953, an increase of four cents ($.04) per hour shall be added to the base rates provided herein as an improvement factor. Another increase shall be made in the same amount as of January 1, 1954, and another as of January 1, 1955.

"The above increases shall be subject to Wage Stabilization Board approval upon joint petition of the Council and the Union, unless or until such approval becomes unnecessary.

"4. It is agreed by the parties hereto that subject to the approval of the Wage Stabilization Board, there shall be contributed to the Retail Clerks Benefit Fund—Local 770—an additional ¼¢ per hour per employee during the life of the Agreement. Such payment shall commence upon approval by the Wage Stabilization Board, or shall be retroactive to April 1, 1952, whichever is the earlier.

"5. It is further agreed and understood that except as herein amended and except for such changes as may result from the Arbitration Award under the Submission Agreement executed by the parties as of even date hereof, the provisions of the Retail Food Agreement and the Extension and Modification thereof shall remain in full force and effect until December 31, 1955.

"There shall be no reopenings until January 1, 1956 for any purpose. Until such date, wages and working conditions shall be adjusted only as herein provided. Either party may give notice in writing of its intention to amend, alter or terminate this agreement sixty days prior to December 31, 1955.

"It is further agreed and understood that the parties signatory hereto shall incorporate the provisions hereof as well as any changes resulting from the Arbitration Award under the Submission Agreement as of even date hereof, in a new agreement embodying the old provisions reaffirmed herein, as well as the amendments hereinabove provided or referred to, and shall execute such new agreement as soon as can be prepared."

3. Agent of appellants.

their Modification Agreement and the laws governing wage stabilization. It is a fair interpretation of section 8b that the amount determined to be permissible would be in effect during the entire period of the modification agreement, even if the controls should be subsequently abolished. This conclusion is justified by the facts that straight time hourly rates, Sunday premium pay and other increases, not in dispute, continued in force according to valid agreements of the parties, notwithstanding the abolition of wage controls. Section 8b contemplated only such increases as were valid under wage controls.

Section 8b was mutually added to the modification agreement to cover the contingency of wage controls. It is not disputed that 8b could not be effectuated if such controls had never come into existence, because that section applied to fringe benefits only, in the event of wage controls. Section 8b means that such controls must either nullify or alter the modification agreement in regard to straight time pay in order for the Union to reopen negotiations in regard to any benefits other than straight time pay.

Wage controls were in fact established January 24, 1951. In October of that year, the Union opened negotiations for added benefits under section 8b contending that because of wage controls, they were now entitled to negotiate for the added benefits. This negotiation was opened under the modification agreement which allowed yearly reopenings. As a matter of fact, the most the wage control regulations ever did was to specify certain limits beyond which increases could not go without specific board approval.

Appellants' agreement to a wage increase under the January 1, 1952 agreement resulted from the Union's demands and was in accordance with the modification agreement. It was not an admission that 8b was in effect. The fact that a cost of living increase was also granted was in accordance with the times and again, appellants waived no rights as to the modification agreement. Section 8b specified only that the agreement must be nullified and straight time increases disallowed before respondents might negotiate for fringe benefits.

The modification agreement called for a submission of any disputes to a three-man arbitration board. The first question submitted to this board was "what, if any, change should there be?" in the modification agreement in regard to premium pay. The Board of Arbitration ignored the "if any"; failed to rule on this question and granted all of the Union's demands as to fringe benefits.

However, this ruling was only an interim decision. It could not stand by itself and was subject to Wage Stabilization approval. That approval was not forth-coming and after the Union had sustained two adverse decisions by the Regional Wage Stabilization Board, the case was still pending with the National Stabilization Board when controls were abolished. Obviously, the abolition of controls could not suddenly make the Board of Arbitration's award a final judgment, after such award had been twice reversed by the regional Wage Stabilization Board.

Respondents could never have negotiated without wage controls and upon the abolition of such controls, in the absence of a final judgment, the disputed issues (night and holiday pay) should have been abandoned, and the controversies that had arisen in war time should have been consigned to limbo. This means, of course, that all final judgments entered during such period are still in effect.

Respondents never contemplated negotiating for future benefits, and affirmance of the instant judgment would be contrary to their intentions. The modification agreement allowed them to negotiate every year in order that their wage demands would be kept current.

[1–3] As respondents were never limited by wage controls in their bargaining for straight time pay, even though wage stabilization approval was necessary, and as appellants never waived their right to refuse fringe benefits, since there was no final judgment, this court must hold that as to the disputed questions, respondents never had the right to negotiate under 8b for fringe benefits, and certainly not bene-

fits for the future. It is the law that during a period of wage stabilization controls, any contracts between the parties must have been approved by the wage stabilization board. If any part of the wage contract has not been approved by the wage stabilization board, it was not a part of the agreement of the parties. There was nothing to enforce after controls had been abandoned. In re Pringle Engineering & Manufacturing Co., 7 Cir., 164 F.2d 299, 301. The validity of the terms of a contract must be determined by the law in effect when the contract is made. (Ibid.)

It was not the abandonment of the controls that might have authorized premium payments but it was the wage controls that had been authorized by the Defense Production Act of September 8, 1950. (Ibid.) In Mitchell v. Texas Housing Co., Tex. Civ.App., 265 S.W.2d 157, 162, it was held that "as part and parcel of any agreement for compensation made during period of controls was the Defense Production Act of 1950 whereby all claims for compensation not permitted by its regulations, whether in quantum meruit or otherwise, would be manifestly without legal basis and unenforceable." The effect of such holding is that unless respondents established their rights to the premium payments by an order of the Wage Stabilization Board, during controls, they had none when the controls were lifted.

The parties entered into negotiation in October 1951 to increase the current wage scale; yet the award of the disputed premium payments could not take place until the lifting of wage controls, which occurred February 6, 1953. The only two possible theories to sustain respondents' position that there should be a future award are (1) that the parties illegally contracted to circumvent the wage stabilization board or (2) that payments were deferred until the future which is not the intent of section 8b under which negotiations were opened. Neither theory is tenable.

Having shown that respondents left the period of wage stabilization without an approval of their premium payments, it must be readily discernible that they are in a hopeless situation. They are in no better position than they were before wage controls allowed them to negotiate under 8b. Therefore, they obtained their judgment for their alleged premium payments without legal authority. It is as though their incomplete proceedings had never been initiated or as though they had never negotiated for an allowance of the premium wage payments.

Despite the imposition of wage controls on hourly wage rates the parties agreed that the scope of reopening negotiation was to be broadened; but such was to continue only "during any period in which such board or agency exercises controls." From such language, it must be apparent that the parties contemplated that any agreement arrived at would be effective only during the period of wage controls. If not so restricted, such agreement would be illegal. Neither in section 8b nor in any other contract does it appear that the parties, in making such contract, contemplated the abandonment of controls. Neither is there evidence that increases were to be effective at a future date. But all negotiations for premium pay items, as well as others, were to occur "only during any period in which such Board or agency controls."

Neither does it appear from any contract that the abolition of controls was to signify the immediate effectiveness of pay increases. Indeed the thesis of respondents on this appeal is that the increases should date from the arbitration award. Now, the court made no finding that the date of lifting controls was to be the date on which increases agreed upon by the parties were to go into effect. In the absence of such finding or of proof that would justify it, how can it be maintained to the contrary? Despite the importance respondents now attach to such date, they made no allusion to it in any contract. If they had had such thought in mind at the times of the contracts they surely would have insisted upon the mention of abolition of controls at least as forcefully as they insisted upon the adoption of section 8b and the imposition of controls. Lifting controls did not alter the terms of the contract which had determined that the amount

of any increase was to date from the time it was fixed and that it had to be authorized by national regulations.

Respondents do not place themselves in an enviable position. While they concede that both contracts of 1952 were drawn within the purview of section 8b and claim all benefits conferred by that section, yet they deny the limitations imposed thereby. Not only were the 1952 agreements drawn pursuant to section 8b, but the documents both disclose that the increases resulting therefrom were to be limited to those authorized by wage regulations. Not only were hourly wage increases, but other wage items were negotiated to the ceilings warranted by the regulations. In no instance did respondents, in negotiating for an increase, attempt to evade the dominance of wage controls. *Amicus curiae* pertinently observes: "If the Union had thought that it was also obtaining increases the total amount of which was sooner or later to be effective irrespective of whether permitted by controls, it is not likely that it would have had such respect for wage ceilings in its negotiations, a respect clearly shown by the 1952 agreements." In their Submission Agreement as in all others, they provided that if any award of the Board "provides for any change in premium pay, such award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the award shall be the date upon which it is approved by the Board, if such approval is necessary." Such phraseology as the foregoing quotation emphasizes the fact that in agreeing to widen the scope of the reopening during controls, the parties intended only such increases as might be obtained under existing regulations.

With their agreement to such requirements for obtaining increases in pay, how can respondents now maintain that since controls have been lifted, they may disregard the fact that no Wage Stabilization Board ever approved the increases which they now contend are theirs merely because controls were abolished? Inasmuch as the agreement provided that such premium pay should not be allowed until approved by the Wage Stabilization Board, and since the controls and the Stabilization Boards are abolished, does not the new status require either that the issue be submitted to such National Board, even though without official status, or require the parties to reopen negotiations for the purpose of adjusting respondents' claims for premium pay? When the agreement, made during the national emergency, provided that their contest should be finally decided by a national tribunal, there is not decision merely because the national government has abolished such tribunal. The parties had, in good faith, a problem requiring solution. They agreed to have such tribunal resolve their differences. The destruction, decadence or abolition of the tribunal could not, in reason, be deemed tantamount to a judicious consideration of a substantial controversy that pertained to the welfare of either or of both contenders.

If respondents contend that an increase during wage controls might not have been permissible under wage regulations, yet such increase must go into effect when controls were abolished, they not only demand an increase contrary to statute, but also, they reject their own agreement. They must show that although an increase was not permissible under wage regulations yet it must be deemed established when the wage stabilization boards cease to enjoy official status. By the contract of January 1, 1952, it was agreed that if the entire amount of hourly wage increases permissible under existing regulations cannot be paid "then there shall be paid the highest portion of the sum so withheld, that is permitted to be paid under such regulations and such payment shall fully discharge the employers from further liability." Although respondents accepted Sunday premium pay and hourly wage rates upon the theory that it was proper under the national regulations, and although they deny that premium pay increases for nights and holidays are authorized by the same statutes, they now maintain that the latter increases should now be deemed effective by virtue of the abolition of wage controls. Such was not in any agreement of the parties, neither in 8b nor in the 1952 agreements.

Since no agreement was ever made that the disputed premium pay should become effective upon the lifting of controls, respondents are in unfortunate plight. To make such agreement while wage controls were effective would have been unlawful as violative of federal statutes. Wage controls could easily be evaded if employers might promise additional inducements payable after the passing of the national emergency. Such an agreement would be illegal. De La Rama S. S. Co. v. Pierson, 9 Cir., 174 F.2d 84; Morford v. Bellanca Aircraft Corporation, 6 Terry 129, 45 Del. 129, 67 A.2d 542, 545. Wages could not be stabilized if such tricks were perpetrated by industry. The only way to effect the purpose of respondents and to make the premium pay effective now, is to make an agreement to such effect. In the absence thereof, respondents cannot by their *ipse dixit*, reverse a judgment that went against them during the emergency.

[4] In re Pringle Engineering & Manufacturing Co., 7 Cir., 164 F.2d 299, holds that the terms of a contract must be determined by the law in effect when the contract is made. Therefore, it is the law in force at the time of the agreement of the parties that determines whether it is valid. 12 Am.Jur. 659, sec. 164; Northern Pac. R. Co. v. Wall, 241 U.S. 87, 36 S.Ct. 493, 66 L.Ed. 905; Willcox v. Edwards, 162 Cal. 455, 461, 123 P. 276.

[5] If any contract subsists for the premium wages, it was executed during the period of wage controls and is therefore illegal and inoperative. No rights grew out of it and none inhere in it. When the President's order was issued, it terminated the controls, and the regulations no longer interfered with industry's contracting with labor. But since contracts made during the period of controls contrary to statute are void, no rights may be asserted as having originated with such contract. The asserted increases are without substance.

The Second Section of the Presidential Proclamation, which stated that all pending petitions before wage boards may now be placed in effect without the approval of such agencies, was interpreted by the respondents to mean the president's order either eliminated the requirement of wage board approval, or in the alternative that the alleged condition precedent of wage board approval was fulfilled.

Section 2, however, was held subject to section 3 which said, "This order shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred or committed, prior to this date."

The president's order did not constitute blanket approval of all pending cases but stated that the employers were then free to make changes in compensation if their petitions were merely up for approval, or if up for review or reconsideration, the employers were free to renegotiate.

The rights of appellants, if the petition were automatically approved, would definitely have been effected under section 3 of the presidential proclamation. No such approval can be deemed to have been granted under section 1.

Appellants are entitled to due process of law and their day in court. They cannot be deprived of a decision on the automatic appeal to the National Wage Stabilization Board merely by reason of the presidential order lifting controls. Section 3 of the President's order preserves the rights of all parties with petitions or appeals pending. The appellants expressed disapproval of premium payments at all stages of the proceeding. No section of the President's order can be reasonably interpreted as having deprived appellants of their closely guarded and carefully preserved rights. Appellants prevailed before the 12th Regional Wage Stabilization Board at both hearings on the matter of premium pay. Because the law made the automatic appeal to the National Board at Washington is no reason why appellants should be deemed to have lost the ground so gained. In fact, the President's order distinctly declares that it "shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding" with

respect to any right possessed "prior to this date." The order was permissive. It did not purport to approve all pending actions.

It follows that respondents cannot contend that the presidential order constituted an automatic reversal. If it should be so decided, it would operate to enter a judgment as to which the Regional Board had firmly held to be contrary to law. Such a result would be contrary to the constitutional doctrine of due process of law.

The question as to the proper joinder of Joseph De Silva and the Food Employers' Council Inc. is not germane to the issues of this action.

It is ordered that the judgment is reversed; that the trial court is directed to make and enter findings of fact and conclusions of law to the effect that no valid agreement has ever existed between defendants and plaintiffs with respect to night and holiday premium pay and to enter judgment that no sums are due and payable to defendants by plaintiffs and that plaintiffs recover their costs.

McCOMB and FOX, JJ., concur.

129 Cal.App.2d 844

ROLLEY, Inc., Plaintiff and Appellant,

v.

MERLE NORMAN COSMETICS, Inc., a corporation, et al., Defendants and Respondents.

Civ. 16101.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1955.

Proceeding upon petition for rehearing, with respect to case first reported in 278 P.2d 63. The District Court of Appeal, per curiam, held that appellate courts will not consider on petition for rehearing questions not previously raised.

Petition denied.

1. Appeal and Error ⇐832(4)

Appellate courts cannot submit to piecemeal argument and will not consider on petition for rehearing questions not previously raised.

2. Pleading ⇐417

Appellate court will not consider sufficiency of superseded complaint where plaintiff has amended it after demurrer sustained.

Harry Gottesfeld and Joseph A. Brown, San Francisco, for appellant.

Littler, Lauritzen & Mendelson, San Francisco, for respondents.

PER CURIAM.

In its petition for rehearing counsel for appellant frankly admits that the opinion of this court is correct. 278 P.2d 63. It admits that its third amended complaint does not state a cause of action. It asks us to grant a rehearing to consider the question whether the demurrer to its second amended complaint was properly sustained. Two ready reasons for denying the petition suggest themselves.

[1] 1. This matter is presented for the first time on petition for rehearing. "Appellate courts cannot submit to piece-meal argument and will not consider on petition for rehearing questions not previously raised." Bradley v. Bradley, 94 Cal.App.2d 310, 312, 210 P.2d 537, 211 P.2d 638 and cases cited.

[2] 2. The court on appeal will not consider the sufficiency of a superseded complaint where the plaintiff has amended it after demurrer sustained. Sheehy v. Roman Catholic Archbishop, 49 Cal.App.2d 537, 540–541, 122 P.2d 60; Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 752, 195 P.2d 492; Pearson v. Parsons, 173 Cal. 336, 159 P. 1173; Schneider v. Brown, 85 Cal. 205, 206, 24 P. 715.

The petition for rehearing is denied.

132 Cal.App.2d 725

Marguerite C. STANFORD, Plaintiff and Appellant,

v.

BAILEY, Incorporated, W. Parker Lyon, Jr., John Doe and Richard Roe, doing business under the firm name and style of Green Lake Restaurant, Henry Doe and William Roe, a co-partnership, Jane Doe, Mary Doe, James Doe and Arthur Doe, Defendants,

Bailey, Incorporated and W. Parker Lyon, Jr., Respondents.

Civ. 20664.

District Court of Appeal, Second District, Division 3, California.

May 4, 1955.

Action to recover for personal injuries sustained by plaintiff when she slipped and fell on a concrete ramp entrance to building owned by one defendant and leased and operated by another defendant. The Superior Court Los Angeles County, Alfred L. Bartlett, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Vallée, J., held that trial court properly rejected plaintiff's attempted introduction into evidence of section of city building code regulating specifications of construction for buildings, in absence of proof that ramp on which plaintiff was injured was constructed in violation of particular provisions of such ordinance.

Affirmed.

1. Landlord and Tenant ⇐167(8)

Rule that lessor is not liable for injuries to invitees of lessee caused by defects in leased premises is subject to exception that if there is some hidden defect in or danger on premises, which is known to lessor at time of executing lease but which is not apparent to prospective lessee, lessor is obligated to inform lessee thereof, and failing to do so, lessor renders himself liable for injuries sustained by lessee resulting from such hidden defects, and in such case, lessor is liable to invitees of lessee to same extent that he would have been had lessee been injured.

2. Municipal Corporations ⇐594(1)
Negligence ⇐6

A municipality, under power delegated to it by state, may enact ordinances creating duties for protection of persons and property, and those who violate such ordinances are liable for resulting injury to others.

3. Negligence ⇐6

Standard of conduct of reasonable man may be established by statute or ordinance, and violation of such legislative enactment may be negligence in itself if plaintiff is one of class of persons whom statute was intended to protect and harm which has occurred is of type which it was intended to prevent.

4. Landlord and Tenant ⇐167(8)

Where ordinance imposes duty on lessor, breach of that duty is violation of ordinance and negligence per se, and in such case lessor incurs independent liability for injuries suffered by persons lawfully on premises, including invitees of tenant, proximately caused by such negligence, in absence of some established defense, and fact that lessor is not occupant does not give him immunity from such duty.

5. Landlord and Tenant ⇐167(8)

Common law standards of duty, applicable to ordinary relationship of lessor on one hand and lessee and his invitees on the other, are not relevant to determination of negligence in case of injury to lessee's invitee which has resulted from lessor's breach of statutory duty.

6. Landlord and Tenant ⇐169(4)

Section of municipal building code regulating construction and alteration of buildings would be assumed to have been enacted subsequent to erection of building adjacent to which plaintiff sustained the injuries for which she was suing the landlord and his tenant, in absence of any proof as to when such building had been constructed.

7. Municipal Corporations ⇐120

An ordinance is not to be given retroactive effect unless such intention clearly appears.

8. Municipal Corporations ⇐120, 122(2)

Ordinance is to be construed according to intention of legislative body enacting it, and in ascertaining that intention, courts must presume that prospective and not retroactive operation was intended, unless such presumption is negatived by express language.

9. Municipal Corporations ⇐601(27)

City ordinance regulating construction and alteration of buildings was applicable to buildings and structures, and to additions, alterations, and repairs, and not to pre-existing buildings.

10. Landlord and Tenant ⇐169(5)

In action to recover for personal injuries sustained by plaintiff when she slipped and fell on a concrete ramp entrance to a building owned by one defendant and leased and operated by another defendant, trial court properly rejected plaintiff's attempted introduction into evidence of section of city building code regulating specifications of construction for buildings, in absence of proof that ramp on which plaintiff was injured was constructed in violation of particular provisions of such ordinance.

Larwill & Wolfe and Charles W. Wolfe, Los Angeles, for appellant.

Crider, Tilson & Ruppé and Donald E. Ruppé, Los Angeles, for respondent Bailey, Inc.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, Los Angeles, for respondent W. Parker Lyon, Jr.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment entered on a jury verdict in an action for damages for personal injuries.

Defendant Lyon was the owner and lessor of a building in Pasadena. Defendant Bailey was the lessee of the building and operated a cafe or restaurant therein. The entrance doorway to the cafe was set back 43 inches from the sidewalk paralleling the front of the building. A concrete ramp extended from the sidewalk to the entrance door. The ramp was constructed of nonroughened concrete and had no non-slip material on it. The ramp was in a recess, i. e., there were walls on each side of the ramp. It had a slope of 6½ inches from the door to the sidewalk. The slope exceeded one in eight and was about one in six and a half; it constituted a grade of about 15 per cent. There was a canopy over the sidewalk that went up to the building over the ramp. The doorway was the only means of entrance into the cafe for patrons.

About 7:15 p. m. on January 12, 1952 plaintiff, accompanied by her husband and intending to purchase dinner, attempted to enter the cafe. It was dark and raining. It had been raining for several days. Plaintiff preceded her husband up the ramp. The light was such that she could see the door and its handle. Standing on the ramp she attempted to open the door, which opened outward, by pulling it toward her. The door seemed to be stuck. She pulled on the knob two or three times. On the second or third pull, the door suddenly came open and struck her shoulder, knocking her off balance. Her feet slipped on the ramp and she fell prone on it, striking her head on the side of the building. There was no foreign substance on plaintiff's shoes or on the ramp. Plaintiff testified that she was hurrying and anxious to get in; the ramp was wet from the rain; the soles of her shoes were wet and her feet slipped on the ramp; she did not slip when she walked up the ramp but slipped only when she pulled the door into her shoulder; she was injured.

Plaintiff's husband testified the only light that showed at the time plaintiff fell came from a small glass window in the door of the cafe and a dim, green illumination over the top of the door. He also testified: On February 1, 1953 he went to the cafe with a light meter; about 7 p. m. he stood on the ramp; the night was dark; the lights and lighting facilities were the same as on the night plaintiff was injured; he held the light meter at the level of the handle of the door; at that point the meter registered about .75-foot candles; there was less light on the ramp than at the place where he held the meter. There was other testimony to the same effect.

A construction engineer called by defendants testified he made a series of sliding friction tests of the ramp when wet and when dry and of the sidewalk adjoining the ramp; the coefficient of friction was the same whether wet or dry; it was .36 on the ramp and on the sidewalk; this means that the traction a person would have in walking on the ramp or on the sidewalk would be the same.

Plaintiff offered in evidence a part of Pasadena Ordinance 4123, adopted December 27, 1949, effective January 30, 1950 and in effect at the time of the accident, which read:

"Section 1. (a) Except as otherwise herein provided the minimum standards, provisions and requirements for safe and stable design, methods of construction and quality of materials, use and occupancy, location and maintenance of all buildings or structures within the city shall be in accordance with the provisions and in the manner prescribed by the Uniform Building Code, 1949 edition, adopted by the Pacific Coast Building Officials Conference. * * *"

She also offered in evidence parts of said "Uniform Building Code."[1] Defendants objected to reception of the parts of the ordinance and the parts of the building code on various grounds. Without waiving their objections, for the sole purpose of enabling the court to pass on the objections, defendants offered in evidence other parts of the building code.[2] The objections were sustained.

1. The parts of the "Uniform Building Code" offered in evidence read:

Section 102, Part I, Chapter 1:

"The purpose of this Code is to provide minimum standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within the city and certain equipment specifically regulated herein."

Part III, Chapter 5, Section 501:

"Sec. 501. Every building, whether existing or hereafter erected, shall be classified by the Building Official according to its use or the character of its occupancy, as a building of Group A, B, C, D, E, F, G, H, I or J, as defined in Chapters 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 respectively. (See Table No. 5-A):"

A portion of Part III, Chapter 11 reading as follows:

"Chapter 11–Requirements for Group F Occupancies."

Part III, Chapter 11, Section 1101 providing in part as follows:

"Sec. 1101. Group F occupancies shall be:

"Division 1. Wholesale and retail stores, office buildings, restaurants, * * *."

Part III, chapter 11, Section 1104 provides as follows:

"Sec. 1104. Stairs, exits, and smokeproof enclosures shall be provided as specified in Chapter 33."

Chapter 33, Sec. 3301:

"Sec. 3301. (a) *Purpose.* The purpose of this Chapter is to provide minimum standards of egress facilities for occupants of buildings;"

Chapter 33, Section 3306, providing in part as follows:

"Sec. 3306(a) *General.* A ramp conforming to the requirements of this Section may be used as an exit. Aisles need not conform to this Section. * *

"(c) *Slope.* The slope of a ramp shall not exceed one in eight.

"(d) *Handrails.* A ramp with slope exceeding one in ten shall have handrails as required for stairways. * * *

"(f) *Surface.* The surface of ramps shall be roughened or shall be of nonslip material."

Chapter 33, that part of Section 3305 (g) being as follows:

"Sec. 3305(g) *Handrails.* Stairways shall have handrails on each side, and every stairway more than eighty-eight inches (88") in width shall have intermediate handrails dividing the stairway into portions not more than sixty-six inches (66") in width."

Chapter 33, Section 3312:

"Sec. 3312. (a) *Exit Illumination.* Exits shall be illuminated at all times with light having an intensity of not less than one foot candle at floor level, * * *."

Part of chapter 4, section 401(e):

"Exit is a continuous and unobstructed means of egress to a public way, and shall include intervening doorways, corridors, ramps, * * *."

2. The parts of the Uniform Building Code offered by defendants read:

"Sec. 103. New buildings and structures hereafter erected in the city, and

Plaintiff's ground for reversal is that the court erred prejudicially in not admitting the offered part of the ordinance and the parts of the Uniform Building Code in evidence. She argues that the ordinance applies to pre-existing buildings and that the evidence showed that the ramp and doorway were not constructed in accord with its requirements. Defendants reply that the ordinance does not apply to pre-existing buildings; it pertains to exits and not to entrances; and plaintiff failed to show that any violation of the ordinance was a proximate cause of injury. Defendant lessor also says that an injured invitee seeking recovery against a lessor must plead and prove his claim to be within some exception to the rule of nonliability of a lessor and that plaintiff failed to do so. There was evidence from which the jury could have concluded that the ramp and doorway were not constructed as required by the ordinance.

[1–3] It is the rule under the general law that a lessor is not liable for injuries to the invitees of a lessee caused by defects in the leased premises. The rule is subject to the exception that if there is some hidden defect in or danger on the premises, which is known to the lessor at the time of executing the lease but which is not apparent to the prospective lessee, the lessor is obligated to inform the lessee thereof; and failing to do so, the lessor renders himself liable for injuries sustained by the lessee resulting from such hidden defects. And in such case the lessor is liable to invitees of the lessee to the same extent that he would have been had the lessee been injured. Stated differently, the lessor's liability in such a case is no greater to the invitee of the lessee than it would be to the tenant himself. Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 610, 195 P.2d 501. It does not follow that because under general law a lessor is not liable for injuries to invitees of a tenant caused by defects in the leased premises, unless the facts described appear, a landlord may not be liable by reason of additional or supplementary regulations.

> "A municipality, under the power delegated to it by the state, may enact ordinances creating duties for the protection of persons and property, and it is very generally held that those who violate such ordinances are liable for resulting injury to others. The standard of conduct of a reasonable man may be established by a statute or ordinance. The violation of such a legislative enactment may be negligence in itself if the plaintiff is one of a class of persons whom the statute was intended to protect and the harm which has occurred is of the type which it was intended to prevent."

Finnegan v. Royal Realty Co., 35 Cal.2d 409, 416, 218 P.2d 17.

[4, 5] If the ordinance imposed a duty on Lyon, the lessor, a breach of that duty is a violation of the ordinance and negligence per se. In such a case a lessor incurs independent liability for injuries suffered by persons lawfully on the premises, including invitees of a tenant, proximately caused by such negligence, in the absence of some established defense. The lessor in such case is held liable for his own illegal act or omission and not for the act or omission of the lessee. There is no immunity from the duty imposed on the lessor by the fact that he is not an occupant. Common law standards of duty, applicable to

buildings and structures moved into or within the city shall conform to the requirements of this Code.

"Additions, alterations, repairs and changes of use or occupancy in all buildings and structures shall comply with the provisions for new buildings and structures, except as otherwise provided in Sections 104, 306 and 502 of this Code.

"Sec. 104. (a) General. Buildings or structures to which additions, alterations or repairs are made shall comply with all the requirements for new buildings or structures, except as specifically provided in this section."

Section 103 is titled "Scope." Section 104 is titled "Application to Existing Buildings."

Section 402 defined "Building Existing" as "a building erected prior to the adoption of this Code, or one for which a legal building permit has been issued."

the ordinary relationship of a lessor on the one hand and a lessee and his invitees on the other, are not relevant to the determination of negligence in a case of injury to the lessee's invitee which has resulted from the lessor's breach of a statutory duty.[3]

[6] Plaintiff's contention is predicated on the assumption that the ramp and doorway into the cafe were constructed and maintained in violation of the Pasadena ordinance. There was no evidence as to when the ramp or the doorway was constructed. There was no evidence that the ordinance was in effect at the time the ramp or the doorway was constructed. Since plaintiff failed to prove that the ordinance was enacted prior to construction of the ramp or the doorway, it must be assumed that it was enacted subsequent thereto. The query therefore is: Does the ordinance apply to buildings existing at the time of its enactment?

[7–9] An ordinance is not to be given a retroactive effect unless such intention clearly appears. It is to be construed according to the intention of the legislative body enacting it; and in ascertaining that intention, the courts must presume a prospective and not a retroactive operation was intended, unless such presumption is negatived by express language. Tevis v. City & County of San Francisco, 43 Cal.2d 190, 272 P.2d 757; Biscay v. City of Burlingame, 127 Cal.App. 213, 220, 15 P.2d 784; London v. Robinson, 94 Cal.App. 774, 776–777, 271 P. 921. We are of the opinion that the Pasadena ordinance does not apply to a building in existence on the date of its enactment unless additions, alterations, or repairs are made to the building. The scope of the ordinance is expressly stated therein. Section 103 is titled "Scope." It reads:

> "New buildings and structures hereafter erected in the city, and buildings and structures moved into or within the city shall conform to the requirements of this Code.
>
> "Additions, alterations, repairs and changes of use or occupancy in all buildings and structures shall comply with the provisions for new buildings and structures, except as otherwise provided in Sections 104, 306 and 502 of this Code."

It is not claimed that the building in question came within any exception. Section 104 is titled "Application to Existing Buildings." It reads:

> "(a) General. Buildings or structures to which additions, alterations or repairs are made shall comply with all the requirements for new buildings or structures, except as specifically provided in this section."

Section 402 defines "Building Existing" as "a building erected prior to the adoption of this Code, or one for which a legal building permit has been issued." It seems manifest that the ordinance applies to new buildings and structures, and to additions, alterations, and repairs, and not otherwise, to pre-existing buildings. See Lee v. Dawson, 44 Cal.App.2d 362, 367, 112 P.2d 683. In Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17, relied on by plaintiff, the ordinance by its express terms was applicable to existing structures.

[10] Since plaintiff failed to prove that the ramp and the doorway were constructed in violation of the particular provisions of the ordinance on which he relies, the court did not err in sustaining defendants' objection to reception in evidence of the parts

3. See Roxas v. Gogna, 41 Cal.App.2d 234, 241, 106 P.2d 227; Harmon v. M. H. Sherman Co., 20 Cal.App.2d 580, 586–587, 85 P.2d 205; Goetz v. Duffy, 215 N.Y. 53, 109 N.E. 113, 114; Pollard v. Trivia Bldg. Corporation, 291 N.Y. 19, 50 N.E. 2d 287, 290; Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N.W. 952, 955; Burt v. Nichols, 264 Mo. 1, 173 S.W. 681, 684, L.R.A.1917E, 250; Moore v. Dresden Inv. Co., 162 Wash. 289, 298 P. 465, 467–473, 77 A.L.R. 1258; Landgraf v. Kuh, 188 Ill. 484, 59 N.E. 501, 503; Annis v. Britton, 232 Mich. 291, 205 N.W. 128, 129; Klein v. Young, 163 La. 59, 111 So. 495, 499; 4 R.C.L. 405, § 11; Annotation, 77 A.L.R. 1273. Cf. Bevan v. Century Realty Co., 64 Ohio App. 58, 27 N.E.2d 777; Singer v. Eastern Columbia, Inc., 72 Cal.App.2d 402, 410–412, 164 P.2d 531; Scholey v. Steele, 59 Cal.App.2d 402, 405, 138 P.2d 733.

of the Pasadena ordinance and the parts of the "Uniform Building Code" offered by plaintiff. As this is the only point urged by plaintiff, the judgment must be affirmed.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 716

Jerome DORSEY, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a Municipal Corporation; Everett G. Burkhalter, Earle D. Baker, Robert M. Wilkinson, Harold A. Henry, Rosalind Wiener, L. E. Timberlake, Don A. Allen, Gordon R. Hahn, Edward R. Robal, Charles Navarro, Harold Harby, Harriett Davenport, Ernest E. Debs, John C. Holland, and John S. Gibson, Jr., as members of and constituting The Council of the City of Los Angeles; Don O. Hoye, Controller of the City of Los Angeles; and Leon V. McCarèle, Treasurer of the City of Los Angeles, Defendants and Respondents,

and

Koebig and Koebig, a California Corporation, Intervenor and Respondent.

Civ. 20865.

District Court of Appeal, Second District, Division 1, California.

May 4, 1955.

Suit by taxpayer to enjoin city and certain city officers from paying any money to engineering firm under contract for certain services in connection with construction of storm drains. From adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., the taxpayer appealed. The District Court of Appeal, Drapeau, J., held that where engineering services necessary for construction of city storm drains were special in character and temporary in nature, such services came within exceptions to civil service in city charter and city had power to enter into contract with engineering firm for such services.

Judgment affirmed.

1. Judgment ⇐178

Summary judgment statute is drastic and should not be used as a substitute for existing methods of trial of issues of fact. West's Ann.Code Civ.Proc. § 437c.

2. Judgment ⇐185.2(5)

Validity of summary judgment is to be determined by sufficiency of affidavits upon which it is based. West's Ann.Code Civ.Proc. § 437c.

3. Judgment ⇐178

Summary judgment proceedings are not to be used to test the sufficiency of pleadings. West's Ann.Code Civ.Proc. § 437c.

4. Municipal Corporations ⇐226

Where engineering services necessary for construction of city storm drains were special in character and temporary in nature, such services came within exceptions to civil service in city charter and city had power to enter into contract with engineering firm for such services. West's Ann. Code Civ.Proc. § 437c.

5. Judgment ⇐181(11)

In passing on motion for summary judgment, every reasonable doubt must be resolved in favor of the pleading.

6. Municipal Corporations ⇐226

There is a field in which governmental agencies may employ independent contractors to perform services that cannot be satisfactorily performed under the provisions of civil service.

Loren A. Butts, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Assistant City Atty., George William Adams and Claude E. Hilker, Deputy City Attys., Los Angeles, for respondent.

Frank P. Doherty and Frank W. Doherty, Los Angeles, for intervenor.

DRAPEAU, Justice.

This is an appeal from a summary judgment under the provisions of Section 437c of the Code of Civil Procedure.

In 1952 it became apparent to the governing bodies of the county of Los Angeles, and of the city of Los Angeles, that there was immediate need for adequate storm drains to protect homes, schools, and highways from flood waters. During rain storms in that year accumulated surface waters caused great damage in the city and in the county. Drainage facilities were inadequate to conduct such waters rapidly to flood channels. Consequently the electorate of the area approved a bond issue of $179,000,000 to remedy the condition, and to be expended under the direction of the Los Angeles County Flood Control District.

In 1953 the flood control district and the City of Los Angeles entered into a contract whereby the city agreed to provide plans and specifications for fifty-three flood control projects within the city. The estimated cost of $75,975,100 was to be paid to the city by the flood control district. By the terms of the contract the chief engineer of the flood control district was to retain control of the preparation of the plans and specifications.

At the time the city undertook this work there were fifteen men in the city's engineering department who were considered qualified and available to design storm control projects. It was estimated that an additional 118 employees would be required to perform the additional engineering work, and that it would take approximately three months to train them. Upon completion of the work the city would have no further use for them.

These engineering services were a specialty within the field of civil engineering. An emergency existed. There was imminent danger of loss of life and damage to property, as well as serious inconvenience to the public. And it was urgently necessary to complete the flood control work with the utmost possible dispatch.

For these reasons the city entered into a contract with the engineering firm of Koebig & Koebig to prepare the plans and specifications for that one of the fifty-three projects upon which the others were dependent.

Plaintiff brought this action as a resident and taxpayer of the City of Los Angeles, to enjoin the city and certain of its officers from paying any money to Koebig & Koebig under the contract, and to declare the contract unlawful and void.

In his complaint plaintiff alleged: That the city had no legal right to enter into the contract for the reason that under its charter a complete scheme is set up to be followed in selecting and appointing persons to be employed in the service of the city. That neither the work nor the personnel involved in the contract comes within any exception from civil service in the charter. And that the work contemplated was of a type and kind that could be performed by employees of the city.

Koebig & Koebig were permitted to intervene in the action.

The city answered, and also demurred to the complaint.

The intervenor moved for judgment on the pleadings, and for summary judgment.

The motion for summary judgment was based upon averments in affidavits substantially as stated in this opinion. Plaintiff did not dispute the verity of these averments by counter affidavits.

The Superior Court dismissed an order to show cause for a preliminary injunction, overruled the city's demurrer, denied the motion for judgment on the pleadings, and rendered summary judgment as stated.

Plaintiff appeals from the judgment.

[1] Summary judgments under Section 437c of the Code of Civil Procedure are drastic, and should be used with caution. Nor should the section be used as a substitute for existing methods of trial of issues of fact. Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62.

[2, 3] The validity of a summary judgment under Section 437c of the Code of Civil Procedure is to be determined by the sufficiency of the affidavits upon which it is based. Proceedings under this code sec-

tion are not to be used to test the sufficiency of pleadings. Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244; Kimber v. Jones, 122 Cal.App.2d 914, 265 P.2d 922.

[4] Plaintiff contends that his complaint and the answer present triable issues of fact; that it was his right to have it determined after a trial in the Superior Court whether or not the Koebig contract was contrary to the city's charter and therefore unlawful; that when the city's demurrer to his complaint was overruled the Superior Court found in effect that his complaint stated a good cause of action; and that it was therefore error to grant the motion for summary judgment. Plaintiff relies upon the cases of Saunders v. Hibernia Savings & Loan Society, 23 Cal.2d 738, 146 P.2d 683, and Arnold v. Hibernia Savings & Loan Society, 23 Cal.2d 741, 146 P.2d 684.

However, the case of Coyne v. Krempels, supra, 36 Cal.2d 257, 223 P.2d 244, holds that the code section provides a method whereby the Superior Court may determine whether or not issues of fact presented for trial are real or are merely the product of adept pleading. Taking as true the uncontroverted affidavits presented in support of the motion in this case, this Court can find no error or abuse of discretion in granting it, and can find no issues of fact remaining for trial.

[5] After resolving every reasonable doubt in favor of the pleading as required by the rule in Arnold v. Hibernia Savings & Loan Society, supra, it appears from the affidavits that the engineering services here under consideration are special in character and temporary in nature, and come within legitimate exceptions to civil service in the charter of the City of Los Angeles.

[6] It is recognized that there is a field in which governmental agencies may employ independent contractors to perform services that cannot be satisfactorily performed under the provisions of civil service. State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503

It follows, therefore, that in the circumstances of this case the Koebig contract was within the powers of the city government, and was not unlawful.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

132 Cal.App.2d 698

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence Charles THOMPSON, Defendant and Appellant.

Cr. 5310.

District Court of Appeal, Second District, Division 1, California.

May 3, 1955.

Hearing Denied June 2, 1955.

Defendant was convicted of violating §§ 286 and 288a of the Penal Code. The trial court, Burdette J. Daniels, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that question whether prosecuting witness was an accomplice was a question of fact for the trial judge, as trier of the facts, to determine.

Judgment affirmed.

Criminal Law ⇐742(2)

In prosecution for violating sections 286 and 288a of the Penal Code, question whether prosecuting witness, who was a spastic, was 23 years old, was partially deaf, had been to school through fifth grade, was about four feet ten inches tall, and weighed about 85 pounds, was an accomplice was a question of fact for trial judge, as trier of facts, to determine. Pen.Code, §§ 286, 288a.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with the violation of Section 288a of the Penal Code in Count I and with the violation of Section 286 of the Penal Code in Count II. A jury was duly waived. The cause was submitted on the transcript of the preliminary examination. The defendant did not testify. The alleged victim testified. Defendant was adjudged guilty on both counts.

It is contended on appeal that, "I. The complaining witness was an accomplice and the appellant was convicted upon the uncorroborated testimony of an accomplice."; "II. The testimony of the complaining witness was inherently improbable."; "III. The court erred in admitting evidence which were conclusions on the part of the complaining witness."

As recited in respondent's brief,

"On October 9, 1953 Duane Jean Bolley lived at 14103 Gilmore Street in Van Nuys, with his grandmother. At the time of the acts herein alleged he was a spastic, twenty-three years old and partially deaf, who had been to school through the fifth grade. Duane is approximately four feet ten inches tall and weighs about eighty-five pounds. He had known the defendant and appellant Thompson for approximately one year and five months at the time of the trial. Thompson had been married for a little over a year to Duane's aunt, although at the time of the trial, he and his wife were separated." It is unnecessary to note the details; the incident was characteristic of such offenses. The law is well settled that whether the victim was an accomplice was a question of fact for the trial judge to determine. That the evidence supports the trial judge's decision in this regard there can be no question.

The record does not support appellant's contention that the testimony of the complaining witness was inherently improbable.

Appellant's third contention relates to testimony that the victim was in fear of defendant. The court's ruling in this regard was not error.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 700

Orrin Potter DANIELS, Petitioner,

v.

THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, State of California, Respondent.

Civ. 20999.

District Court of Appeal, Second District, Division 3, California.

May 3, 1955.

Proceeding on petition for writ of mandate requiring Superior Court to determine issue of paternity of minor child in divorce proceeding pending in such court in which petitioner had been named defendant. The District Court of Appeal, Shinn, P. J., held that defendant named in divorce action in Superior Court was not entitled to mandate of District Court of Appeal requiring Superior Court to determine issue of paternity in such divorce proceeding, where time had expired within which Superior Court could make additional finding upon that issue and where it did not appear that action of court in refusing to determine such issue had been taken inadvertently or through mistake.

Petition denied.

1. Trial ⇐391

It is duty of trial court to decide all issues of fact that have been duly tried and submitted for decision unless parties have waived their right to have same decided.

2. Mandamus ⇐48

Defendant named in divorce action in Superior Court was not entitled to mandate of District Court of Appeal requiring Superior Court to determine issue of paternity in such divorce proceeding, where time had expired within which Superior Court could make additional finding upon that issue and where it did not appear that action of court in refusing to determine such issue had been taken inadvertently or through mistake.

3. Mandamus ⇐26

Mandate may not issue to compel action which is not within court's jurisdiction.

Boyle, Bissell & Atwill, Pasadena, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

The petition in this court for writ of mandate represented that the petitioner was a defendant in an action brought by Joan Evelyn Daniels for a decree of divorce and to establish the paternity of a minor child, paternity of which was denied by petitioner; there was a pre-trial hearing in which the court ordered that the question of paternity was in issue and was to be tried; the issues, namely, the divorce issue and the issue of paternity had been fully tried; the cause was submitted for decision; the matter of findings was considered by means of proposed findings on behalf of plaintiff and proposed findings on behalf of defendant, one of which was that defendant was not the father of the child; that the court made an order settling the findings in accordance with the request of defendant; that thereafter the court received a letter from an attorney, who was not an attorney in the cause, objecting to the court's deciding the question of paternity and stating he had filed a separate action on behalf of the minor child against petitioner herein to establish her paternity; that the court thereafter made and filed its findings, conclusions of law and judgment awarding plaintiff a divorce but the court declined to make any finding or any adjudication of the issue of paternity. The petition sought mandate to require the court to determine that issue.

At the time the alternative writ was issued the trial court had jurisdiction to vacate its findings and make other or additional findings on motion for new trial or in case the omission to find upon and determine the issue of paternity was the result of clerical mistake or inadvertence.

Thereafter the matter was placed on the calendar of this court and was duly submitted. We have not been advised that the court has taken or proposes to take any further action in the matter.

[1–3] It was unquestionably the duty of the court to decide all issues of fact that had been duly tried and submitted for decision unless the parties had waived their right to have the same decided, which is not the case here. Our issuance of an alternative writ was a suggestion that the paternity issue should have been decided. The time has expired within which the trial court can make an additional finding upon that issue through proceedings for a new trial. Unless the action of the court was taken inadvertently or through mistake, which appears not to have been the case, the court no longer has the power to alter its findings or judgment. Such being the case, the court is under no duty to act. Mandate may not issue to compel action which is not within the court's jurisdiction.

The aternative writ is discharged and the petition for peremptory writ is denied.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 610

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James FRATIANO, Dominic John Raspona and James B. Modica, Defendants, James Fratiano, Appellant.

Cr. 5254.

District Court of Appeal, Second District, Division 2, California.

April 29, 1955.

Rehearing Denied May 12, 1955.

Hearing Denied May 25, 1955.

Prosecution for attempted extortion and conspiracy by defendants to compel conveyance of overriding oil royalty. From adverse judgment of the Superior Court, Los Angeles County, Ralph K. Pierson, J., one of the defendants appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Conspiracy ⇐47

Threats ⇐7

Evidence was sufficient to sustain conviction for attempted extortion and conspiracy. Pen.Code, §§ 182, 524.

2. Conspiracy ⇐40

If in their endeavors to achieve same end, defendants pursue common purpose by their several, respective acts, each contributing his part, jury is warranted in concluding that all were involved in conspiracy to effect a common object.

3. Conspiracy ⇐45

When one conspirator undertakes to do some act for purpose of effectuating his agreement with his confederates and thereby assents to criminal compact, either by words or deeds which imply his assent, evidence of such facts which form a part of transaction under investigation is admissible. West's Ann.Code Civ.Proc. § 1850.

4. Conspiracy ⇐45

Purpose of evidence in conspiracy cases is to establish a mental state, and jury is entitled to consider every fact which has bearing on ultimate fact in issue and evidence which tends to show, step by step, gradual formation of criminal concord in minds of those accused is not objectionable merely because evidence begins at a time long anterior to wrongful meeting of minds.

5. Criminal Law ⇐427(2)

Where facts from which criminal conspiracy is to be inferred are so intimately blended with other facts going to constitute crime that it is difficult to separate them, it is not essential to introduction of evidence of acts and declarations of one of conspirators that evidence should be first introduced to establish prima facie, in opinion of the court, facts of conspiracy. Pen.Code, § 182.

6. Criminal Law ⇐680(1)

Order in which evidence is admitted is a matter within sound discretion of trial court.

7. Criminal Law ⇐427(3)

While existence of conspiracy should ordinarily precede proof of acts, evidence of acts and declarations of an alleged conspiracy may be admitted before sufficient proof of the conspiracy has been received. West's Ann.Code Civ.Proc. § 1870.

8. Conspiracy ⇐24

Proof is not required to show that alleged conspirators met together and entered into an explicit agreement to commit crime or that conspiracy was expressed in words, since if conspirators in any manner tacitly came to mutual understanding to commit crime, it is sufficient to constitute conspiracy.

9. Criminal Law ⇐44

Whenever design of person to commit crime is clearly shown, slight acts in furtherance of that design will constitute an attempt, and courts should not destroy practical and common sense administration of law with subtleties as to what constitutes preparation and what constitutes an act toward commission of a crime.

10. Criminal Law ⇐44

It is sufficient proof of an attempt to commit a crime where it is shown that efforts of accused reached far enough

toward accomplishment of intended offense to amount to commencement of its consummation.

11. Criminal Law ⇐44

Where accused believes he can accomplish crime he intends to commit, his inability to do so does not erase existence of his attempt and his guilt is just as deeply dyed as if he had achieved his purpose.

12. Criminal Law ⇐409

Admissions of accused outside of court without corroboration are not sufficient to support a conviction, but such rule applies only to those statements which are relevant because they admit guilt, and not where statement is relevant by reason of its utterance, regardless of its veracity.

13. Criminal Law ⇐427(2)

In prosecution for attempted extortion and conspiracy, it was not essential to prove fact of conspiracy before admitting recorded telephonic conversations between defendants and intended victims showing existence of a conspiracy. Pen.Code, §§ 182, 524.

14. Criminal Law ⇐829(1)

Refusal of requested instructions covering matters substantially included in instructions given is not erroneous.

15. Criminal Law ⇐785(3)

Instruction that any witness is presumed to speak the truth but that jury should consider relation of witness to case in weighing his testimony was proper instruction.

16. Conspiracy ⇐48

In prosecution for conspiracy, requested instruction that jury should decide separately question of innocence of each of several defendants was misleading and properly denied. Pen.Code, §§ 182, 524.

17. Conspiracy ⇐41

Once a criminal conspiracy is established, acts of any conspirator committed pursuant to conspiracy and while it exists are binding upon all accused.

18. Criminal Law ⇐772(1)

In prosecution for attempted extortion and conspiracy, court's instruction concerning attempt to commit a crime and preparation antecedent to the offense was sufficient. Pen.Code, §§ 182, 524.

19. Criminal Law ⇐814(1)

In prosecution for attempted extortion and conspiracy by defendants, who sought to force victims to convey an overriding oil royalty, court's instruction that contract for sale of realty was not enforceable unless written and that if such agreement was made by an agent, the latter's authority to act must be in writing, was relevant to issues. Pen.Code, §§ 182, 524.

20. Indictment and Information ⇐179

Where several acts are alleged conjunctively in a single count and either constitutes the crime pleaded, proof of any one of such acts will support a verdict of guilty on such count even though no proof of their acts had been charged.

21. Threats ⇐7

In prosecution for attempted extortion, conviction would have been warranted on proof of threats against one of intended victims to acquire property from him or from other intended victim. Pen.Code, §§ 182, 524.

22. Criminal Law ⇐422(1)
Threats ⇐7

In prosecution for attempted extortion and conspiracy, recorded statements made by one of intended victims during telephone conversation with one of defendants concerning threats made by co-conspirators against intended victim's family were not so inflammatory as to render them inadmissible. Pen.Code, §§ 182, 524.

23. Criminal Law ⇐1144

Every intendment and presumption not inconsistent with record must be indulged in favor of the judgment.

24. Criminal Law ⇐438

In prosecution for attempted extortion and conspiracy, court did not err in admitting, subject to motion to strike, recorded telephonic conversation between one of conspirators and intended victim, when conspirator's voice was identified by two witnesses after record had been played. Pen.Code, §§ 182, 524.

Louis Thomas Hiller, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Jay L. Shavelson, Deputy Attys. Gen., for respondent.

MOORE, Presiding Justice.

From a judgment convicting him of conspiracy in violation of section 182 of the Penal Code and of attempted extortion in violation of section 524 of the same code, appellant now demands a reversal on the grounds of the insufficiency of the evidence to support the judgment, errors in rulings, errors in giving and refusing instructions, errors in the admission and exclusion of evidence.

The Evidence Sufficient.

[1] Prior to the events about to be recited, one George Terry had incorporated the Terry Drilling Company and was its president and principal stockholder. The corporation owned 35 per cent interest in 800 acres of Tapo Canyon in Ventura County and was one of the general partners in the copartnership of "Terry and Jansen" which held a lease from the Tapo Oil Company, a California corporation. The partnership acquired the lease from the last named corporation December 4, 1952 and soon thereafter began to drill. Oil was discovered February 16, 1953. The success of the undertaking was acclaimed in the press.

The witness Riddell was a friend of Terry and a stockholder in the drilling company. The defendant Raspona had been an acquaintance of Terry about four years. He operated a liquor store in Burbank. Terry visited the store and at one time in 1950 leased a drilling rig to Raspona, but had no other transactions with him. About February 20, 1953, pursuant to the merchant's request, Terry paid a visit to the liquor store when Raspona inquired of Terry whether the latter knew of any royalty for sale in the discovery well. Terry knew of a Mr. Lopspeich that had a two per cent overriding royalty that he might be interested in selling "and I told him I would see him and let him know." Raspona said he had some people with $5,000 that wanted to buy some royalty in a well.

After talking with Mr. Lopspeich, Terry discussed the matter with Raspona near his liquor store and told him that "this royalty deal had already been sold and that there was nothing available up there." Raspona repeated that some "mighty fine people were interested with him."

About July 9, 1953, Raspona and a party called "Ray" stopped near Terry's office and Ray said, "I want to talk to you, personally." He said nothing more, but Raspona asked Terry to "come to my place tomorrow." Prior to such meeting Terry had not seen or conversed with Raspona since their conversation about February 20. Although, prior to the trial, Terry had heard the name Fratianno, he had met neither Fratianno or Modica.

The royalty sought by Raspona and his codefendants was a "two per cent overriding royalty" in this Tapo 435 acres under lease to the partnership, worth $25,000.[1]

Appellant appeared greatly concerned about acquiring the royalty. After the foregoing events, he telephoned Terry that he was "Jimmy Fratianno" and wanted to see him. They did not meet.

Besides his friendship for Terry and his holdings in the Terry Drilling Company, Carl Riddell was an independent driller and knew Raspona and Modica. About April 27, 1953, Riddell, at their request, met Raspona and Modica at the latter's store. Raspona told Riddell he had a deal with Terry and that $5,000 had been put up by appellant's friends; that appellant had represented the people who had put up the money and Raspona stated that he felt appellant might think he (Raspona) had taken the money, and would not deliver any percentage or any deal he might have with

1. Terry explained that "a royalty is an interest in a leasehold estate." There are usually two kinds of royalty: overriding and participating. "An overriding royalty bears no part of any expense attached to the operations of the lease. It is a certain percentage of the gross income from production of oil and gas. A participating royalty is one that bears its proportionate share of the operating expenses connected with the production and sale of the oil."

Terry because it had suddenly become good. Raspona asked Riddell to tell appellant and Modica that he was not the kind of character that would take their money and not deliver. $5,000 was mentioned. Appellant stated that he was known as "the Weasel" and asked Riddell (1) for assurances as to Raspona and (2) to arrange a meeting with Terry.

In further numerous conversations with Raspona and appellant, the former insisted that Riddell had promised to arrange a meeting for him and Terry; that Terry had been evasive about meeting him and appellant and that he was worried for fear that "these people" meant business and might take Terry out and "shake him out of it." Raspona told Riddell that "These people would blow Terry's and my head off if I did not make contact with Terry and straighten the thing out; that they had a 'net work' all over the country and could fix things if anybody got into trouble and he said it would be lots of trouble if this contract wasn't made and this so-called deal completed." He told Riddell that he "had better arrange the meeting or they would blow his head off and, that if he resorted to the law, he would be killed."

Riddell had another conversation with Raspona about August 6, 1953. Riddell had received a call from appellant. He informed Raspona of the call from appellant who told Riddell he allowed no one to talk about him. Riddell drove down to the liquor store and told Raspona of his telephonic call from appellant and that he wished to come down and straighten the thing out. He met Raspona in the liquor store and they sat in "the car" while they visited. Riddell told Raspona that appellant had called him and said that he was going to blow Riddell's brains out; that he did not allow people to talk about him; that he had come to get Raspona to straighten appellant out.

When Riddell complained to Raspona of appellant's threats and appealed to Raspona to get him out of the situation, Raspona stated to Riddell that appellant was determined to go through with this deal; that no one could stop him and that "these people" had a net work and even the police were fixed, and that "the best thing to do would be to get Terry to go through with the deal."

On August 7, 1953, appellant with profane and obscene language threatened to Riddell to "blow Riddell's head off."

On August 8, 1953, the police installed sound recording equipment onto Riddell's telephone. Commencing on the evening of August 9, the several tape recordings of the conversations of defendants were made. The substance of such conversations is convincing proof that defendants had a common understanding and were attempting in unison to terrorize Mr. Riddell and his family into action and to force him to induce Terry to assign to them an overriding royalty on the Tapo lease.

The following is taken from such conversations:

"Raspona: I'm just going to have to straighten this thing out, Carl. I don't want nothing happening. Your wife called yesterday, worried sick. I don't know why. I know they're not going to touch kids, for Christ's sake * * *

"Riddell: Why talk about kids * * what am I supposed to do. This guy call—ed me up. He's splitting my head open. He's going to crucify me * * I either have to have him arrested or go kill him * * * I know, but when they start threatening my family Don, what am I going to do? * * * here is this Fratianno. What does he want from me? What's his deal?

"Raspona: When we had that talk out there in that God damned liquor store * * * you said: 'I'll make a date. I'll get hold of him and we'll set down and talk like people.' Remember —your exact words, Carl? * * * Now, he feels that the least you could do, was to make a date and then when Ray went down there with me * * *

"Riddell: Who's this Ray?

"Raspona: Oh, well, Christ, he's that big guy, Carl. You know that big heavy-set kid * * * So, its just a case of this, Carl. The man gave me money because I told him he was going to get in on a good thing * * * the

man stayed away and he didn't call. He comes back into town. He is ready to blow my head off because the deal is a success and I got his money in my pocket * * * Then he has to go out of town again and he comes back in, wondering why he's still not in. It's just like you * * * you want to put in five G's in that damned Tapo Canyon and I'm supposed to do it and you think you're in and then you're out, and you'd be God damned mad, too, and its just a simple thing.

"Riddell: I know nothing of this. Why should they keep threatening me? My wife is all upset. Helen is blowing a fuse * * * She's hollering now. She wants to talk to you.

"Mrs. Riddell: Don? * * * What's this all about?

"Raspona: * * * As far as Carl is concerned, honey, he's stepped on forty people's seat [sic] * * * If the man would only put himself out and get with this dirty son-of-a-b'ing George Terry * * * The deal is this, honey. I was supposed to put some money into this well before it even come in, with Terry on an override * * * It winds up that Terry double crosses me like he does other people, and he's double crossed other people, 'jillions' of times and * * * the wind-up is that this man figures his money is in the deal. He leaves town. His own business comes back and for Jesus Christ, his money is not in the deal. I called Terry. He don't call me back. He don't do nothing. He was going out to see that I got the override and everything else. So Carl comes out to meet these people and try to help me out and tell the people that the money has not been put up * * * that I don't have any override on it. They feel that I took the God damned money, bought the override, and that I'm getting the money and they're left out * * * I want to see what the hell happened and why my investment wasn't put in. They blamed it onto me, for Christ's sake * * * Hell, I made George Terry money. I gave him a couple of thousand for my little company, for Christ's sake. I gave him my Cadillac five or six hundred below wholesale. Carl, there's nobody going to get hurt * * *

"Riddell: Well, that isn't what you told me the other day, Don.

"Raspona: Do me a favor. Why don't you come down tomorrow morning * * * Get in my car, let's go down to that God damned office. Let's talk to that guy. I'll say 'Look, here is the man responsible! Leave Carl and his family alone.' Let's go down there and wait and this way I can say you went with me * * * Listen, Carl, do me this favor. If you want it over right now, it is at home, get with him and call me back. Get with him and come on down to my God damned liquor store right now and I'll end this whole God damned thing."

Raspona took the position that only Terry was at fault and promised to have appellant apologize to Riddell.

Subsequently, Raspona rebuked Terry for not seeing appellant. When Terry replied that he had dealt with Raspona only, the latter said, "Well, you are going to know them George, I'll guarantee you that * * * You are going to know them * * * you'll soon find out who they are * * * Its just people don't want 'no' for an answer * * * I'll tell you one thing, get your best hold, George.

"Terry: Give the man his money back, whoever he is. I don't know him, but I suppose they are going to be threatening me now.

"Raspona: Well not only that, but even worse than that will happen and they don't even give a God damn * * * That's the kind of people they are, but its not only one man, George, its an awful lot of men * * * Well, now, he's here to stay a while and so now they're going to bring trouble, that's all * * *"

"Terry: What kind of trouble?

"Raspona: Well you'll find out, Buddy. You've never had trouble until you deal with people like this, Carl knows * * *

"Terry: And there was nothing left for sale * * *

"Raspona: All right, then. There's nothing left for sale, George. Yes. Then, grab your best hold because you're in for a rough time. God damn it. I can't speak any plainer than that can I?"

At a later time Terry asked why they wished to meet him.

"Raspona: Well, they want to find out why the hell they didn't get the percentage, and you're going to meet with them one way or another. I guarantee you that, George. The S O B has followed you to Carl's house * * You think you are not in for trouble? I'm trying to help you, boy * * * but these Goddamned people don't know that. They don't care if Carl knows the man's name or anything else. They don't give a Goddamn. They'd defy Christ, that's the kind of people they are. I'm just trying to help you George * * * For Christ sake, a ten or fifteen minute drive and talk to the God damned man and maybe we can settle the God damned thing."

Following the foregoing, Riddell took the telephone. Raspona said he would tell the people that Terry would not meet them and told Riddell to tell "that stupid idiot" to grab his best hold. He then put Modica on the telephone and he told Riddell to get himself "squared around"; said appellant would not listen to him because of the attitude of Terry.

Appellant was evidently restless to be in the conversations. He called Riddell on the telephone and continued as follows:

"Fratianno: Understand? I want to be a man with you and a man with Terry. Now this has gone far enough * * * We put up our money. People are talking. Now I ain't going to stand for it. Now, I'm going to tell you another thing. As far as Terry is concerned I don't give a —— ——. People can go to the police all they want. The police is not going to watch him 24 hours a day, 365 days a year.

"Riddell: Yeah.

"Fratianno (with obscenities omitted): If the —— go to the coppers for me, he's going to die. I'll tell you right now, I'm plenty mad. I want to be a man and I want that other —— to be a man, because his —— money ain't going to do him no good when he's dead. Now you tell him. You put him on the phone with me, Carl. You tell Terry I want to talk to him. Will you put him on the phone?" Terry was then called to the telephone.

"Fratianno: Let me tell you something, Terry. Now we're not going to get —— on this thing. You know that, don't you?

"Terry: I didn't know I had any deal with you.

"Fratianno: Well, I had a deal with Don and you had a deal with Don. Is that right?

"Terry: I started the deal with Don and told him that the deal was off.

"Fratianno: You did tell him? Well, look, Terry. Its not off with me and I'm going to tell you one —— thing and I don't give a —— who knows it, coppers or no coppers. I'll blow your —— —— head off. I'm going to tell you right now, you ain't —— with no kids.

"Terry: Well, I never met you in my life.

"Fratianno: You ain't going to meet —— you don't have to meet me, Terry, because you ain't going to know me, and I'm going to tell you, you'd better straighten this —— thing our and straighten it fast. I'm going to give you one —— week to straighten it out and if you don't straighten it out in one —— week, you ——, you could have people following you the rest of your —— life, and I'll blow your —— —— head off. All your money ain't going to do you no —— good * * * You, Carl and Don straighten this —— thing out and straighten it fast."

When Riddell took the telephone receiver, appellant told him he had given Terry just seven days to straighten the thing out and told Riddell to help.

Raspona told Riddell that appellant had given him $5,000 to buy into the oil deal and he would not accept the money back now that the deal was a success. When Riddell told Raspona that the other shareholders of the Terry Drilling Company would interfere, Raspona said: "If there's any —— stockholder who interferes, there won't be no —— stockholder interfering. I'll guarantee you his heirs won't interfere and * * * if there's any S O B tries to hold up any —— deal and I know it and I pass it on, there ain't no S O B going to hold up no deal * * * Anyone who tries to interfere will be called by 'the people' and the corporation commissioner can be fixed."

The jury were justified in believing that the threats made by Raspona and appellant and especially the threat to blow Terry's head off induced both men to fear for their safety. Also, Terry was in fear from his conversations with both such defendants. The men were driven by a consuming ambition to acquire an interest for $5,000 that would pay them $8,800 in six months' time.

From the foregoing recitals, the hope of reward, the savage zeal of defendants, their stealth, their secret meetings, their common theme and their unanimity in striving to force Terry into a compliance with their demands, the conclusion is unescapable that they had formed a criminal conspiracy. Not only was Raspona a close personal friend of Modica, but had assisted him in establishing a liquor store. Also, Modica had known appellant for nearly 30 years and appellant had known Raspona for over twenty years before the oil discovery in Tapo Canyon. They were interested in common in acquiring an advantageous investment in the lease to the partnership. According to his own testimony, Raspona had Terry's promise to sell him a two per cent overriding royalty for $5,000 and a Cadillac automobile. He communicated news of such fact to Modica who paid $2,500 to appellant who in turn delivered the $5,000 to Raspona. The three men evidently agreed that one half of the royalty should go to Raspona and the remaining one per cent should be divided equally between Modica and appellant. But no substantial basis existed for the speedy consummation of a sale by Terry. He had given no definite promise to Raspona, and the latter had paid nothing towards such a purchase. But having united their moneys in one pool and having cheerily agreed among themselves upon the investment, they resolved not to be dissuaded by Terry's reticence. They invoked all available forces to drive through an imaginary deal.

In April 1953, they urgently invited Carl Riddell, an associate of Terry, to meet with them at Modica's store where the trio poured into Riddell's ear the fantastic tale that Terry had agreed to sell the two per cent royalty on the 455-acre lease and requested Riddell to effect a meeting of themselves with Terry. It was Riddell's first meeting with appellant who had come to the store with one "Ray." After Raspona had explained that he "had some sort of a deal with Terry and that Fratianno had represented the people who had put up the money," Raspona asked Riddell to tell appellant that he was not the kind of character that would take their money and keep the royalty for himself. Thereupon, appellant invited Riddell to a private audience at which he asked Riddell to arrange a meeting with Terry and Raspona. The only promise of Riddell was that he "would endeavor to convey the message to Mr. Terry" when he saw him. He told appellant the latter could call Terry on the telephone.

At a subsequent conversation, Raspona rebuked Riddell for his failure to arrange the meeting with Terry and imparted to Riddell the threats of appellant and Modica that they would blow off the heads of Riddell and Terry unless they straightened out the matter of conveying the royalty interest. Also, he emphasized the power of his confederates by his references to their "net work" throughout America and to their ability to make trouble. By such admonitions to Riddell, a definite attempt was made to drive fear into the hearts of Terry and Riddell by causing them to believe in the power and ruthlessness of Modica and Fratianno.

Some weeks after the last mentioned conference, appellant telephoned Riddell that he would blow Riddell's head off; that

he (Riddell) had not arranged the meeting with Terry and had been talking about him and that he would blow Riddell's "—— —— head off his shoulders." At the same time, Modica injected his advice to Riddell and Terry to worry about themselves.

[2–4] After the conspirators had cursed their volleys of verbal flame into the consciousnesses of Terry and Riddell, Raspona attempted to induce the oil operators to accede to the demands of his codefendants. Such action, combined with the common behavior and the use of vile epithets, their evident concurrence in a program of intimidation, their use of identical methods of approach and their unanimous demand for the same thing—these exclude all reasonable doubt of the conspiracy of the three men. See People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. "'* * * it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts * * * nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy.'" People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17, 19; 11 Cal. Jur.2d 252. If in their endeavors to achieve the same end, the defendants pursued a common purpose by their several, respective acts, each contributing his part, the jury is warranted in concluding that all were involved in a conspiracy to effect a common object. People v. Curtis, 106 Cal.App.2d 321, 327, 235 P.2d 51; People v. Bentley, 75 Cal. 407, 409, 17 P. 436. When one conspirator undertakes to do some act for the purpose of effectuating his agreement with his confederates and thereby assents to the criminal compact, either by words or deeds which imply his assent, evidence of such facts which form a part of the transaction under investigation is admissible. Code Civ.Proc. § 1850; People v. Collier, 111 Cal.App. 215, 240, 295 P. 898. Paraphrasing the language of Justice Works, the brilliant jurist who once presided over this court: the purpose of the evidence in conspiracy cases is to establish a mental state—an illicit concord of minds of several persons. The jury is entitled to consider every fact which has a bearing on the ultimate fact in issue. There is no valid objection to evidence which tends to show, step by step, the gradual formation of a criminal concord in the minds of those accused, merely because the evidence begins at a time long anterior to the wrongful meeting of minds. "It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy. * * * 'From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are almost always proven by circumstantial and "piecemeal" evidence * * *.'" People v. Stevens, 78 Cal.App. 395, 407, 248 P. 696, 700. See Allen v. United States, 7 Cir., 4 F.2d 688.

[5–8] "Where * * * the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish *prima facie,* in the opinion of the court, the fact of conspiracy." People v. Ferlin, 203 Cal. 587, 599, 265 P. 230, 236. The order of receiving the evidence is to be controlled in the sound discretion of the court. People v. Sica, 112 Cal.App.2d 574, 584, 247 P.2d 72. It is not unreasonable for a court to find the existence of a conspiracy from the acts of the accused confederates in trying to effect an unlawful purpose. People v. Torres, 84 Cal.App.2d 787, 794, 192 P.2d 45. While the existence of the conspiracy should under the statute, Code Civ.Proc. § 1870, ordinarily precede proof of the acts, that rule is not unyielding. Merely for the sake of convenience, evidence of the acts and declarations of an alleged conspirator is admitted before sufficient proof of the conspiracy has been received. People v. Sica, 112 Cal.App.2d 574, 584, 247 P.2d 72. Also, proof is not required to show that the alleged conspirators met together and entered into an ex-

plicit agreement to commit the crime or that the conspiracy was expressed in words. "If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy." People v. Yeager, 194 Cal. 452, 484, 229 P. 40, 53.

Sufficient Proof of Attempted Extortion.

[9, 10] Appellant churns throughout the pages of his brief that the evidence proves not an attempt to commit an extortion, but a mere preparation for the commission of that crime. We find in the record much more than "mere preparation." Not only did the defendants entertain a specific intent to commit the crime of extortion, but they performed direct acts to effectuate such intent. People v. Fiegelman, 33 Cal.App.2d 100, 104, 91 P.2d 156. Thereafter, they were frustrated by an external force. "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime." Ibid., 33 Cal.App. 2d 105, 91 P.2d 158. Not only did defendants make threats to force the arrangement of a meeting but the demands made upon Terry through Riddell, the direct threats to Terry by the telephonic calls on both men constitute acts unequivocally directed to the achievement of their single aim, namely to acquire for $5,000 a property worth many times that sum. Raspona told Terry, "It's just people don't want 'no' for an answer." When Terry inquired why others wished to see him, Raspona replied: "They want to find out why the hell they didn't get the percentage, and you're going to meet with them one way or another. I guarantee you that, George. The —— has followed you to Carl's house." After Riddell had complied with Raspona's request and put him in contact with Terry, the latter was serenaded almost daily by Raspona's repetitious hum of appellant's ruthless character. Modica told Riddell to get himself "squared around" and to "worry about yourself" and to "tell that other idiot —— to just worry about himself, too." As the conferences of the conspirators grew in number and ferocity, appellant's boldness waxed in bitterness until he at last announced to Terry he might have one week "to straighten the matter out; the deal was not off with him." Shortly thereafter, Raspona advised Riddell to tell Terry "to dig up what the —— he can"; that as to himself, he was willing to forget the royalty but that those who had put up the money insisted on acquiring their two per cent interest. He wanted his "—— two per cent in that —— joint or there's not no —— going to enjoy one —— minute of it." In the course of Riddell's conversations with Raspona, he once said that Terry could not convey an interest without the consent of other shareholders. To that Raspona with mounting vulgarity and woeful promise, replied: "If there's any —— stockholder who interferes there won't be no —— stockholder interfering. I'll guarantee you his heirs won't interfere, not no —— stock. If there's any —— tries to hold up any —— deal and I know it and I pass it on, there ain't no —— going to hold up no deal." When asked what Terry could do to escape a clash with defendants, Raspona told Riddell: "Give him the two per cent * * * You can't give him nothing but two per cent. Believe me, that —— [referring to appellant] when he makes up his —— mind, the Pope couldn't stop him * * * I'll bet a thousand Fratianno could clear the transaction with the Corporation Commissioner. I'm sitting here tonight and the guy calls me and tells me that this is the eighth well they have brought in."

Such declarations by men of the character disclosed by this record were not the indices of child's play. The jury were warranted in finding that they were the overt acts of malicious men bent upon a sordid crime, resolved to achieve their purpose, to take what did not belong to them. Terry was in fear and might have been victimized but for the timely interference of the police. The dramatic performance of appellant as above described

clearly constitutes an attempt to perpetrate the crime of extortion. People v. Fiegelman, supra. It is sufficient proof of an attempt to commit a crime where it is shown that the efforts of the accused "'reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation.'" People v. George, 74 Cal.App. 440, 449, 241 P. 97, 101.

The Attempt Was Actionable.

[11] Appellant's argument that the acquisition of the two per cent overriding royalty in the 435-acre lease was impossible is as vain as his attempt to evade the wily arts of the police. Either more skill in the minds of the defendants, or less stamina in the hearts of the proposed victims and their scheme would have triumphed. The Terry Drilling Company had leased only 435 acres of its 800 in Tapo Canyon to Mr. Terry and his partner James Jansen. While that partnership was known as Terry and Jansen, the Terry Drilling Company and Jansen were the general partners and they had five limited partners. Had Terry been subjected to sufficient force, he could have caused the two per cent to be assigned by exercising his power as a partner in Terry and Jansen and by virtue of his control of Terry Drilling Company, assisted by Riddell, a holder of a large block of the stock in that corporation. After discovery of oil in Tapo Canyon, the assignment of a two per cent interest might readily have been effected by the payment of comparatively small sums to the other partners in Terry and Jansen. But even though Terry had found it impossible to convey the two per cent override, that would not have been the impossibility which precludes actionable attempt. The defense of impossibility means a legal impossibility. Where the accused person believes he can accomplish the crime he intends to commit, his inability to do so does not erase the existence of his attempt and his guilt is just as deeply dyed as if he had achieved his purpose. People v. Lee Kong, 95 Cal. 666, 668, 30 P. 800, 17 L.R.A. 626. "* * * slight acts done in furtherance of that design will constitute an attempt * * *." People v. Fiegelman, supra, 33 Cal.App.2d 105, 91 P.2d 158.

The Telephonic Conversations.

[12] Admission of the telephonic conversations is assigned as prejudicial error. Appellant contends that extrajudicial statements are not admissible against coconspirators until the fact of the conspiracy shall first have been established by independent evidence. The recorded telephonic conversations were admitted, not to show their substance, the truth or falsity of them, but to prove that the statements were made; that a common purpose inheres in all of them and that each conspirator had knowledge of the interest, activities and statements of all the others. The rule requiring proof of the *corpus delicti* before receiving extrajudicial confessions is an importation into American jurisprudence. Its meaning is that admissions of the accused outside of court without corroboration are not sufficient to support a conviction. But the courts of this state have applied it to the statements of the accused, admitting the truth of a matter other than the actual fact charged and not in itself constituting an essential element of the crime. (19 Cal. Jur.2d, sec. 493.) The California rule applies only to those statements which are relevant because they admit guilt. It does not apply where the extrajudicial statement is relevant by reason of its utterance, regardless of its veracity. How else could such crimes as extortion be proved without proof of the utterances of the accused? It is difficult to conceive of proof of such a crime without some evidence of the talk of the accused prior to his trial.

[13] In the matter at bar, a conspiracy was shown to exist by the several statements made to Riddell and to Terry by each of the defendants, and by their conduct; no hearsay is involved. Inasmuch as the contents of the recorded conversations are relevant to the issues involved and they are not hearsay, it was not essential to prove the fact of conspiracy before admitting evidence of the extrajudicial statements.

Appellant cites numerous authorities in support of his thesis that the records were inadmissible in the absence of independent

evidence of the conspiracy. People v. Steccone, 36 Cal.2d 234, 223 P.2d 17; People v. Busby, 40 Cal.App.2d 193, 104 P.2d 531; People v. Besold, 154 Cal. 363, 97 P. 871. But not one of them involves extortion or a crime done with words only. In each, the extrajudicial statement was purely hearsay and was offered to prove the truth of the matter itself.

Giving and Refusing Instructions—Not Error.

[14, 15] Appellant assigns as error the court's rejection of his proposed instructions 15, 17, 19, and 21. They deal primarily with the common presumptions of veracity and innocence. All they contain were substantially included in the instructions given. (Court's instructions 8, 9, 21, 22.) Proposed 17 is not legally accurate. It would have told the jury that in considering a defendant's testimony to disregard the fact that a defendant is interested in the outcome. The court's instruction 9 told the jury that any witness is presumed to speak the truth but to consider the witness' relation to the case in weighing his testimony. This was a correct instruction. People v. Jailles, 146 Cal. 301, 307, 79 P. 965; see Caljic 52, alternate. Proposed instructions 19 and 21 dealing with the presumption of innocence are abundantly covered by the court's instructions 8, 21 and 22.

[16, 17] By a proposed instruction the court would have told the jury to "decide separately the question of the innocence or guilt of each of the several defendants" etc. Such would have been misleading in a prosecution for conspiracy where the acts of any defendant during and pursuant to the conspiracy are binding on all. The court had already instructed that "as to each defendant you must determine whether he was a conspirator." Therefore, the proposed instruction would have been confusing and not in point. The law is that once a criminal conspiracy is established, the acts of any conspirator committed pursuant to the conspiracy and while it exists are binding upon all the accused. One of the court's instructions directed the jury fully to consider the guilt or innocence of each defendant.

Appellant says he proposed his 24, 27, 28, 29, 36 and 37 on the law of conspiracy and that the court's refusal to give them was prejudicial error. The record reveals that the court instructed sufficiently upon all the essential elements of conspiracy, including the requirement of proving an overt act more than the mere association of the defendants and the necessity of showing the existence of the conspiracy by independent evidence. In addition, the court instructed fully on the law of attempted extortion, and detailed the elements of the crime, defined it and declared a specific intent must be proved. For illustration, the instruction on page 100 of the clerk's transcript defines the extortioner as "every person who attempts to extort money or other property from another by means of a threat to do an unlawful injury to the person or property of the individual threatened, or of a third person * * *" Also, the "difference between 'actual extortion' and 'attempt to extort' obviously lies in the results obtained; and if one uses a threat such as I have specified with the specific intent and for the purpose that I have specified, he is guilty of attempt to extort, although he fails to induce any fear in the mind of the other or third person or fails to obtain any money or property as a result of the attempt."

Appellant complains at the court's refusal to read his proposed 103 and 104 for the reason that they dwelt upon the court's having admitted the conversations of Terry and Riddell concerning threats made to them without any proof of such threats. The answer to that complaint is that the jury knew that the recording apparatus had been attached to Riddell's telephone with his consent and both Terry and Riddell knew their conversations were being recorded. In such situation the jury had a view of such facts as would enable them to determine whether the two oil operators were induced by fear or were pretending.

[18] Appellant says his instruction 110 applied to evidence concerning threats purportedly communicated to Riddell and Ter-

ry as the alleged agent of defendants and should therefore have been read to the jury. But if Raspona made statements to Riddell for the purpose of having them reach Terry and terrorize the latter into selling his royalties far beneath their value, it was not necessary to show that Riddell was acting as Raspona's agent or at his specific request. Appellant contends that his proposed instruction 66 regarding the difference between preparation and attempt to commit extortion is a correct statement of the law, taken from People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913, and that its rejection was highly prejudicial. He argues that the court's instruction on the subject fails to define what preparation consists of and how much further an act must go beyond the preparation stage in order to become an attempt. While his 66 contained the terms necessary to deal with the issues involved, it contained other matter not essential to the appropriate instruction such as given by the court. It has too much about preparation, arranging the means necessary for the commission of extortion. There was no evidence that defendants merely suggested methods or means of committing the crime of extortion. On the contrary, the proof was of overt acts toward its commission. The court's instruction 41 [2] was sufficient and had been expressly approved in People v. Fiegelman, 33 Cal.App.2d 100, 106, 91 P.2d 156. In that case, as in this, the court was urged to follow People v. Miller, supra.

[19–21] Appellant claims that he suffered prejudicial error by the court's instruction 19 which directed the jury that an agreement (1) involving personal property worth $500 or upwards is nonenforceable, unless there is some note or memorandum in writing of the contract signed by the party or (2) a contract for the sale of an interest in real property is nonenforceable unless there is some note subscribed by the party to be charged. He says that instruction was irrelevant; that whether the alleged agreement of Raspona and Terry was enforceable or not, the defendants could have believed it was. He says that by 19, the court interpreted the agreement of Raspona and Terry as illegal and thereby misled the jury. What the court said was that a contract for the sale of realty was not enforceable unless written and that if such agreement is made by an agent, the latter's authority to act must be in writing. Such instruction was relevant to the issues. Even though the jury might believe that Terry had promised to assign the two per cent override to Raspona, still there was no legal obligation on Terry. The very fact that the promise was not enforceable was pertinent to the good faith of defendants in their savage pursuit of Terry and Riddell to acquire the royalty though they had no right thereto. Also, it depreciated the good faith of defendants in urging that they had a contract. It reflected upon Raspona and impeached his credibility to have it shown that he had told his colleagues that he had a binding agreement with Terry. Inasmuch as there was no valid contract for the transfer of the royalty, the flimsy excuse of defendants that their acts were justifiable resentment at Terry's repudiation of his agreement pales into an insignificant flicker. The court's instruction was pertinent and sufficient; defendants' 19 would have been misleading. Appellant asserts that the court's instruction 23 was a fatal variance from count 2 of the amended information. He says separate offenses were charged by this instruction; that it charged attempted extortion in that defendants by wrongful

2. "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

"There is a difference between the preparation antecedent to the offense and the actual attempt to commit it. The attempt is a direct movement toward the commission after preparations are made and must be manifested by acts which would have ended in the crime if not interrupted. Whenever the design of a person or persons to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.

"It is immaterial whether or not the crime attempted was impossible of completion if you find that it was apparently possible of completion to the person or persons so acting with the necessary intent."

use of fear or force attempted to obtain property from Riddell or Terry that unless Riddell or Terry deliver to the defendants said property, defendants would do unlawful injury to the person of Riddell or Terry. This, appellant says, was a fatal variance from count 2 which, he declares, *charged defendants* with feloniously, and by the wrongful use of force or fear, attempting to obtain property from Riddell and Terry by feloniously threatening Riddell and Terry that they, Riddell and Terry, would suffer unlawful injury unless Riddell and Terry delivered the property to defendants. Such argument aims at a distinction without a difference. The court's instruction 23 could not have misled and it is not erroneous. While the crime was alleged to have been attempted against Riddell and Terry, the People were proposing to prove threats by defendants against Riddell and Terry and attempts to acquire property from either of them by threatening either Riddell or Terry. While the allegation was of threats against both Riddell and Terry, the crime would be complete if threats had been made against either Riddell or Terry in an attempt to acquire property from either of them. It is the law that where several acts are alleged conjunctively in a single count and either constitutes the crime pleaded, the proof of any one of such acts will support a verdict of guilty on such count even though no proof of their acts had been charged. People v. Wolfrom, 15 Cal.App. 732, 735, 115 P. 1088. Although the pleading alleges attempted extortion of Riddell and Terry by defendants, a conviction would have been warranted on proof of threats against Riddell to acquire property from Riddell *or* Terry; on proof of threats against Terry to acquire either his property or that of Riddell.

Appellant contends that the possibility of proving threats against Terry in order to obtain property was not justified by the evidence and therefore the instruction was misleading and fatally erroneous. Such contention is based upon a presumption that the jury would have chosen the one alternative least supported by the evidence. Such presumption violates the constitution to the effect that prejudicial error will not be presumed.

No Prejudicial Error in Admitting Statements.

[22] Appellant assigns as prejudicial error the court's admission of statements of Mr. Riddell concerning threats against his family. His testimony and the tape recordings disclose that among the numerous, unpleasant things poured into the ears of Mr. Riddell in the course of one telephonic conversation, Raspona said things could be straightened out. "Mr. Riddell: But why * * * talk about the kids. This guy called me up. He's splitting my head open." In a subsequent conversation, in protesting to Raspona the threats made by some one, Mr. Riddell said: "Everybody is hollering at me about this thing—splitting my head open and hanging me and burning my kids and my wife and house. * * * Then when I talked to you, I said * * * something about the law, and you said: 'One thing, if you go to the law, then your family will suffer. Yours kids will suffer.' Now you said that to me Don." "Mr. Raspona: Carl, no one would ever touch your family. * * *" "Mr. Riddell: The people shouldn't say those things * * * Maybe he wouldn't split my head open, but he says it anyway." At a later time while the two men were discussing the matter of Mr. Terry's meeting "with the people," Mr. Riddell replied: "With all that I came out to do you a favor and somebody is going to blow my brains out and split my skull and burn my house down."

[23] Appellant complains that such statements are inflammatory; that they painted appellant as a heinous person. Of course, it would have been less unpleasant had some of the statements of the conspirators been suppressed. That is a common grievance. But if a crime is to be adjudicated, how can the culprits be measured, the extent of their guilt be determined without knowing their thoughts as well as their deeds. An extortion is usually effected by the use of language. If the extortionist operates by way of his pet phrases, why should they be excluded be-

cause they came into the record by the complaining witness' part of their conversation? It is true that the vulgar phrases and the intimations of injury to the families of the prosecuting witness uttered by the defendants were hurtful to them as well as the outright demands for the assignment, but that is not a good reason for excluding what was actually said by defendants to effectuate their purpose. While the asserted threats are not strictly factual proof of extortion, yet so long as such statements furnish some probative value to the issue they should not for that reason only be excluded. The argument that Riddell repeated on the telephone what had already been said by the conspirator is an assumption of bad faith on the part of the witness. In the first place, it was for the jury to determine whether the witness was dishonest in his testimony and in the second place, this court cannot presume that something was done which constitutes error. On the contrary, every intendment and presumption not inconsistent with the record must be indulged in favor of the judgment. Walling v. Kimball, 17 Cal.2d 364, 373, 110 P.2d 58. Since we must assume the witness did receive the several calls that threatened violence and since appellant was part of a "net work" of kindred operators, as testified by Raspona, and since such threats are similar to the threats of appellant on divers other occasions, the inference that he made them to Riddell does no violence to the cause of justice.

Admitting Terry's Testimony as to His Conversation with Appellant on July 9, 1953, Not Erroneous.

[24] Appellant's contention that such testimony was admitted without foundation is unwise. The court heard it subject to a motion to strike. After the record was played, appellant's voice was identified by two witnesses.

The judgment of conviction of conspiracy to violate section 182 of the Penal Code, and of attempted extortion in violation of section 524, Penal Code, is affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

COLGATE-PALMOLIVE-PEET COMPANY, Plaintiff and Respondent,

v.

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, etc., et al., Defendants and Appellants.

Charles DUARTE et al., Cross-Complainants and Appellants,

v.

COLGATE-PALMOLIVE-PEET COMPANY, etc., et al., Cross-Defendants and Respondents.

Civ. 16240.

District Court of Appeal, First District, Division 1, California.

April 26, 1955.

Rehearing Denied May 26, 1955.

Hearing Granted June 23, 1955. *

Action by employer against union and certain of its officers. One defendant as representative of all members of union and union filed cross-complaint against employer and two of its officers. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., sustained demurrer to affirmative defenses of union, and demurrer to cross-complaint. Union and cross-complainant appealed. The District Court of Appeal, Peters, P. J., dismissed appeal from order sustaining demurrers to affirmative defenses, and held that allegations in cross-complaint that contract between union and employer provided that parties would consider modifications proposed by either party from time to time, that company and some of its officers conspired to refuse to bargain in good faith on modifications proposed by union, and that employees, in self-protection, were required to strike with resulting loss of wages and loss of dues and strike benefits to union, stated a cause of action for breach of contract and for tort as to employees and as to union.

Order reversed.

1. Appeal and Error ⇐102

Portion of order of trial court sustaining, without leave to amend, demurrer to cross-complaint was appealable where

* Dismissed by Stipulation Jan. 3, 1956.

cross-complaint had joined several third parties who were not parties to original action.

2. Labor Relations ⇐777

Cross-complaint alleging that employer and union had agreed to consider contract modifications which might be proposed by either party from time to time, that company and some of its officers conspired to refuse to bargain in good faith on proposals made by union, and that employees, in self-protection, were required to strike with resulting loss of wages to employees and dues and strike benefits to union, sufficiently alleged cause of action for breach of contract as to union and its members. Labor Code, §§ 923, 1126.

3. Labor Relations ⇐263

Where contract between union and employer provided that parties would consider modifications to contract which might be proposed from time to time by either party, neither company nor union was committed by agreement to accept any proposals made by the other, but each was bound to discuss and to consider in good faith any requested change. Labor Code, §§ 923, 1126.

4. Labor Relations ⇐778

Under statute providing that any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or equity, and breach of such agreement by any party shall be subject to same remedies, including injunctive relief, as are available on other contracts in courts of state, breach of collective bargaining agreement is no different from breach of any other contract, and permits the recovery of damages in an amount which will compensate the party aggrieved for all of the detriment proximately caused thereby. Labor Code, § 1126; West's Ann.Civ.Code, § 3300.

5. Labor Relations ⇐764

Cross-complaint alleging existence of contract between union and employer obligating parties to consider modifications to contract proposed by either party, and that company and some of its officers conspired to refuse to bargain in good faith on proposals made by union, and that employees, in self-protection, were required to strike with resulting loss of wages to employees and dues and strike benefits to union, sufficiently set forth a cause of action in tort as to union and its members.

6. Torts ⇐12

The intentional unlawful interference with contract rights is an actionable tort.

7. Appeal and Error ⇐917(1)

On appeal from order sustaining demurrer to cross-complaint against employer and its officers, for breach of contract between union and employer and conspiracy to breach contract, District Court of Appeal assumed, in accordance with facts of which it could take judicial knowledge, that employer was engaged in interstate commerce.

8. Labor Relations ⇐510

In so far as cross-complaint on behalf of union and employees against employer and some of its officers, stated common-law tort cause of action for conspiracy to induce a breach of contract, National Labor Relations Act had not pre-empted jurisdiction in federal courts, and state court had jurisdiction over that cause of action. Labor Management Relations Act of 1947, § 301, 29 U.S.C.A. § 185.

9. Courts ⇐489(1)

If a state court offers a remedy not in conflict with remedies provided for in National Labor Relations Act, or one not available under the federal Act, state jurisdiction exists, but where the federal Act provides a remedy that is adequate, even though state law provides a comparable remedy, federal courts have exclusive jurisdiction. National Labor Relations Act, § 8(a) (5), 10(a) as amended 29 U.S.C.A. §§ 158(a) (5), 160(a); Labor Management Relations Act of 1947, § 301, 29 U.S.C.A. § 185; Labor Code, §§ 923, 1126.

10. Courts ⇐489(1)

Since National Labor Relations Act provides remedies for breach of collective bargaining contract, jurisdiction of federal court is exclusive, and state court had no jurisdiction of contract cause of action for breach of collective bargaining agreement. National Labor Relations Act, § 8(a) (5),

10(a) as amended 29 U.S.C.A. §§ 158(a)(5), 160(a); Labor Management Relations Act of 1947, § 301, 29 U.S.C.A. § 185; Labor Code, §§ 923, 1126.

Gladstein, Anderson, Leonard & Sibbett, Norman Leonard, Rubin Tepper, San Francisco, for appellants.

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, Irving Rovens, San Francisco, for respondents.

PETERS, Presiding Justice.

[1] In this action the defendants in their answer pleaded six affirmative defenses, and one of them, on his behalf and on behalf of the union and its members, filed a cross-complaint joining some new parties. The trial court sustained demurrers without leave to amend to the six affirmative defenses, and also sustained without leave to amend a general demurrer to the cross-complaint. Defendants and cross-complainants appealed from the entire minute order. On motion of plaintiff this court dismissed the appeal from that portion of the order sustaining the demurrers to the six affirmative defenses, on the ground that such order was nonappealable. Thus, the only portion of the order to be considered on this appeal is that part of the order sustaining, without leave to amend, the demurrer to the cross-complaint.[1]

This action was commenced by the Colgate-Palmolive-Peet Company against Warehouse Union, Local 6, the International Longshoremen's and Warehousemen's Union, and certain of the officers and agents of the union to recover damages alleged to have been sustained by the plaintiff employer by reason of claimed coercion of the company's union employees by defendants so as to slow down their output and in other ways to vex, annoy and damage plaintiff.

The defendants answered, denying the major allegations of the complaint, and setting forth six affirmative defenses. In addition, one of the defendants, Duarte by name, claiming to act in a representative capacity on behalf of all members of the union, filed a cross-complaint against the plaintiff and against two of its officers. This was the first time that these officers were brought into the action as parties. The cross-defendants generally demurred to the cross-complaint. This demurrer was sustained without leave to amend, and cross-complainant appeals. It is our duty to determine whether the cross-complaint states a cause of action good against a general demurrer.

The cross-complaint contains two causes of action. In the first cause of action, after alleging the representative character of the proceeding, it is averred that the union is the sole collective bargaining representative of the employees; that since July 9, 1941, the union and the company have been parties to a collective bargaining agreement, which apparently has no terminal date. Section 18 of that contract is set forth in *haec verba,* and reads as follows:

> "*Section 18. Future Changes:* The above constitutes an agreement between the company and its employees, represented by the International Longshoremen's and Warehousemen's Union, Local 6, and shall remain in effect unless and until changes become necessary because of conditions beyond the control of the company, or are requested by the employees through their representatives.
>
> "Thirty (30) days notice will be required before the adoption of any change suggested either by the employees or the company, and no change of any sort will be made without col-

1. This portion of the order is appealable because the cross-complaint joined several third parties who were not parties to the original action. In such event the dismissal as to them is final, making the order appealable. Herrscher v. Herrscher, 41 Cal.2d 300, 259 P.2d 901; Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363; Halterman v. Pacific Gas & Electric Co., 22 Cal. App.2d 592, 71 P.2d 855; County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501.

lective agreement to it having been arrived at between the company and the representatives of the employees. If and when such changes are found necessary they will be made with due regard for mutual rights, privileges and well-being of the employees and the company."

It is then alleged that on February 4, 1952, the company was informed of the union's desire to reopen the agreement for the purpose of proposing certain changes in the contract; that on March 11, 1952, certain specific proposals respecting modifications in wages, hours and working conditions were made by the union to the company; that on or about March 12th the company and its officials named in the cross-complaint "agreed, combined, confederated, and conspired with each other and with other persons * * * to interfere with, restrain and coerce the employees at said Berkeley plant * * * in their freedom to negotiate through the representative of their own choosing, i. e., Local 6, the terms and conditions of their employment, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid and protection * * *" It is then alleged that in pursuance of this agreement and conspiracy the cross-defendants refused to accept the proposals advanced by Local 6 and "refused to make bona fide counterproposals, adopted an intra[n]sigent attitude in collective bargaining relations, unreasonably and without justifiable cause protracted said negotiations, coercively discharged employees at its Berkeley plant for engaging in concerted activities for their mutual aid and protection, and in other ways demonstrated its unwillingness to bargain in good faith with Local 6." It is alleged that by reason of the actions and attitude of cross-defendants the employees in order "to protect their right to engage in free collective bargaining * * * in order to preserve Local 6 as their collective bargaining representative, and in order to protect their wages, hours and working conditions" were compelled to strike against the company.

On February 1, 1953, it is alleged, the cross-defendants abandoned their conspiracy and then did bargain collectively in good faith, as a result of which a new collective bargaining agreement was entered into on February 10, 1953, and the employees then returned to work. It is averred that as a direct and proximate cause of the conspiracy the employees suffered loss of wages for which judgment is asked.

The second cause of action incorporates the charging allegations of the first, and alleges, in addition, that as a direct and proximate result of the "illegal agreement, combination, confederation and conspiracy," of the cross-defendants the labor union and its members suffered losses including $15,000 loss of dues which were noncollectible during the strike, and $80,000 paid out as strike benefits. In addition to these damages, $500,000 punitive damages are prayed for.

[2, 3] It is our opinion that this cross-complaint, in each of its two causes of action, somewhat inartfully, alleges good causes of action in both contract and tort. Both parties argue at length the question as to whether there exists in this state a statutory public policy, by virtue of section 923 of the Labor Code, requiring employers and employees to bargain collectively in good faith. Much can be and is said on both sides of that question. But we do not have to decide it in this case. The cross-complaint alleges the existence of an agreement between the parties, pursuant to the express terms of which the union gave notice of intention to reopen negotiations and offered specific proposals of change. It then alleges that the company and some of its officers conspired to refuse to bargain in good faith, and that the employees, in self-protection, were required to strike, with the result that wages were lost to the employees and dues were lost by the union, which was also compelled to pay out large sums in strike benefits. The cross-complaint sets forth section 18 of the collective bargaining agreement which recognizes the indefinite term of the agreement by setting forth a method of modifying or reopening the contract to consider future changes

suggested by either party. If all the arguments about whether a duty to bargain collectively in good faith exists generally under California law be disregarded, the contract still remains. The reasonable interpretation of that contract as pleaded, is that the parties have mutually agreed to consider modifications which may be proposed from time to time. Having made that an express term of the contract, the refusal to negotiate in good faith, or the refusal to consider in good faith a proposal for change, constitutes a breach of contract. This duty to listen in good faith to a proposal made by the other side should not be confused with the free choice of bargaining that each side possesses. Neither the company nor the union is committed by the agreement to accept any proposals made by the other, but each is bound to discuss mutually and to consider in good faith—that is, bargain collectively—any requested changes. If this were not the proper interpretation of the agreement it is obvious that a contract such as the one here involved with an indefinite term could become, under changing conditions, completely unconscionable. If either side could not propose changes which the other side was required in good faith to consider, the party adversely affected by a change in circumstances would never be able to effect a modification since any proposals made by such party need not be even listened to or considered by the other side. The parties here protected themselves against such a contingency by the provision in reference to future changes. Thus, the question is not one of public policy at all, but a simple question of contract law. The parties provided for a means of securing future changes, and such provision, necessarily, imposed on each side the duty to consider in good faith any proposal made pursuant to section 18 by the other party. If this duty was not contemplated by and included within section 18 that provision would be meaningless. The breach of that contract obligation is averred.

The parties dispute the question as to whether the breach of such a contract to bargain collectively can be the basis for civil liability in damages. This point, assuming the breach of the contract, is settled by the provisions of section 1126 of the Labor Code. It provides: "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

[4] Obviously, under this section, the breach of a collective bargaining agreement is no different from the breach of any other contract. Under normal contract law the breach of the contract set forth in the cross-complaint, if proved, permits the recovery of damages in an "amount which will compensate the party aggrieved for all of the detriment proximately caused thereby". Civ.Code, § 3300.

[5, 6] It is equally clear that the cross-complaint sets forth a cause of action in tort. The allegations, already analyzed, that demonstrate that a cause of action *ex contractu* has been pleaded, plus the allegation that the breach was induced, unlawfully, as a result of a conspiracy on the part of the named cross-defendants, demonstrates that this is so. The intentional unlawful interference with contract rights is an actionable tort. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631; Buxbom v. Smith, 23 Cal.2d 535, 145 P.2d 305; see also California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 219 P.2d 511; Dominguez Estate Co. v. Los Angeles Turf Club, 119 Cal.App.2d 530, 259 P.2d 962; Prosser on Torts, p. 976 et seq.

The second cause of action also sets forth good causes of action in both contract and tort. This cause of action incorporates all the charging allegations of the first and sets forth a cause of action for the damages sustained by the union. For the reasons already discussed this states good causes of action and the damages sought are recoverable if the allegations of the cross-complaint can be proved.

Thus it is apparent that the cross-complaint sets forth sufficient facts to allege causes of action good against a general demurrer. If this were the only issue in-

volved on this appeal a reversal would obviously be called for. But there is present, although almost entirely unargued, a much broader question, and that is the question of the jurisdiction of the state courts to hear this controversy at all. Counsel have failed to discuss the question in their briefs, except most superficially, and no opportunity was presented at the time of oral argument to discuss the question because counsel submitted the appeal without oral argument. The really difficult question is whether or not the federal government has pre-empted jurisdiction in this type of labor dispute.

[7] This question is only involved, of course, if respondent company is engaged in interstate commerce. While it is true that that fact does not appear in the pleadings, because of the importance of the jurisdictional question the point will be discussed on the assumption, obviously in accord with the facts of which we probably can take judicial knowledge, that respondent company is engaged in interstate commerce.

The National Labor Relations Act (hereafter referred to as the N.L.R.A.) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees". 29 U.S.C.A. § 158(a) (5). The act also gives the National Labor Relations Board (hereafter referred to as N.L.R.B.) the exclusive power to prevent any person involved in interstate commerce from engaging in an unfair labor practice. 29 U.S.C.A. § 160(a). There can be no doubt that under the facts alleged in the cross-complaint the appellants, interstate commerce being present, had available to them the procedures set forth in the N.L.R.A., one of which was to seek a cease and desist order from the N.L.R.B. pursuant to the terms of the statute. There can be but little doubt that, had appellants sought a mandatory injunction in the state courts to compel the employer to bargain, they would have been met by the argument that the sole jurisdiction to grant such relief, the conditions of interstate commerce being met, was the N.L.R.B. The real question is whether the federal act has pre-empted jurisdiction in actions for breach of contract or for tort such as the ones here involved.

This problem has been discussed in two relatively recent cases of the Supreme Court of the United States. The first of these is Garner v. Teamsters C. & H. Local Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 decided in December of 1953. In that case an injunction was issued by a state court under state law in a labor dispute involving peaceful picketing for the purpose of inducing the employer to compel his employees to join a union. The Pennsylvania Supreme Court, 373 Pa. 19, 94 A.2d 893, held that the grievance was within the exclusive jurisdiction of the N.L.R.B., and was not within state jurisdiction. The Supreme Court of the United States agreed. It stated, 346 U.S. at page 488, 74 S.Ct. at page 164:

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the state or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. International Union, U. A. W. A. F. of L, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 69 S.Ct. 516, 521, 93 L.Ed. 651.
>
> "* * * It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioner presented it to that body * *. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.
>
> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final adminis-

trative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

In the instant case the appellants, under the allegations of their complaint, could have sought an injunctive order from the N.L.R.B. to compel the employer to bargain collectively. This they did not do. Instead they sought to recover damages arising from breach of the agreement, and for a conspiracy on the part of the company and certain of its officials to refuse to bargain collectively, or at all. The Taft-Hartley Amendment to the N.L.R.A., 29 U.S.C.A. § 185, provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The broad implication of the Garner case was that all activities cognizable by the federal law, whether remediable or not thereunder, were exclusively pre-empted to the federal domain. The case actually involved, however, a factual situation of peaceful picketing and the relief sought was an injunction. A damage action under the last quoted section was not involved, although the reasoning of the case would seem to indicate that there too the federal power was exclusive. If the Garner case were the only available authority, we would be inclined to hold that under the rules there set forth the California courts have no jurisdiction in either the contract or tort causes of action pleaded. But the Garner case is not the only available authority. Another pronouncement of the United States Supreme Court in this field was made in June of 1954 in the case of United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025. In that case the court stated the problem involved in the following language, 347 U.S. at page 657, 74 S.Ct. at page 834: "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act."

The case involved a suit by an employer against the union for tort damage allegedly resulting from union intimidation of the employer and some if its employees which caused the employer to shut down its projects in the area. The courts of Virginia had upheld a substantial award of actual and punitive damages against the union. The United States Supreme Court granted *certiorari* for the sole purpose of determining the jurisdictional question involved. 346 U.S. 936, 74 S.Ct. 374, 98 L.Ed. 425. Mr. Justice Burton, speaking for the majority, held that the N.L.R.A. did not give the N.L.R.B. exclusive jurisdiction over common-law tort actions for damages even though the tortious conduct constituted an unfair labor practice under the federal act, and so of course could be enjoined under that act. The rationale of the opinion is disclosed in the following quotation, 347 U.S. at page 663, 74 S.Ct. at page 837:

"Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such

conduct. The latter exclusion is the issue here. In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted.[5] Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from his right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act.

"In the Garner case, we said:

"'The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

"'This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or it is entirely ungoverned." In such cases we have declined to find an implied exclusion of state powers. International Union v. Wisconsin Board, 336 U.S. 245, 254, 69 S.Ct. 516, 521, 93 L.Ed. 651. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, 315 U.S. 740, 749, 62 S.Ct. 820, 825, 86 L.Ed. 1154.' 346 U.S. at page 488, 74 S.Ct. at page 164.

"To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself,

5. "The cases relied upon to exclude state jurisdiction are those where a conflict with federal control has been made clear.

"'[W]hen Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together."' Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 10, 58 S.Ct. 87, 82 L.Ed. 3; See also, Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364; International Union of United Automobile Workers v. O'Brien, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978; Plankinton Packing Co. v. Wisconsin Board, 338 U.S. 953, 70 S.Ct. 491, 94 L.Ed. 588; La Crosse Telephone Corp. v. Wisconsin Board, 336 U.S. 18, 69 S.Ct. 379, 93 L.Ed. 463; Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234; Hill v. State of Florida, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782."

a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law."

After pointing out that the federal act did prescribe a judicial procedure in the case of secondary boycotts for recovery of tort damage in federal or other courts, the Supreme Court reasoned that "it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet, without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us." 347 U.S. at page 666, 74 S.Ct. at page 839. Thus, the Supreme Court recognized that although the employer may have some tort remedy under the federal act, he is not precluded from seeking another remedy in the state courts. The two dissenting justices believed that the rule of the Garner case was controlling, and that the state courts had no jurisdiction of the controversy.

The problem in the instant case falls between the Garner and Laburnum cases. Until the United States Supreme Court clarifies its position on this problem the best a state court can do is to make an informed guess as to what the position will ultimately be. (For good discussions of the problems involved in the federal pre-emption of jurisdiction in the labor field see 54 Columbia Law Rev. 997; 5 Labor Law Journal 743; see for collection of lower court opinions on the subject, all decided before the Garner and Laburnum cases, 7 Vanderbilt Law Rev. 374, fn. 21, p. 377.)

In the absence of a definitive opinion by the United States Supreme Court we have come to the following conclusions:

1. The N.L.R.A. has no provision for a tort cause of action of the type here involved brought by the union against the employer;

2. The federal act does have a section permitting federal suit by either party for damages for a breach of a collective bargaining agreement;

3. As we read the Garner case as modified by the Laburnum case, the law seems to be that where the federal act is silent as to the injurious conduct, there was no intent on the part of the Congress to destroy the common-law remedies offered in the state courts.

[8] It therefore follows that, in the instant case, insofar as the cross-complaint states a common-law tort cause of action, i. e., a conspiracy to induce a breach of contract, the federal act has not pre-empted jurisdiction in the federal courts. In other words, the state courts have jurisdiction over that cause of action. This would seem to be clear from the Laburnum case.

[9, 10] State jurisdiction over the principal cause of action alleged in the cross-complaint, i. e., for breach of contract, however, is very dubious indeed. As already pointed out, the federal act expressly provides for a suit for damages for breach of a collective bargaining agreement. The Garner case would seem to determine that the federal act has pre-empted jurisdiction in that field for the federal tribunals. While the Laburnum case recognizes a sphere of concurrent jurisdiction, the implication of that case is that where the federal act has provided for damages for breach of contract, such remedy is exclusive. The test to be derived from these cases seems to be whether the federal act provides an adequate remedy—not whether it provides a right of action. The Garner opinion excluded the jurisdiction of state courts, even where the conduct complained of violated state law, because the federal act provided an adequate remedy. While the Laburnum case undoubtedly limited the Garner case, it seems to hold that the federal act is exclusive when and only when the federal act provides an adequate remedy for the conduct condemned by the federal act. If a state court offers a remedy not in conflict with the federal remedies, or one not available under federal law, state jurisdiction exists. Conversely, where the federal act provides a remedy that is ade-

quate, even though state law provides a comparable remedy, the federal courts have exclusive jurisdiction. In the tort cause of action no comparable remedy for damages is provided by the federal act. Therefore, the state courts have jurisdiction. But as to the contract cause of action, the federal law does provide the remedy of damages for breach of a collective bargaining agreement. This being so, the federal jurisdiction is exclusive.

Because the cross-complaint states a good cause of action for damages in tort, and because the state courts have jurisdiction of such cause of action, it was error to sustain the demurrer without leave to amend.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

132 Cal.App.2d 598

Ben MINDENBERG, Plaintiff and Appellant and Cross-Respondent,

v.

CARMEL FILM PRODUCTIONS, Inc., a corporation, Mickey Kaplan, Ted Harris, Tom Emmett, David Belinkoff, Sidney Becker, Ezra E. Stern, Hollywood Film Enterprises, Inc., a corporation, Defendants and Respondents.

Ben MINDENBERG, Plaintiff and Respondent,

v.

CARMEL FILM PRODUCTIONS, Inc., a corporation, Defendant and Appellant.

Civ. 20400.

District Court of Appeal, Second District, Division 3, California.

April 28, 1955.

Action for procurement of breach of contract, for breach of contract, and for conspiracy and fraud. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment of nonsuit as to all defendants upon first and third causes of action and as to all except corporate defendant upon second cause of action and entered judgment against corporate defendant on such second cause of action, and plaintiff and corporate defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that contract, under which corporation agreed to repurchase corporate stock from plaintiff, was, in absence of sufficient earned surplus from which such payment could be made, void whether treated as sale of stock held in trust for plaintiff or withdrawal of money in lieu of plaintiff's 18¾ per cent interest in the corporate assets.

Judgment of nonsuit affirmed, and judgment against corporate defendant reversed.

1. Conspiracy ⇐19
Fraud ⇐50

In fraud and conspiracy action, plaintiff had burden of proof.

2. Conspiracy ⇐19
Fraud ⇐58(1)

In fraud and conspiracy action based upon allegations of alleged joint venture, which was between plaintiff and the individual defendants, and which was pursued through corporate defendant, evidence was not sufficient to sustain plaintiff's claim. West's Ann.Code Civ.Proc. § 2055.

3. Contracts ⇐138(1)

Where contract was not enforceable because it was against public policy, defendant's breach of such contract could not give rise to cause of action for damages.

4. Conspiracy ⇐3

On the civil side, charge of conspiracy is important only for purposes of showing joint action and joint liability for commission of a wrong, and, if a wrong is not done, the conspiracy to accomplish nontortious act does not create a cause of action.

5. Dismissal and Nonsuit ⇐63

Where, in action against certain individual defendants and corporate defendant, second cause of action sought recovery on contract between plaintiff and corporation,

nonsuit was properly granted as to the individual defendants.

6. Licenses ⇐18½(14)

Contract, which provided for issuance to plaintiff and his wife of 18¾ per cent of authorized stock, and provided that, pending such issuance, plaintiff and wife would have 18¾ per cent interest in corporate assets, ordinarily would be classified as a sale of "security" which would require permit from Commissioner of Corporations prior to issuance of any stock pursuant to the contract.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

7. Licenses ⇐18½(10)

If assignee is investor who, for a consideration, is given right to share of profits or proceeds of a corporate enterprise to be conducted by others, interest representing assignee's interest is a "security", and permit from Commissioner of Corporations would be needed before issuance of stock pursuant to arrangement could be made, but, if assignee is to share in conduct of enterprise, instrument representing the assignment is not a "security".

8. Corporations ⇐376

Contract by which plaintiff assigned to corporation his interest in corporation, whether represented by stock or arising from agreement under which he was to be issued certain stock, and to have certain interest in corporation pending such issuance, was within Corporations Code provision limiting corporation to use of earned surplus for repurchases of its stock. West's Ann.Corp.Code, §§ 824–828, 1706, 1707, 1708, 1715.

9. Corporations ⇐152, 376

Neither paper profits, anticipated earnings, nor accrued items of debit or credit are to be taken into consideration in computing earned surplus for purpose of declaration of dividends or corporate purchase of its own stock. West's Ann.Corp.Code, §§ 824–828, 1500(a, b), 1501, 1502, 1706, 1707, 1708, 1715.

10. Corporations ⇐82

In action for breach of contract by which corporation was to purchase from plaintiff its own stock which plaintiff assigned to it, evidence was not sufficient to establish existence of earned surplus from which corporation could make such purchase. West's Ann.Corp.Code, § 1707.

11. Corporations ⇐82

In absence of an earned surplus, agreement whereby corporation is to repurchase its own stock is void. West's Ann.Corp. Code, § 1707.

12. Corporations ⇐82

In action against corporation for breach of agreement whereby corporation was to repurchase from plaintiff its own stock, plaintiff had burden of proving existence of corporate earned surplus from which corporation could make such purchase and his averment that there was not any reasonable grounds for believing that corporation was unable to pay its debts and liabilities or would be rendered unable by payment of balance due upon the contract. West's Ann. Corp.Code, § 1707.

13. Corporations ⇐94

Where plaintiff had, by contract, been granted a certain interest in corporate assets, issuance of stock certificate to plaintiff was not essential to plaintiff's becoming a stockholder.

14. Corporations ⇐60

"Capital stock" means not shares of which nominal capital is composed but the actual capital, that is, assets, with which the corporation carries on its corporate business.

See publication Words and Phrases, for other judicial constructions and definitions of "Capital Stock".

15. Corporations ⇐116

Sale of plaintiff's 18¾ per cent interest in the corporate assets constituted a sale of stock.

16. Corporations ⇐82

Contract under which corporation agreed to repurchase corporate stock from plaintiff was, in absence of sufficient earned surplus from which such payment could be made, void whether treated as sale of stock of plaintiff or withdrawal of money in lieu of plaintiff's 18¾ per cent interest in the corporate assets. West's Ann.Corp.Code,

§§ 100–6804, 824, 828, 1500(a, b), 1501, 1502, 1706, 1707, 1708, 1715, 5000–5012.

Vaughan, Brandlin & Wehrle, Los Angeles, for plaintiff, appellant and cross-respondent.

Ernest R. Utley, Raymond Wallenstein, Los Angeles, for defendant, respondent and cross-appellant.

ASHBURN, Justice pro tem.

This case went to trial upon the seventh amended complaint and answer thereto. The complaint was in three counts. A nonsuit was granted all defendants[1] upon the first and third causes of action and to all of them, except Carmel Film Productions, Inc., upon the second count. Judgment was ultimately rendered against that defendant for $19,750 with interest and costs. Plaintiff appeals from the judgment of nonsuit and defendant Carmel Film Productions, Inc., appeals from the judgment against it.

[1] Plaintiff charged defendants with fraud and conspiracy; although the burden of proof rested on him he did not take the witness stand and his failure to do so was not explained. His counsel rested upon examination of four of the defendants under section 2055, Code of Civil Procedure, and upon the testimony of an accountant. The cases were submitted in this court upon a single record and one set of briefs. Plaintiff's counsel filed the first brief, which is devoted to the matter of the nonsuits; defendants filed a brief discussing those matters as well as Carmel's attack upon the judgment against it; plaintiff has presented no reply brief, thus virtually confessing the error alleged to inhere in that judgment.

The first count of this seventh amended complaint turns upon the allegation of a joint venture between plaintiff and defendants Harris and Belinkoff, one which contemplated and pursued the use of a corporate form—defendant Carmel—as a mere matter of convenience in conducting the affairs of the joint venture. Plaintiff relies upon the doctrine of Elsbach v. Mulligan, 58 Cal.App.2d 354, 368, 136 P.2d 651, 659: "If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured thereby * * * justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement." The same principle of equity is discussed and applied in Hillman v. Hillman Land Co., 81 Cal.App. 2d 174, 183–185, 183 P.2d 730; Hichle v. Torrance Millworks, Inc., 126 Cal.App.2d 624, 628, 272 P.2d 780, and other cases. Plaintiff-appellant, assuming the necessary predicate, argues that he was excluded from participation in the affairs of the joint venture and that its assets were appropriated by the individual defendants and their corporate instrumentalities, Carmel Film Productions, Inc., and Hollywood Film Enterprises, Inc., each of which is alleged to be their alter ego. Plaintiff claims a right to accounting and other relief. The theory is well conceived, but the evidentiary support is too attenuated to deserve recognition as substantial proof.

[2] The evidence shows without conflict that the original plan was formation of a corporation and the conduct of business by it, each of the three (Mindenberg, Harris and Belinkoff), to own one-third of the stock; that the corporation—Carmel—was promptly formed; that it conducted the business throughout, observing the customary corporate forms, electing officers and directors, conducting directors' meetings, acting through its elected officers, etc.; 10 shares of stock were issued to or for the benefit of each of the three participants,—plaintiff, Harris and Belinkoff. The testimony and other proof fails to reveal any respect in which the corporation was used as a blind or sham, or as an agency of the

1. Defendants are Carmel Film Productions, Inc., Mickey Kaplan, Ted Harris, Tom Emmett, David Belinkoff, Sidney Becker, Ezra E. Stern, Hollywood Film Enterprises, Inc.

stockholders in any manner or sense other than that of the normal corporation. The only evidence to which plaintiff points in support of his claim of joint venture is the testimony of Belinkoff:

"Q. Now, Mr. Belinkoff, sometime in the latter part of 1946 it is true, is it not, that you and Mr. Harris and Mr. Mindenberg had a conversation about going into business together? A. Yes.

"Q. And during the course of those conversations isn't it true that the three of you agreed to go into business? A. Yes.

"Q. And is it not true that it was agreed that Mr. Mindenberg's share in the business and his part of the expenses incurred in the corporate business would be one-third? A. Right."

It will be noted that the transaction of "corporate business" is assumed in the last question. The same witness testified that the original agreement was "* * * * to go in, form a corporation, and loan the business whatever we felt would be necessary * * *"; that the interest of each was to be represented by a third of the corporate stock; that a joint venture or partnership was never mentioned; that there was no discussion "* * * which indicated an operation other than through a duly organized corporation." Defendant Harris testified that in the beginning it was definitely discussed that the business was to be a corporation and each was to have a third of the corporate stock. Defendant Emmett said that, when renting an office from him at the beginning of the enterprise, plaintiff "* * * told me that he and Mr. Harris were planning on forming a corporation to sell and distribute 35 millimeter films." Plaintiff's entire argument with respect to the first count hinges upon the Belinkoff statement that the three men "agreed to go into business." Of itself this does not imply a joint venture or any specific type of operation. Qualified by immediate reference to "corporate business", and later explained as meaning that and nothing else, this evidence could afford no substantial support to plaintiff's claim and none of the above cited cases indicates the contrary, nor do any other authorities with which we are familiar. Not only did plaintiff fail to testify, but his written agreements (the basis of count 2) contain no slight intimation of any joint venture in relation to the corporation or its assets or business. The trial judge properly granted a nonsuit on the first cause of action.

[3] The third count seeks damages for wrongful procurement of breach by Carmel of the contract upon which the second rests, namely, a contract of the corporation to purchase the shares of its stock owned by plaintiff. It will appear from the discussion of that count that the contract was not an enforceable one because unlawful on grounds of public policy, and hence the causing of its breach by defendant Carmel could not give rise to a cause of action for damages. Prosser on Torts, p. 980; Rest. of Law of Torts, § 766, Comment c at p. 54; 86 C.J.S., Torts, § 44, p. 965.

[4] It is alleged that the defendants acted pursuant to a conspiracy to induce a breach of contract. But that does not change the legal aspect of the matter. On the civil side a charge of conspiracy is important only for the purpose of showing joint action and joint liability for commission of a wrong. But if no wrong is done, the conspiracy to accomplish the non-tortious act does not create a cause of action. Scarbourough v. Briggs, 81 Cal.App.2d 161, 167, 183 P.2d 683; Bowman v. Wohlke, 166 Cal. 121, 124, 135 P. 37; Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 488, 110 P.2d 396; 11 Cal.Jur.2d § 47, p. 272. The nonsuit was properly granted as to the third count.

[5] The second cause of action seeks recovery upon a contract between plaintiff and the corporation, Carmel Film Productions, Inc. There are no other parties to it and the nonsuit was therefore properly granted as to all defendants other than Carmel.

With respect to the propriety of the judgment against Carmel a further statement of facts is needed. Shortly after the corporation was formed 30 shares of stock were issued, 10 each to Harris, Becker and Ezra Stern. The shares issued to Becker were so placed at the request of Belinkoff

because he and Becker were interested jointly; the shares in the name of Stern were so issued at plaintiff's request and because of his fear of seizure under a government or other lien. These shares were held by Stern in trust for plaintiff. On March 8, 1948, plaintiff and Carmel made a written agreement which recited inter alia the issuance of the 30 shares of stock, of which "10 shares to Ezra E. Stern, attorney for Carmel", and then said: "The parties agree that they will cause to be issued 18¾% of the authorized stock to Mindenberg and his wife, Rose Harris Mindenberg, as joint tenants. The stock to be issued to Mindenberg shall be fully paid and shall be issued to him without cost." And: "Pending the issuance of said stock, it is understood that Mindenberg and his wife shall have a present 18¾% interest in and to all of the assets of said corporation * * *." Whether this 18¾ per cent interest in the assets was to be in addition to the 10 shares held by Stern for plaintiff or was intended as a reduction in plaintiff's interest does not appear. There was no evidence on the subject other than the writing.

[6, 7] No attempt was made to obtain a permit from the Commissioner of Corporations to issue any stock pursuant to this arrangement. This contract ordinarily would be classified as a sale of a security. See People v. Oliver, 102 Cal.App. 29, 36, 282 P. 813; People v. Sidwell, 27 Cal.2d 121, 127, 162 P.2d 913; People v. Hoshor, 92 Cal.App.2d 250, 254, 206 P.2d 882. But the record shows that plaintiff was then active in the corporation and the contract expressly contemplates a continuance of that situation. "If the transaction is one in which the assignee is merely an investor who for a consideration is given the right to share in the profits or proceeds of an enterprise to be conducted by others, the instrument representing such interest is a security. Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest in the production of oil is not a security within the act." Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777, 782. To the same effect are People v. Syde, 37 Cal.2d 765, 768, 235 P.2d 601; People v. Gould, 37 Cal.2d 885, 235 P.2d 604. Those cases seem to be applicable here. Moreover, defendant Carmel is in the position of the issuer of a security and cannot take advantage of the absence of a permit. Austin v. Hallmark Oil Co., supra, 21 Cal.2d 718, 727, 134 P.2d 777; Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P.2d 302. Neither side to this appeal contends that the agreement of March 8, 1948 was invalid and we proceed upon the assumption that there was no infirmity in it.

Without any explanation in the evidence it appears that the same parties made another agreement, the one in suit, on April 30, 1948. The main paragraph reads as follows: "In consideration of the payment of the sum of Twenty-six Thousand Two Hundred Fifty Dollars ($26,250.00) to the undersigned, Ben Mindenberg, or order, payable in instalments as hereinafter set forth, I hereby assign, transfer, set over, deliver, acquit and release to Carmel Film Productions, Inc., all of my right, title and interest therein, whether represented by stock or arising out of that certain "Memorandum of Agreement" between the parties hereto dated March 8, 1948." The price was payable in installments, of which $6,500, and no more, was paid. The contract further says: "As security for the payment of the aforesaid obligation, the said corporation represents that it has instructed its attorney, Ezra E. Stern, who the said corporation further represents is now holding ten (10) shares of the capital stock of the undersigned in said corporation, for the undersigned, to retain said stock certificate on behalf of the undersigned, and the undersigned hereby instructs the said Ezra E. Stern to deliver said certificate, duly endorsed, to the corporation only upon payment by said corporation of the considerations for this Agreement, and upon notice of such payment in writing by the undersigned." The corporation thus recognized plaintiff's ownership of the 10 shares standing in Stern's name and plaintiff contracted on that basis. The contract can mean nothing other than

a sale of the 10 shares of issued stock and the right to issuance of certificate for 18¾ per cent of the entire stock, be they cumulative or alternative rights resting in plaintiff.

The second count alleges that defendant at all times "* * * had a sufficient earned surplus out of which to pay the monies required to be paid to plaintiff on account of said contract * * *." Also that there has been at no time "* * * any reasonable ground for believing that defendant Carmel Film Productions, Inc., was or is unable, or by reason of paying the balance due upon said contract Exhibit 'B' would be rendered unable, to satisfy its debts and liabilities when they fell due." These allegations are directed toward compliance with the Corporations Code. Section 824 provides: "Except as provided in this division, the directors of a corporation shall not authorize or ratify the purchase by it of its shares, or declare or pay dividends, or authorize or ratify the withdrawal or distribution of any part of its assets among its shareholders." Sections 825–828 and 1715 prescribe penalties and other remedies incident to a violation. Section 1706 specifies situations in which the corporation may purchase its shares out of stated capital or surplus, none of which is pertinent here. And section 1707: "A corporation may also purchase shares issued by it, or by a corporation of which it is subsidiary, in any of the following cases: * * * (c) Subject to any limitations contained in its articles, out of earned surplus. Purchases under this subdivision are not limited to cases authorized under other subdivisions of this section or of Section 1706." Section 1708: "A corporation shall not purchase or redeem shares issued by it, or by any corporation of which it is subsidiary, in any case when there is reasonable ground for believing that the corporation is unable, or, by such purchase or redemption, will be rendered unable, to satisfy its debts and liabilities when they fall due, except such debts and liabilities as have been otherwise adequately provided for." Notwithstanding compliance with these statutes in his pleading, plaintiff sought declaratory relief to the effect that neither contract was an agreement by a corporation to purchase its own shares. The court so ruled and, denying declaratory relief, rendered judgment for plaintiff for $19,750 plus interest and costs.

[8] Having held that the contract was not within the statute the court made no finding as to the existence of an earned surplus. Defendant, as appellant, asserts this to be error because the contract was plainly within the purview of section 1707 and its limitation to the use of earned surplus for such repurchases. And defendant is correct in this. The 10 shares of stock issued to Stern and held in trust for plaintiff were still outstanding and were specifically made a part of the subject matter of the sale.

Plaintiff, though he alleged there was an earned surplus, failed to prove it. Defendant Belinkoff, a certified public accountant who kept the corporate books, testified there was none on July 31, 1948 (2 months after the contract date); that the corporate income tax return showed a surplus deficit of $2,933.65 as of July 31, 1948; that there was an actual surplus of $7,161.42 on July 31, *1949*; but that the books, (and hence these figures) were upon an accrual basis. Defendant Kaplan, who was vice president at the time of the agreement, stated that there was no earned surplus on that date, that he consulted an attorney in October 1948 and thereupon the company ceased to make payments on the contract.

In an effort to prove an earned surplus plaintiff presented as a witness Robert B. Roskowick, a certified public accountant, who examined the Carmel books in 1951. He attempted to show that there probably was an earned surplus by building up a synthetic or computed inventory, one which did not appear on the books. He started with an inventory of $85,101.47 on July 31, 1948, which appeared in the income tax return; then he computed the relationship between sales and costs, assuming it to be constant, and concluded there should have been an inventory of $53,426.42 in January 1949. But the uncontradicted evidence of defendant Belinkoff was that the company never carried any inventory in fact because it would buy film as needed and turn it over to Hollywood and charge Hollywood

for it; that the inventory appearing in the income tax return was not an actual one but was used because of the exigencies of its loan arrangement with Bank of America. And Mr. Roskowick did not carry through to a computed surplus by deducting expenses or obligations. He said the books showed an earned surplus on July 31, *1949* of $7,161.42, but a deficit in surplus on July 31, 1948, of $2,933.65. Also that the books were kept on an accrual basis, and the above figures were a result of that method. The witness further said he did not know whether there was an actual earned surplus or not, just what the books showed. Also that the $7,100 surplus was made up of three items, an account receivable of some $8,500 and two accounts payable totaling $1,200 to $1,500; that no other assets or liabilities were taken into account as they had been written off the books. This was in July 1949, after the company had quit business. This surplus item did not take into account any moneys owing to plaintiff; indeed, there was no such item on the books. Nor did it take cognizance of an obligation to De Luxe Film Laboratories of uncertain amount. This proof would not have supported an affirmative finding of the existence of the necessary earned surplus.

Ballantine and Sterling on California Corporation Laws (1949 Ed.) section 152, page 211: "It is the theory of these sections that as a general rule the purchase by a corporation of its own shares should not be allowed except out of earned surplus which would be available for distribution as cash dividends. The withdrawal of assets by a shareholder upon a sale or surrender of his shares has the same effect upon creditors as the payment of a dividend." It appears that sections 1501 and 1502, Corporations Code, concerning declaration of dividends, closely parallel sections 1707 and 1708 (above quoted) relating to purchase of stock. Ballantine and Sterling further say, in section 132, at page 177: "Section 1500, subd. (a), authorizes dividends to be declared in cash or in property only out of 'earned surplus,' and Subd. (b) gives an alternative that dividends may be declared 'out of net profits earned during the preceding accounting period,' despite the fact that the net assets amount to less than the stated capital. The code makes no attempt to define what is meant by 'earned surplus' or by 'net profits.' * * * The *earned surplus rule* limits the authority to declare dividends according to the existence of a balance or excess of assets over liabilities including stated capital, such excess being derived from profits or earnings. Earned surplus then represents the accumulated net earnings or balance of profits since incorporation or time of recapitalization, after deductions for amount of dividends paid therefrom, losses and other charges. This is usually ascertained from the balance sheet."

[9, 10] The law is settled to the effect that paper profits, or anticipated earnings, or accrued items of debit or credit are not to be taken into consideration in computing earned surplus, either for purpose of dividends or as basis for corporate purchase of its own shares of stock. See 6a Cal.Jur. § 443, p. 787; 13 Cal.Jur.2d § 254, p. 31; Southern Cal. Home Builders v. Young, 45 Cal.App. 679, 693, 188 P. 586. The evidence in this case does not establish the existence of an earned surplus at any time. The burden so to do rested on plaintiff. Goodman v. Global Industries, 80 Cal.App.2d 583, 182 P.2d 300; Flynn v. California Casket Co., 105 Cal.App.2d 196, 233 P.2d 131; Schreiber v. San Joaquin Exploration Co., 125 Cal. App.2d 171, 270 P.2d 19.

[11] In the absence of an earned surplus such an agreement is void. It falls within the doctrine of Smith v. Bach, 183 Cal. 259, 262, 191 P. 14, 15, "that, where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se*, or merely *malum prohibitum*." Stevens v. Boyes Hot Springs Co., 113 Cal.App. 479, 298 P. 508, applies this principle to contracts such as the one under discussion here. In that case an installment note was given as consideration for the purchase of the corporation's own shares. One of the payments was made, then the corporate successor of the maker refused to pay any more, alleging illegality, and it also sought recovery of the sum previously paid on the purchase

price. It prevailed in both respects. The case arose in 1922 under sections 309 and 359, Civil Code; the court held that the transaction was not within any of the exceptions to the prohibition upon dividing, withdrawing or paying to stockholders any part of the capital stock; that the transaction was void and the note unenforceable. "Upon this subject we conclude that the defense relied on by defendants, namely, that the contract was void as being prohibited by statute, is sound, and the conclusion of the trial court upon this subject is correct. Contracts of this character being unlawful and against the express law and public policy, cannot be enforced and they are void *ab initio*. Section 1667, Civ.Code." Stevens v. Boyes Hot Springs Co., supra, 113 Cal. App. 479, 483, 298 P. 508, 510. At bar, as in Stevens, we have a present sale with an immediate payment of $5,000 and no earned surplus at any time. We think this case is governed by the Stevens case and that plaintiff, upon the showing made at the trial, was not entitled to recover.

[12] In the main, the foregoing discussion as to the existence of an earned surplus applies to plaintiff's allegation "That there is not now, nor at any time since the execution of the said contract Exhibit 'B' has there been, any reasonable ground for believing that the defendant Carmel Film Productions, Inc. was or is unable, or by reason of paying the balance due upon said contract Exhibit 'B' would be rendered unable, to satisfy its debts and liabilities when they fell due." It was incumbent upon him to prove this averment as well as that of an existing earned surplus. Goodman v. Global Industries, 80 Cal.App. 2d, at page 589, 182 P.2d 300. Plaintiff dismally failed in his attempted proof of this allegation. His complaint, filed on March 30, 1953, alleged in counts one and three that the corporation was then insolvent and the evidence was that the only known asset at the time of trial was $8,585 due from Hollywood Film Enterprises and some valueless films.

[13–15] The trial judge, losing sight of the 10 shares owned by plaintiff, held there was no sale or purchase of "stock of defendant corporation" because plaintiff's interest so sold was merely an undivided interest in the corporate assets. This ignores the legal effect of the agreement for "a present 18¾% interest in and to all of the assets of said corporation * * *." The issuance of the certificate was not essential to plaintiff becoming a stockholder. Kauffman v. Meyberg, 59 Cal.App.2d 730, 739, 140 P.2d 210; Reeder v. Finderup, 78 Cal. App. 305, 308, 248 P. 525; Majors v. Girdner, 31 Cal.App. 47, 51, 159 P. 826; Mitchell v. Beckman, 64 Cal. 117, 121, 28 P. 110. "Capital stock" means, "'* * * not the shares of which the nominal capital is composed, but the actual capital—i. e. assets —with which the corporation carries on its corporate business.'" Hansen v. California Bank, 17 Cal.App.2d 80, 94, 61 P.2d 794, 801. See also Kohl v. Lilienthal, 81 Cal. 378, 385, 20 P. 401, 22 P. 689, 6 L.R.A. 520; Tapscott v. Mexican Colorado, etc., Co., 153 Cal. 664, 667–668, 96 P. 271. The sale of plaintiff's 18¾ per cent interest was a sale of stock.

Moreover, the same section (824) which forbids purchase of shares (except as provided by statute) also prohibits "the withdrawal or distribution of any part of its assets among its shareholders." The net result of the transaction, if consummated, would be distribution to plaintiff of assets in excess of $26,000 and resumption by the corporation of his 18¾ per cent interest in its assets and profits. The initial invalidity of purchase of its own stock by a corporation grew out of the fact that "* * * the result constitutes an illegal withdrawal and payment to stockholders of a part of the capital stock, contrary to the statutory provisions of law * * *." Hansen v. California Bank, supra, 17 Cal.App.2d 80, 93, 61 P.2d 794.

Robinson v. Wangemann, 5 Cir., 75 F.2d 756, 757: "A transaction by which a corporation acquires its own stock from a stockholder for a sum of money is not really a sale. The corporation does not acquire anything of value equivalent to the depletion of its assets, if the stock is held in the treasury, as in this case. It is simply a method of distributing a proportion of the assets to the stockholder." The only permissive withdrawal or distribution

of assets is "as provided in this division", § 824; and that division comprises sections 100–6804; included within it are sections 5000–5012 which cover the matter of distributions and limit same to the process of winding up.

[16] It is apparent that the contract in suit was void whether treated as a sale of the 10 shares of stock held in trust for plaintiff by Stern or as a withdrawal of moneys in lieu of his 18¾ per cent of the corporate assets.

It is also evident that plaintiff is precluded from recovery by his failure to prove that there was no violation of section 1708, Corporations Code.

The judgment of nonsuit is affirmed; the judgment for plaintiff and against defendant Carmel Film Productions, Inc. is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Cally E. BROWN and Charles Brown, Plaintiffs and Respondents,

v.

LOS ANGELES TRANSIT LINES, a corporation, and Dorothea Threatts, Defendants and Appellants.

Civ. 20386.

District Court of Appeal, Second District, Division 3, California.

May 2, 1955.

Rehearing Granted June 1, 1955.*

Action to recover for passenger's injuries sustained as result of a collision of defendant's streetcars. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to support jury award of $25,000 to 64 year old plaintiff who sustained injuries to neck and scalp resulting in muscle spasms and a highly nervous condition.

Judgment affirmed.

* Opinion vacated 287 P.2d 810.

1. Evidence ⇐555

In personal injury action, it was not error to permit neurologist called as witness by plaintiff to testify on direct examination that he acquired knowledge by reading certain textbooks and that he based his opinion of plaintiff's condition on reading done and upon his experience, where, in such testimony, no textbook or other medical literature was mentioned by name and there was no statement as to contents of any book or literature.

2. Evidence ⇐363, 556

Medical textbooks and testimony regarding statements in them are not admissible on direct examination.

3. Appeal and Error ⇐237(2)

In personal injury action, admission of testimony elicited from neurologist testifying on behalf of plaintiff, with reference to relationship which may exist and does exist between trauma and trigger mechanism involved in bringing on Parkinson's disease was not prejudicial error where, even though there was implication that neurologist was stating he had read that such relationship existed, defendant made no motion to strike testimony so elicited.

4. Evidence ⇐363

Where witness on direct or cross examination has based his opinion on medical books, books upon which he based his opinion are admissible.

5. Evidence ⇐363, 558(11)

Where witness does not base his opinion on medical books, medical books are not admissible and may not be referred to on cross-examination for purpose of testing knowledge of witness or discrediting his testimony.

6. Evidence ⇐558(11)

If a witness bases his opinion in part upon an opinion in a book, it is permissible on cross-examination to show that opinion of witness does not coincide with opinion of author.

7. Appeal and Error ⇐1048(6)

In personal injury action, reference by counsel for plaintiff in redirect examination of expert neurologist to three medical publications which had not been referred to on cross-examination was not reversible error, where, even though such reference was improper, error was also made on cross examination in asking questions relating to other books and where it appeared that the errors substantially balanced each other.

8. Damages ⇐130(3)

In personal injury action, evidence was sufficient to support jury award of $25,000 to 64 year old plaintiff, who sustained injuries to neck and scalp resulting in muscle spasms and a highly nervous condition.

Henry R. Thomas, Wayne Veatch, Fred C. Quimby, Jr., and Henry F. Walker, Los Angeles, for appellants.

Bauder, Gilbert, Thompson & Kelly and Reginald I. Bauder, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff Mrs. Brown was a passenger on a streetcar of defendant which collided with another streetcar of defendant at a street intersection. In this action for damages for personal injuries (and for husband's loss of wife's services) resulting from the collision, the defendant admitted liability. Only the question as to amount of damages was submitted to the jury. Defendant appeals from a judgment for $25,000 in favor of plaintiffs. Mrs. Brown will be referred to as the plaintiff.

Appellant contends that the court erred prejudicially in permitting plaintiff's witness, a physician who was testifying as an expert neurologist, to testify on direct and redirect examination regarding statements in medical textbooks.

The collision occurred in January, 1952. Plaintiff was 64 years of age. She did not have any recollection of the occurrence of the accident, except that she heard the crash. The next thing she remembered was that she was in a hospital.

After the collision plaintiff was taken to the receiving hospital and then, upon instructions from her physician Dr. Williams, she was taken to another hospital where Dr. Williams examined her. He found that she had tenderness and edema (swelling) of the posterior scalp, had some stiffness of her neck, had muscle spasms on both sides of her neck, and that she was in a highly nervous state. She was in the hospital about three days. During that time Dr. Williams made a diagnosis that she had a concussion of the brain; and that she had traumatic shock. When she returned home her face was very much swollen. She was confined to her bed at home about three weeks. At the end of the three weeks she could not get out of bed without help. A nurse took care of her about three months during the daytime. About two weeks after the accident a tremor or violent shaking started or was manifested in her head and right arm. The tremor or shaking continued thereafter and was continuing at the time of trial. (The trial commenced on November 30, 1953.)

At the trial, plaintiff contended that the tremor was a manifestation of Parkinson's disease (or shaking palsy); and that such disease was caused by the collision. According to the evidence, such disease is not curable and it gets progressively worse. At the trial, defendant contended that the tremor was not Parkinson's disease but that plaintiff's condition was due to hysteria or some emotional disturbance, and that the shaking would stop when she is relieved of the tensions that are operating on her; and that if it be assumed that a lawsuit is the cause of the emotional disturbance she would recover when the suit is terminated. Defendant stated that it did not contend that plaintiff was malingering. There was testimony, on behalf of plaintiff, that the tremor could not be feigned, because a person who would try to feign it would be so tired after the first few minutes that he would have to quit. At the trial, a factual question was whether Parkinson's disease could be caused by trauma. There was testimony on behalf of plaintiff that the disease could be caused by trauma, and

there was testimony on behalf of the defendant to the contrary.

Dr. Gordy, an expert neurologist called as a witness by plaintiff, testified that she examined plaintiff in September, 1953, that the tremor is characteristic of Parkinson's tremor; that the examination showed other characteristics of Parkinson's syndrome or disease such as a rigidity of muscles and a stooped posture, difficulty in getting up suddenly and maintaining balance; the tremor appeared in a rather violent form instead of a slow imperceptible type of condition; in Dr. Gordy's opinion the trauma or injury in the streetcar accident precipitated Parkinson's syndrome; and that there is a definite causal relationship between the accident and the tremor of plaintiff's hand and head.

Dr. Bercel, a physician called as a witness by plaintiff, testified that he specializes in neurology and psychiatry; he had had many cases of Parkinson's disease; he did not give plaintiff a neurological examination; in October, 1953, he gave plaintiff an electromyogram test; the purpose of the test is to determine the nature of the tremor; in his opinion, which is based only upon his interpretation of the graph made in that test, plaintiff's tremor is characteristic of Parkinson's tremor.

Dr. Williams, a physician called as a witness by plaintiff, testified that he is a general medical practitioner; plaintiff was his patient prior to the accident; in 1949 he treated her for hypertension; he examined her at the hospital after the accident (as above stated); after the accident he treated her 66 times; when he observed the tremor about two weeks after the accident he recommended that she consult a neurologist, and he also made that recommendation in April, 1952; in his opinion, plaintiff's tremor was typical of Parkinson's syndrome.

Dr. Adelstein, an expert neurologist called as a witness by plaintiff, testified that he examined plaintiff in September, 1952; in his opinion, the trigger mechanism or the precipitating factor "of these symptoms, particularly the shaking and the tremor, was the concussion or the head injury that she sustained at the time of her accident." Then the witness was asked, on direct examination, if dozens of books on neurology had been written. Defendant objected to the question on the ground that it was incompetent, irrelevant and immaterial. The objection was overruled. The witness answered that many standard textbooks on neurology had been written. Counsel for plaintiff stated "And I take it that you and other neurologists acquire your knowledge by the simple method among others of reading these books that have been written by neurologists?" The witness answered, "That is correct."

Then the proceedings were as follows:

"Q. [By counsel for plaintiff.] And have you done research, Doctor, on the question of whether or not Parkinson's syndrome is sometimes precipitated by trauma or a blow to the head?

"Mr. Thomas [counsel for defendant]: That is objected to as being incompetent, irrelevant, immaterial, and calling for hearsay. It doesn't give the opponent any chance to cross-examine. It is improper direct examination.

"Mr. Bauder [counsel for plaintiff]: I submit, your Honor, it goes into his qualifications. If he is basing his knowledge on textbooks on neurology that he has read and acquired knowledge of the subject from the textbooks, certainly that is entitled to the jury's consideration.

"The Court: Objection is overruled.

"The Witness: Yes. I have read a number of standard orthodox texts and other literature, medical literature, over a period of some years with reference not only to Parkinson's disease or this type of shaking palsy, but also with reference to the cause of it; also with reference to the relationship which may exist and does exist between injury or trauma and the trigger mechanism which seems at times to bring on a condition like this.

"Q. By Mr. Bauder: And have you based your opinion that this was precipitated by the streetcar accident in part on which you have read in these texts?

"Mr. Thomas: That is objected to on the same grounds.

"The Court: Objection is overruled.

"Mr. Thomas: Any reference to any textbook on direct examination is improper. It doesn't make any difference whether this expert based it on that or what he based it on. I object to the question.

"Mr. Bauder: I think the jury is entitled to know exactly what he bases his opinion on.

"The Court: Objection is overruled.

"Q. By Mr. Bauder: Go ahead, Doctor. A. It is based not only on the reading that I have done on this subject but also it is based upon my experience during the past 28 years with patients who have had this condition, patients in my own private practice.

"Q. That is what I was going to ask you. Have you seen in the course of your practice as a neurologist cases where your treatment and observation of the patient showed that a Parkinson's syndrome followed a head injury? A. Yes, sir, I have."

On cross-examination, counsel for defendant asked if the witness was familiar with the work of Dr. Livingston Hunt, a famous professor of neurology at Columbia University, and if Dr. Hunt was not considered the outstanding authority in the United States on tremors. The witness replied that he did not know him. Counsel for defendant asked the witness if it was not a fact that Sir Stewart, the English authority on tremors, was considered the outstanding authority in the world on tremors. The witness replied that he did not place him.

Also on cross-examination, counsel for defendant asked if the witness was familiar with the works of Dr. Brain of the University of Chicago. He replied in the affirmative. Counsel for defendant then asked: "Q. He states positively that Parkinson's does not result from trauma, doesn't he, Doctor? A. That is his opinion, sir." Counsel for defendant also asked: "And Dr. Brain does categorically take the position that trauma cannot cause Parkinson's doesn't he, Doctor? A. Well, just as categorically as I state that it can." Counsel for defendant referred again to his original question regarding Dr. Hunt, and asked the witness if Dr. Hunt was an authority on tremors. The witness answered, "If you will bring his book here I will try to identify him." Then the proceedings were as follows: "Well, you have got the book up there, Doctor, and I don't want to foreclose you from telling me about it. What is the name of the book that you have been referring to? A. The name of this book is entitled Trauma and Disease by two authors named Brandy and Kahn." Thereupon, counsel for defendant said: "I'd like to keep it [book]. I will return it to you at the conclusion of the case." Dr. Adelstein also testified on cross-examination that in his experience in seeing or treating more than 10,000 Parkinson disease cases there was one case which was caused by an accident. That was the case of a 19 year old boy.

On redirect examination of Dr. Adelstein, counsel for plaintiff said there is another textbook entitled Correlative Neuroanatomy, and he asked the witness if that book did not list "trauma following brain concussion" as being among the causes of Parkinson's syndrome. Defendant objected thereto on the ground that it was not proper redirect examination and that "it doesn't pretend to be a textbook treatise on it." Then counsel for plaintiff asked if the book was a textbook on neurology. The witness replied in the affirmative. There was no ruling upon the objection to the previous question, and there was no answer to that question. Counsel for plaintiff asked the witness if the book by Brandy and Kahn (referred to on cross-examination), at a certain place therein, dealt with the connection between trauma and Parkinson's syndrome. The witness replied that it did. Then there were questions and answers as follows: "Q. And does it tell you that it happens? A. It says that it not only happens but it has been noted a number of times. Q. Are you familiar with the textbook of Clincial Neurology that was written by Dr. Neilson, a California Neu-

rologist here?" Counsel for defendant objected to the question on the ground that it was not proper redirect examination. The objection was overruled. Then counsel for plaintiff asked another question, and the previous question was not answered. The second question was whether the witness had called the attention of counsel for plaintiff to some of the texts that he (counsel) had referred to regarding "the question of the traumatic origin of this situation." The witness replied in the affirmative. Then there were proceedings as follows: "The Court: Are you relying on those texts, Doctor, in conjunction with your own experience in your opinion in this case? The Witness: Yes, sir, I am. Mr. Thomas: Let us file them, please sir, and I will return them to the doctor, the ones he is relying on. That will give me some chance to read them myself. Q. By Mr. Bauder: The American Medical Journal is customarily read by all doctors, whether they are neurologists or anybody else, to keep current on events; isn't that true? A. It's a very widely read magazine. Q. And the portions to which I referred—and for the record I am referring to page 1229, this language here: 'Parkinson's syndrome developed in a patient about two months after he had had a moderately severe concussion. Neilson in his book on Clinical Neurology states that there is an increasing belief that trauma—.'" Counsel for defendant objected thereto on the ground that it was not proper redirect examination. The objection was overruled.

On recross-examination, counsel for defendant read certain statements from the book of Dr. Neilson and asked the witness if he agreed with the statements. The answers of the witness were to the effect that he agreed with some of them and disagreed with others. Counsel for defendant also read certain statements from the Stanford Press book (which had been referred to by counsel for plaintiff as Correlative Neuroanatomy) and asked the witness if he agreed with the statements. He replied to the effect that he agreed with some of them and disagreed with others.

Dr. Doyle, a neurologist called as a witness by defendant, testified that he examined plaintiff in May, 1952; she had moderately high blood pressure; as a result of the accident she sustained a mild concussion of the brain and contusions of the scalp, chest, and lower part of the spine; in his opinion plaintiff's condition is not necessarily due to the accident, she is not suffering from Parkinson's disease, and Parkinson's disease cannot be caused by trauma.

Dr. Dickerson, a neurosurgeon called as a witness by defendant, testified in answer to a proper hypothetical question that in his opinion there was no organic injury to plaintiff's brain, she is not suffering from Parkinson's disease, and Parkinson's disease is not caused by trauma.

[1] Appellant argues that it was error to permit Dr. Adelstein, on direct examination, to testify regarding opinions in medical textbooks. As above shown, Dr. Adelstein testified on direct examination, in response to questions, that many textbooks on neurology had been written, he and other neurologists acquire knowledge by reading the books, and that he based his opinion (that plaintiff's condition was precipitated by the accident) upon the reading he had done and upon his experience during 28 years. In that testimony, no textbooks or other medical literature was mentioned by name and there was no statement as to the contents of any book or literature. That testimony did not constitute error. In Healy v. Visalia, etc., R. Co., 101 Cal. 585, at page 592, 36 P. 125, at page 126, it was said with reference to testimony of a physician: "As an expert it was competent for him to give the grounds upon which he based his opinion, as well as the opinion itself; and the fact that his opinion was based upon information derived from his reading did not make it incompetent for him to so state. He was not asked to state, nor did he state, what the 'cases on record' were, nor whether the facts of those cases corresponded with the facts of the case on trial, and the contents or statements of the medical books were not given to the jury." See, also, Forrest **v.** Fink, 71 Cal.App. 34, 40–41, 234 P. 860.

[2, 3] Also on direct examination, Dr. Adelstein was asked if he had done re-

search on the question as to whether Parkinson's syndrome is precipitated by trauma. He responded directly to that question by saying, "Yes." Then he volunteered a statement that he had read texts and other medical literature over a period of years with reference to the cause of Parkinson's disease, and also with reference to the relationship which may exist and "does exist" between trauma and the trigger mechanism which seems to bring on a condition like this. In California, on direct examination, medical textbooks are not admissible. Gluckstein v. Lipsett, 93 Cal.App.2d 391, 403, 209 P.2d 98. Testimony regarding statements in medical books is not admissible on direct examination. Baily v. Kreutzmann, 141 Cal. 519, 522, 75 P. 104. Appellant's assertion that Dr. Adelstein testified on direct examination regarding opinions in textbooks is based principally upon his use of the words "does exist" when testifying that he had read texts with reference to the relationship that may exist and "does exist" between trauma and the trigger mechanism which seems to bring on the condition. Dr. Adelstein had theretofore testified that in his opinion the trigger mechanism or precipitating factor of plaintiff's tremor was the injury she sustained. In interpreting his testimony, a question could reasonably arise as to whether he was stating that he had read that a relationship does exist between trauma and the disease, or whether he was stating that he had read about the relationship between trauma and the condition, and that in his opinion a relationship between them does exist. Even though there is an implication that he was stating he had read that such a relationship does exist, it would not necessarily follow that it constituted prejudicial error. That testimony was volunteered, and it cannot be said that counsel for plaintiff, in asking if the witness had done research on the question, should have anticipated that he would include in his answer a statement as to what he had read. Appellant did not make a motion to strike out that testimony. Regardless of whether such a motion was legally required, the failure to make such motion, when considered in connection with appellant's reference on cross-examination of Dr. Adelstein to the contents of specified medical textbooks, is an important factor to be considered in determining whether said testimony constituted prejudicial error. In view of such cross-examination, the said testimony which included the words "does exist" did not constitute prejudicial error.

[4, 5] Appellant also argues that it was error to permit Dr. Adelstein to testify on redirect examination regarding opinions in medical books that had not been previously mentioned. Respondent (plaintiff) states in reply to that argument that since Dr. Adelstein was asked on cross-examination with respect to specific medical books and their contents, and since the answers to those questions challenged the testimony of Dr. Adelstein that he based his opinion in part on medical literature, he had a right on redirect examination to show that there were medical authorities which supported his opinion. The rules in California as to the admissibility of medical books, on cross-examination of a physician who testifies as an expert, are as follows: (1) Where the witness on direct or cross examination has based his opinion on medical books, those books upon which he based his opinion are admissible; (2) Where the witness does not base his opinion on medical books, medical books are not admissible and may not be referred to for the purpose of testing the knowledge of the witness or discrediting his testimony. Gluckstein v. Lipsett, 93 Cal. App.2d 391, 403, 209 P.2d 98, supra; For a discussion of the rules in other jurisdictions and in California, see 12 So.Cal.Law Rev. 424; 2 U.C.L.A.Law Rev. 252; Kern v. Pullen, 138 Or. 222, 6 P.2d 224, 82 A.L.R. 440.

[6] Although Dr. Adelstein on direct examination had not mentioned the names of any books or authors upon which he relied or mentioned the name of any book or author at all, counsel for appellant asked specifically, on cross-examination, regarding certain named books and authors. He asked if the witness was familiar with the

work of Dr. Hunt, a famous professor of neurology, and if it was not a fact that Sir Stewart, the English authority on tremors, was considered the outstanding authority in the world on tremors. The witness replied that he did not know them. Then the witness was asked if he was familiar with the works of Dr. Brain. After the witness replied in the affirmative, he was asked if Dr. Brain did not state positively that Parkinson's disease does not result from trauma? The witness replied, "That is his opinion, sir." Counsel for plaintiff stated that he objected to the question, and that if the author was quoted the book should be produced. He did not object upon the ground that it was improper cross-examination, or object upon any ground, but he called for the production of the book. Although there was no proper objection, the question was, nevertheless, improper. The witness had not testified that he based his opinion in part upon Dr. Brain's book—he had only stated that he was familiar with the works of Dr. Brain. The mere fact that the witness was familiar with that book would not render admissible on cross-examination the opinions in the book which are contrary to the opinion expressed by the witness. A witness might be familiar with certain books and yet reject the statements of opinion therein. If a witness bases his opinion in part upon an opinion in a certain book, it is permissible on cross-examination to show that the opinion of the witness does not coincide with the opinion of the author. The vice of injecting into the case upon cross-examination the opinions of authors upon which the witness has not stated that he placed reliance is that if such cross-examination were permitted unlimited hearsay could be presented. Apparently, Dr. Adelstein had a book with him while he was testifying. Counsel for appellant also asked him the name of "the book that you have been referring to?" The witness replied that the "name of this book" is Trauma and Disease by Brandy and Kahn. Nothing was said on cross-examination regarding the contents of the book.

[7] On redirect examination, counsel for plaintiff referred to three medical publications which had not been referred to on cross-examination. Those publications were Correlative Neuroanatomy (also known as Stanford Press), Clinical Neurology by Dr. Neilson, and the American Medical Journal. He asked the witness if Correlative Neuroanatomy did not list trauma as a cause of Parkinson's syndrome. That question was not answered for the reason, apparently, that counsel for plaintiff interrupted and asked another question. With reference to Clinical Neurology, he asked if the witness was familiar with the book. That question was not answered for the reason, apparently, that counsel for plaintiff interrupted and asked another question. With reference to the American Medical Journal, he asked whether it was read by doctors. After the witness replied in the affirmative, counsel for plaintiff read a portion of the Journal to the effect that Parkinson's disease developed in a patient about two months after he had a concussion, and that Neilson in his book on Clinical Neurology states "that there is an increasing belief that trauma—." Then counsel for appellant interrupted the reading and objected on the ground that it was not proper redirect examination. The objection was overruled. Also on redirect examination, counsel for plaintiff asked if the Brandy and Kahn book (which had been referred to on cross-examination, but as to the contents of which nothing was said on cross-examination) dealt with the connection between trauma and Parkinson's syndrome. After the witness replied that it did, counsel asked if the book tells that "it happens." The witness replied that it says it not only happens but it has been noted a number of times. It was improper to refer to those publications on redirect examination. The improper cross-examination, which first brought the contents of a medical book before the jury, did not justify said references on redirect examination. The initial error on cross-examination led to a succession of errors. When the error on cross-examination was made by asking a question as to an alleged opinion in Dr. Brain's book, counsel for plaintiff tacitly acquiesced in the asking of the question by failing, as above stated, to register a proper objection. He

should have moved to strike out the answer, rather than to call for the production of the book that was then being referred to. The manner in which that error on cross-examination was used as a pretext for errors on redirect examination is not to be approved. The approval of the manner in which opinions of supposed medical authorities were placed before the jury would result in untold confusion in the field of expert medical testimony. The evidence with respect to books exceeded all proper bounds. The argument that the first mistake excused the others is untenable. The errors substantially balanced each other. Each side had whatever advantage there was in bringing before the jury the opinions of authors on the subject under inquiry. Irrespective of the errors on each side with respect to that hearsay, there was ample testimony of expert witnesses on each side to have warranted the jury in finding that Parkinson's syndrome can or cannot result from trauma. In view of such testimony of witnesses who were present in court, it is unlikely that the jury attempted to weigh the hearsay evidence, based upon fragmentary references to books, which was favorable to one side against the hearsay evidence of the same character which was favorable to the other side. Under the circumstances of this case, there was no reversible error.

It is to be noted, as above shown, that Dr. Gordy, a witness called by plaintiff, testified that in her opinion the trauma precipitated Parkinson's syndrome, and there is a definite causal relationship between the accident and the tremor. No reference to medical literature was involved in her testimony. Likewise, there is no reference to medical literature in the testimony of Dr. Bercel or Dr. Williams, witnesses called by plaintiff. Dr. Bercel's opinion, which was based upon the graph he made, was that the tremor is characteristic of Parkinson's tremor. Dr. Williams' opinion was that the tremor was typical of Parkinson's syndrome.

[8] Appellant also asserts that the amount awarded as damages is excessive. The question as to the amount of damages was a question of fact for the jury. The evidence was sufficient to support the award.

No other grounds of appeal are urged by appellant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

132 Cal.App.2d Supp. 907

Thecla HOFLAND, Plaintiff and Respondent,

v.

L. H. GUSTAFSON, Defendant and Appellant.

Civ. A. 8646.

Appellate Department, Superior Court, Los Angeles County, California.

April 20, 1955.

Action to recover damages due to alleged negligence of defendant. The Municipal Court, Los Angeles Judicial District, entered judgment for plaintiff and defendant appealed. The Superior Court, Appellate Department, held that where plaintiff in civil suit had previously executed release in favor of defendant's insurance company, which release contained no place for signature of defendant, presentation of such instrument to plaintiff for her signature constituted offer on part of defendant which was accepted as such by plaintiff when she signed and delivered release, notwithstanding fact that consideration was not actually paid until a few days after release was executed, and delay in receipt of check was not such material failure of consideration that it gave plaintiff right to rescind release.

Judgment reversed.

1. Pleading ⇐291(1)

Although genuineness and due execution of release are admitted by failure to file verified denial, person signing such release is not thereby precluded from asserting any defense available, including legal effect of release and failure of consideration.

2. Release ⇐25

In ascertaining legal effect of a release, one must look to instrument itself to determine intent of parties.

3. Release ⇐38

Instrument of release is ordinarily presently operative once maker has signed and delivered writing.

4. Release ⇐13(6)

Nonpayment of consideration does not affect operative effect of instrument as valid release.

5. Contracts ⇐22(1)

Obligation to pay consideration is created by acceptance of release.

6. Release ⇐6

Signature of party being released is unnecessary to make release legally binding on both parties where instrument shows on its face that it was not intended to be signed by party obtaining release.

7. Contracts ⇐85

Although failure of consideration may be ground for rescinding contract, contract is not void, and once in effect, remains in effect until rescinded or terminated.

8. Contracts ⇐260

Unsubstantial failure of consideration does not give other party right to rescind contract, but is only basis for damages.

9. Contracts ⇐261(7)

Mere delay in performing contract is not considered substantial breach, justifying rescission, unless delay is such as to warrant conclusion that he does not intend to perform.

10. Contracts ⇐212(1)

Where time is not of essence of contract, payment within reasonable time is sufficient.

11. Release ⇐13(6)

Where plaintiff in civil suit had previously executed release in favor of defendant's insurance company, which release contained no place for signature of defendant, presentation of such instrument to plaintiff for her signature constituted offer on part of defendant which was accepted as such by plaintiff when she signed and delivered release, notwithstanding fact that consideration was not actually paid until a few days after release was executed, and delay in receipt of check was not such material failure of consideration that it gave plaintiff right to rescind release.

12. Appeal and Error ⇐110

Order denying new trial is not appealable.

Edward Feldman, Alex D. Fred, Los Angeles, for appellant.

Gilligan & Prate, Los Angeles, for respondent.

Before BISHOP, Acting P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

The only issue involved on this appeal by defendant from the judgment of $1,297.25 based on the defendant's negligence and from the order denying defendant's motion for a new trial is the effect of plaintiff's attempt to rescind a written release.

A release had been presented to the plaintiff by the insurance investigator for defendant's insurance company, and was signed by plaintiff on June 16, 1953, approximately three weeks after her accident. It recited that "For and in Consideration of the sum of Four Hundred Twenty xx/100 ($420.00) to me/us in hand paid by L. H. Gustafson the receipt of which is hereby acknowledged, I * * * hereby fully and forever release, acquit and discharge the said L. H. Gustafson * * * from any and all actions, claims and demands * * * it being understood and agreed that the acceptance of said sum is in full accord and satisfaction of a disputed claim * * * the amount stated herein is the sole consideration of this release and that I/we voluntarily accept said sum for the purpose of making a full and final compromise." "Thecla Hofland" (Signed.)

Before the check of $420 was received from the defendant's insurer, drawn on a Colorado Springs, Colorado, bank and dated June 24, 1953, the plaintiff's attorney had, on June 18, 1953, sent a notice of rescission to the insurer in Colorado. The grounds stated in the notice were mistake, undue influence and failure of consideration. No evidence was offered to prove mistake or

undue influence. The only evidence of failure of consideration was the eight days which elapsed between the signing of the release and the receipt of the check by the plaintiff. After its receipt, the check was returned to the defendant, on July 2, 1953, without any attempt having been made by the plaintiff to cash it.

[1] It is true as claimed by respondent, that although the genuineness and due execution of the release were admitted by her failure to file a verified denial, she is not precluded by that fact from asserting any defense she may have, including the legal effect of the release and failure of consideration. Sproul v. Cuddy, 1955, 131 Cal. App.2d 85, 280 P.2d 158.

Respondent's theory and also that of the trial judge in holding the release invalid was that as no consideration had passed and as the release had been signed by the plaintiff alone, it constituted merely a revocable offer.

[2–5] In ascertaining the legal effect of a release, one must look to the instrument itself to determine the intent of the parties. Such an instrument is ordinarily presently operative once the maker has signed and delivered the writing. (Restatement of Contracts, section 402, comment b.) "The non-payment of the consideration did not affect the operative effect of the instrument as a valid release. The obligation to pay the consideration is created by the acceptance of the release." Paige v. O'Neal, 1859, 12 Cal. 483, 496.

[6] A signature of the party being released is unnecessary to make a release legally binding on both parties where the instrument shows on its face that it was not intended to be signed by the party obtaining the release. Tindall v. Northern Pac. R. Co., 1910, 58 Wash. 118, 122, 107 P. 1045; see also Frankfort Marine Accident & Plate Glass Ins. Co. v. California, etc., Co., 1915, 28 Cal.App. 74, 82, 151 P. 176; Dallman Supply Co. v. Smith-Blair, Inc., 1951, 103 Cal.App.2d 129, 132, 228 P.2d 886.

[7–11] Turning to the present release and the circumstances surrounding its execution, we are satisfied that the presentation of the instrument to the plaintiff for her signature constituted an offer on the part of the defendant and was accepted as such by the plaintiff when she signed and delivered the release and that it was so intended by the parties. The writing contains no place for the signature of the defendant, and such could not have been intended as necessary to make it presently operative. The fact that the consideration was not paid until a few days after the release was executed did not constitute such a material failure of consideration as to entitle plaintiff to rescind. "Although failure of consideration may be a ground for rescinding the contract * * * the contract is not void, and, once in effect, remains in effect until rescinded or terminated." 17 C.J.S., Contracts, § 129, p. 477. But an unsubstantial failure of consideration does not give the other party the right to rescind the contract but is only the basis for damages. Marrazzo v. Orino, 1938, 194 Wash. 364, 78 P.2d 181, 187; see also Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 1942, 21 Cal.2d 411, 433, 132 P.2d 457. Mere delay in performing a contract is not considered a substantial breach, justifying rescission, unless the delay is such as to warrant the conclusion that he does not intend to perform. 17 C.J.S., Contracts, § 422, p. 907. Where time is not of the essence of the contract, payment within a reasonable time is sufficient. Walsh v. Walsh, 1940, 42 Cal. App.2d 287, 292, 108 P.2d 765. The delay in the receipt of the check by the plaintiff was not such a material failure of consideration that it gave her a right to rescind the release.

[12] The purported appeal from the order denying a new trial is hereby dismissed, as it is not appealable. Kallgren v. Steele, 1955, 131 Cal.App.2d 43, 279 P.2d 1027. The judgment is reversed.

132 Cal.App.2d Supp. 915

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John BOWMAN, Defendant and Appellant.

Cr. A. 24.

Appellate Department, Superior Court, San Bernardino County, California.

April 28, 1955.

Defendant was convicted of violating Vehicle Code, § 246. On motion to dismiss appeal, the Appellate Department of the Superior Court, Hilliard, J., held that notice of appeal filed before judgment was premature and since notice of appeal was not filed within time prescribed, it was void.

Motion granted.

1. Criminal Law ⇐1081

A notice of appeal filed after jury verdict and before judgment of conviction was entered and sentence was pronounced was premature. Rules on Appeal from Municipal and Inferior Courts—Criminal Cases, rule 2.

2. Criminal Law ⇐1081

Where notice of appeal was not filed within five days after rendition of judgment as provided by court rule, it was void. Rules on Appeal from Municipal and Inferior Courts—Criminal Cases, rules 2, 3, 10; Vehicle Code, § 246.

Paul A. Fowler and Thomas C. Parry, San Bernardino, for appellant.

Lowell E. Lathrop, Dist. Atty., San Bernardino, for respondent.

HILLIARD, Judge.

Defendant, having been convicted after a jury trial on a charge of violating Section 246 of the California Vehicle Code, has filed his notice of appeal, and briefs in support thereof.

Respondent moves to dismiss the appeal for irregularity in a substantial respect pursuant to Rule 10 of the Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases.

Copy of the trial court docket, included in the Record on Appeal in conformity with Rule 3, indicates that the jury returned its verdict on or prior to February 28, 1955. On that date counsel for appellant filed a written notice of appeal. Thereafter, on March 1, 1955, judgment of conviction was entered and sentence pronounced; appellant's motion for new trial was made and argued; and the trial court denied the motion for new trial.

[1, 2] It is apparent that the notice of appeal was premature since Rule 2 provides such notice shall be filed with the trial court within five days after the rendition of judgment. Unless so filed within the time required it is void and of no effect. People v. Wilson, 7 Cal.App.2d 543, 46 P.2d 229; Garrett v. Superior Court, 79 Cal.App. 273, 249 P. 871.

For the reason above stated the motion is granted and the appeal is dismissed.

COUGHLIN, P. J., and MITCHELL, J., concur.

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